STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES COMMITTED BY NON-STATE ACTORS UNDER THE CONSTITUTION

BY

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UNDERTAKEN IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

DOCTOR LEGUM

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STUDENT NO: 13018760 NOVEMBER 2004 POTCHEFSTROOM

salus populi suprema lex esto - the safety of the people is the highest law

SUMMARY

In the 21st century the state is powerful and touches all aspects of everyday life. The state is in control of a country and all under its jurisdiction. Decisions made and policies implemented by the state effect its citizens. Ultimately the government of a state is responsible and liable for the human rights protection of its citizens. The buck stops with the government. This study is premised on the assumption that in terms of international Human Rights Law and national Constitutional Law, the state is responsible for human rights abuses committed by non-state actors.

The first and most basic obligation of the state is to protect its citizens from the infringement of their fundamental human rights. An overview of the history and ratio of the formation of states shows that the safety of the people is the highest law. The bond between government and citizen is one of mutual obligation. The citizen adheres to the laws of the state and pays taxes and in turn, the state must protect citizens from each other and from outside threats to the citizens' fundamental human rights. Subjection implies and requires protection and protection subjection.

International law and international human rights norms and principles play an increasingly important role in the world today. States are no longer free to do as they like in the domestic sphere, but are bound by international law. In this study, specific attention is given to the various international treaties that the South African government has ratified without any reservation and the international legal duties that they impose. The scope and content of state responsibility for human rights abuses committed by non-state actors under contemporary international law are examined. A comparative overview of the state's duty to protect under the Inter-American and European Systems with specific reference to the United States of America and the United Kingdom is conducted.

The right to security and to be free from violence is indispensable for the exercise of all other human rights. Section 12 1 (c) of the South African Constitution expressly guarantees the right to be free from violence from both public and private sources. All other relevant constitutional imperatives and recent constitutional case law clearly indicate that there is a positive legal duty on the South African government to take reasonable measures to prevent human rights violations from occurring.

Despite the constitutional guarantee, the most vulnerable in South Africa continue to suffer gross violations of their right to security on a scale unseen in other liberal constitutional democracies. In conclusion, a number of recommendations are proposed as framework to improve the current *de facto* situation and to contribute to the establishment of a governmental value system that actually protects human rights.

OPSOMMING

In die 21ste eeu is die staat magtiger as ooit en beinvloed bykans alle aspekte van die alledaagse lewe. Beleidsbesluite en die implementering daarvan deur die staat affekteer ieder en elk binne die staat se jurisdiksie. Die staat is verantwoordelik en aanspreeklik om die menseregte, insluitend die reg op sekuriteit van sy burgers behoorlik te beskerm. Hierdie studie is gebaseer op die uitgangspunt dat die staat in terme van beide internasionale menseregtereg en nasionale grondwetlike reg, verantwoordelik is vir menseregte skendings deur privaatpersone wat nie aan die staat verbind is nie.

Die eerste en mees basiese plig van die staat is om sy burgers te beskerm teen inbreuk op hulle basiese menseregte. 'n Oorsig van die geskiedenis van state en die rede vir die ontstaan van state wys duidelik dat die veiligheid van staatsburgers die hoogste prioriteit van die staat behoort te wees. Die verhouding tussen die staat en die landsburger kan beskryf word as 'n verhouding van wederkerige regte en verpligtinge. Die burger is verplig om die wette van die land te gehoorsaam en om belasting te betaal terwyl die staat op sy beurt verplig is om beskerming te verleen.

Internasionale reg en internasionale menseregtenorme speel 'n al meer belangrike rol in wereldpolitiek. Geen staat is meer vry om te handel na goeddunke nie maar word regtens gebind deur internasionale reg. In die studie word daar gefokus op die verskillende internasionale konvensies wat die Suid-Afrikaanse regering onderteken het en die gevolglike internasionale regspligte wat daaruit voortvloei. 'n Regsvergelykende oorsig na die staat se positiewe regsplig om burgers te beskerm in die Inter-Amerikaanse Sisteem en die Europese Sisteem met spesifieke verwysing na die posisie in die Verenigde State van Amerika en die Verenigde Koningkryk word behandel.

Die reg op sekuriteit en om vry te wees van alle vorme van geweld is noodsaaklik vir die behoorlike uitoefening van alle menseregte. Artikel 12 (1) (c) van Die Grondwet Van Suid Afrika waarborg uitdruklik die reg om vry te wees van alle vorme van geweld van beide openbare en privaat oorsprong. Verskeie ander grondwetlike bepalings en onlangse regspraak dui duidelik daarop dat daar 'n positiewe regsplig op die Suid Afrikaanse regering rus om redelike stappe te neem ten einde geweldadige menseregteskendings te voorkom.

Ten spyte van die grondwetlike waarborg word die menseregte van die mees kwesbare lede van ons samelewing daagliks geskend op 'n skaal ongekend in ander liberale konstitusionele demokrasiee. Ten slotte word aanbevelings gemaak ten einde die situasie te verbeter en ter vestiging van 'n staats waardesisteem vir die owerheid waardeur menseregte daadwerklik beskerm word.

ACKNOWLEDGEMENTS

I would like to acknowledge and extend my warm appreciation to the following persons without whom this thesis would not have materialised:

Professor Francois Venter, my promoter for his guidance, advise, critical insights and dedication in devoting valuable time to give meticulous attention to detail;

My mother, Ina Wilken, for always believing in me and encouraging me to achieve the impossible. Your faith, kindness and love always have and still is a great source of inspiration to me. Your unselfish love and sacrifice is an example to me;

My father Willem van Aardt, without your love, guidance and support I would not have been able to succeed in life. Thank you for encouraging me to always do better academically and for enabling me to receive the best education possible. I value your wisdom, advise and friendship;

My wife, Linda. Thank you for allowing me to complete a dream and for the sacrifices in order to make this possible. Thank you for your support and love. Thank you for managing our business in such a professional and efficient way while I spent hours and days in the books. Finbond will not have been where it is today without your absolute dedication;

Last but not least I would also like to thank my Saviour and Lord, Jesus Christ for blessing me with the ability and perseverance to complete this thesis. Without your love, grace, mercy, goodness and kindness it will not be possible to accomplish anything. All I have and all I am can only be attributed to Your unfailing loving-kindness and mercy. Thank You for giving me life in abundance.

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ABBREVIATIONS

A.C.	Law Reports, Appeal Cases (UK England)
AD	Appelate Division (South Africa)
All ER	All England Reports
Barb.	Barbour's Supreme Court Reports (New York)
BCLR	Butterworths Constitutional Law Reports
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, social and Cultural rights
CRC	Convention on the Rights of the Child
CONG. GLOBE	Congressional Globe (USA)
Cong. Gl.	Congressional Globe (USA)
Co.Rep.	Coke's King's Bench Reports
E.H.R.R.	European Human Rights Reports
E.R.	English Reports
E.T.S.	Eurpean Treaty Series
F.2d.	Federal Reporter, Second Series (USA)
F.Cas.	Federal Cases (USA)
F.Supp.	Federal Supplement (USA)
G.A. res.	General Assembly Resolution (United Nations)

HRC	Human Rights Committee
H.R.Rep.	House of Representatives Report (USA)
IACHR	Inter-American Commission on Human Rights, The
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
I.C.J.	International Court of Justice: Reports of Judgments, Advisory Opinions and Orders
IIHRL	Interights International Human Rights Law
I.L.M.	International Legal Materials
I.M.T.	International Military Tribunal
Inter-Am. Ct. H. R.	Inter-American Court of Human Rights
Johns	Johnson's Reports of Chase's Circuit Court Decisions (USA)
Law & Contemp. Probs.	Law and Contemporary Problems
Lofft	Lofft's King's Bench Reports
N.Y.	New York Court of Appeals Reports
OAS	Organization of American States
O.A.S.T.S.	Organization of American States Treaty Series
Pa	Pennsylvania Supreme Court Reports
Phil.	Philadelphia Reports
SA	South African Law Reports
S. Ct.	Supreme Court Reporter (USA)
UKPC	Privy Council (Commonwealth)
U.N. Doc.	United Nations Documents
U.N.GAOR Supp.	United Nations General Assembly Official Record Supplements
U.N. SCOR	United Nations Security Council Official Records
U.N.T.S.	United Nations Treaty Series
U.S.	United States of America Supreme Court Reports
U.S.C.	United States Code
U.S.T.S.	United States Treaty Series
W.L.R.	Weekly Law Reports (UK)

Journals

Am. J. Int'l L.	American Journal of International Law
Am. Soc'y Int'l L. Proc.	American Society of International Law Proceedings
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law and Policy, The
Cal. L. Rev.	California Law Review
Cal. W. L. Rev.	California Western Law Review
Colum. Hum. Rts. L. Rev.	Columbia Human Rights Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Duke L. J.	Duke Law Journal
EJIL	European Journal of International Law
Fordham Int'l L. J.	Fordham International Law Journal
Hamline L. Rev.	Hamline Law Review
Harv. Hum. Rts. J.	Harvard Human Rights Journal
Harv. Int'l L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hastings Const. L.Q.	Hastings Constitutional Law Quarterly
HastingsInt'l&Comp.L.Rev.	Hastings International and Comparative Law Review
Hastings L.J.	Hastings Law Journal
Hum. Rts. Q.	Human Rights Quarterly
ILSA J. Int'l & Comp. L.	ILSA Journal of International and Comparative Law
Int' J. Legal Info	International Journal of Legal Information
Iowa L. Rev.	Iowa Law Review
Law & Contemp. Probs.	Law and Contemporary Problems
Mich. J. Int'l L.	Michigan Journal of International Law
NJHR	Nordic Journal of Human Rights
N.Y.U. L. Rev.	New York University Law Review
Notre Dame J. L. Ethics & Pub. Pol'y	Notre Dame Journal of Law, Ethics and Public Policy
Pace Int'l L. Rev.	Pace International Law Review
Rutgers L. J	Rutgers Law Journal

SACJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
San Diego L. Rev.	San Diego Law Review
SAPL	South African Public Law
SAYIL	South African Yearbook of International Law
SIM Special	Studie- en Informatiecentrum Mensenrechten Special
Tenn. L. Rev.	Tennessee Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tul. L. Rev.	Tulane Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U.S.F. L. Rev.	University of San Francisco Law Review
Va. J. Int'l L.	Virginia Journal of International Law
Wash. & Lee L. Rev.	Washington and Lee Law Review
Wash. L. Rev.	Washington Law Review
Wash. U. J. Urb. & Contemp. L.	Washington University Journal of Urban and Contemporary Law
Wis. L. Rev.	Wisconsin Law Review

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1. INTRODUCTION

1.1	***Problem statement and motivation***
1.2	***Aim of the study***
1.3	***Importance of the topic***
1.3.1	*National*
1.3.2	*International*
1.4	***Principle hypothesis and points of departure***
1.5	***Research methodology***
1.6	***Limitations of study***
1.7	***Work already done in this field***
1.8	***Framework and outline***

This is an exciting time in the development of South African constitutional and human rights law. Major constitutional changes have taken place in South Africa in the last decade. The fact that the Constitution with its fundamental bill of rights is the supreme law of South Africa has led to a period of intense scrutiny of both substantive and procedural laws and to the development of the common law.

In this thesis an attempt is made to explicate the rudiments of the positive legal duty that the South African Constitution and international law places on the state to protect its citizens against the violent actions of non-state actors.

1.1 *Problem statement and motivation*

Ten years after the first democratic elections and the coming into force of a supreme Bill of Rights in the form of the Interim Constitution, ordinary South-Africans suffer abhorrent human rights violations at the hand of thugs, gangs and criminals. Women, children, the poor and the elderly which are the most vulnerable in our society, often being the victims of these atrocious human rights abuses.

For many, the constitutional guarantee of security and the right to be free from violence is a worthless paper guarantee. This, however, does not mean that the ideal to turn this right into a practical reality should not be pursued vigorously, or that society should say *nec me movet* [1]or have a lax attitude towards the criminals who undermine this fundamental human right. The difficulties that society face with the notorious unacceptably high levels of crime calls for decisive aggressive engagement with the right to security and the means through which it may be enforced effectively.

This study will contemplate and grapple with the issues related to *inter alia* the judicial enforcement and practical realization of the right to security and to be free from violence and deal specifically with the state's positive legal duty to protect citizens from acts of private violence. Furthermore, this study will endeavour to answer the following question:

Is the state responsible and, therefore, liable for human rights abuses committed by non-state actors under the South African Constitution?

[1] I care not.

1.2 *Aim of the study*

The aim of the study which is entitled **STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES COMMITTED BY NON-STATE ACTORS UNDER THE SOUTH AFRICAN CONSTITUTION** is to:

1.2.1 Investigate and establish state responsibility for private acts of violence against citizens under the South African Constitution and recent case law.

1.2.2 Investigate the history and origins of state responsibility for human rights abuses committed by non state actors

1.2.3 Investigate and establish state responsibility for private acts of violence against citizens under International Human Rights Law.

1.2.4 Investigate and establish state responsibility for violent human rights abuses committed by non-state actors under European and American Regional International Human Rights Law.

The study will seek to perform a comprehensive audit of existing national and international legal provisions and case law relevant to the state's positive legal duty to protect its citizens from human rights abuses committed by non-state actors

The study is descriptive, analytical and takes the positive view that *mutatis mutandis* progress and reform is both possible and attainable.

This study in general is an effort to make a positive practical contribution towards the juridical creation of a society where the right to security and to be free from all

forms of violence can be judicially enforced and experienced as a reality in the day-to-day lives by the citizens of this country, especially by the most vulnerable in our society: children, women, the poor and the elderly.

1.3 ***Importance of the topic***

1.3.1 National

Realizing the utmost importance thereof for the future sustainable development of this country, President Thabo Mbeki, in his state of the nation address again committed the South African government to address crime and to improve the crime prevention and integrated justice sectors.[2]

Oculis magis hebenda fides quam auribus. [3]

The Constitution of the Republic of South Africa demands more than mere words and empty promises.[4] What is urgently needed is the proper implementation of effective policy with actual results.

Answering the question and addressing the issue of state responsibility for human rights abuses committed by non-state actors is of crucial importance to South Africa's young constitutional democracy. At the heart of the matter is the establishment of a value system that seeks the effective enforcement of the rule of law and the valuing of and respecting of fundamental human rights and freedom in line with universally accepted peremptory norms and legally binding international treaty laws.

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[2] Michaels *Saturday Star 22 May 2004* 2.
[3] Rather trust what the eyes see that what the ears hear; Hiemstra and Gonin *Trilingual Legal Dictionary* at 248.
[4] Legget *SA Crime Quarterly* 2003 no. 3 25 – 26. Kepler *Rapport* 28 September 2003 11; Kotze *Rapport* 26 Oktober 2003 6; Hosken *Pretoria News* 4 March 2004 1.

Melius omnibus quam singulis creditur. [5]

The rule of law, respect for human rights and effective enforcement mechanisms is in fact what separates civilized successful nations from uncivilized, lawless poor nations, whose citizens lead a penury existence.

The formulation of section 12 (1) (c) Of the Constitution of the Republic of South Africa 1996,[6] is clear in its reference to protection against violence from both private and public sources. Section 12 should also be read together with section 7 which provides in subsection 7 (2) that "*The state must respect, protect, promote and fulfill the rights in the Bill Of Rights*". [7] This provision clearly implies that the state should not only respect the rights to security and to be free from all forms of violence but should take active positive steps to protect the right. Section 39 (1) (b) further provides that a court *"must consider international law"* when interpreting the Bill Of Rights. [8]

Mens et animus et consilium et sententia civitatis posita est in legibus.[9]

There is a positive legal duty resting on the South African government to take reasonable measures to protect its citizens from human rights abuses committed by non-state actors. If one looks at the current *status quo* of the actual enjoyment of the right to security and the right to be free from all forms of violence, it is clear that drastic measures are required to alleviate current shortcomings in South African criminal justice system.

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[5] It is better to trust in the universality of mankind than one individual (state); Hiemstra and Gonin *supra* note 3 at 229.
[6] *Constitution of The Republic of South Africa*, 1996.
[7] *Constitution of The Republic of South Africa*, 1996.
[8] *Constitution of The Republic of South Africa*, 1996.
[9] Within its laws are reposed the heart and the mind, the judgment and conviction of the state; Hiemstra and Gonin supra note 3 at 229.

1.3.2 International

From an International Human Rights perspective, the issue of state responsibility for human rights abuses by non-state actors is one of the major issues in International Human Rights Law today. It has relevance in the area of state responsibility for violence against women, the elderly and children; the sexual abuse of women and children; domestic violence, trafficking in women and children for prostitution, exploitive labour, child labour; illegal land occupation by squatters; non-governmental youth militias assaulting opposition politicians; genocide against certain sections of the community by criminals and in the areas of private acts of violence against racial, religious, ethnic and sexual minorities.

All the major international human rights treaties and conventions contain language creating positive legal duties on states to protect individuals against human rights abuses committed by non-state actors. The International Covenant on Civil and Political Rights,[10] for example, provides in Article 2 that states undertake not only to *"respect"* the rights in the Covenant but also to *"ensure"* those rights to all those within their territory and subject to their jurisdiction. Similarly, Article 2 of the Convention of the Rights of the Child states that parties undertake to *"ensure the rights set forth in the convention to each child in their jurisdiction..."*. The American Convention on Human Rights[11] contains a similar obligation to "ensure" rights. The European Convention on Human Rights[12] uses

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10 *International Covenant on Civil and Political Rights* U.N. Doc. A/6316 (1966), (entered into force Mar. 23, 1967) ("ICCPR").

11 The American Convention on Human Rights opened for signature on Nov. 22, 1969 (O.A.S.T.S. No. 36, 1144 U.N.T.S. 123) and entered into force on July 18, 1978.

12 *The European Convention of Human Rights* (4 November 1950, Rome). The text of the Convention has been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55) which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the test of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10

the term *"secure"*, and the African Charter on Human and Peoples' Rights,[13] *"promote and ensure"*. Under the Convention on the Elimination of All Forms of Discrimination Against Women,[14] states undertake to *"take all appropriate measures"* to eliminate discrimination against women; specific obligations are then spelled out using the *"all appropriate measures"* language. This general obligation translates to a positive legal duty to take all the necessary precautionary legislative and other measures as may be needed to give full effect to the fundamental human rights set out in the various legally binding conventions.

Although it might be stated as a general principle that a state is not responsible for all acts or omissions of private individuals; the formulation of obligations in the Human Rights conventions referred to above, has three important implications:

1. States have the positive legal duty to establish and maintain the necessary legal framework and other institutions through which the various fundamental human rights, including the right to be free from all forms of violence, can be guaranteed;
2. States should in the first instance exercise due diligence to implement effective mechanisms to prevent violations by non-state actors from occurring;
3. States are not only liable for their own actions but also for the actions of non-state actors if the state failed in its international *obligatio et iurus* to protect.

The language in these human rights instruments establishing the positive legal duty to *"ensure"* or *"secure"* raises several issues: Can a single failure to act

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(ETS no. 146) has lost its purpose. HR-Net ? HYPERLINK http://www.hri.org/docs.ECHR50.html 19 August 2004.

[13] *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

[14] *Convention on the Elimination of All Forms of Discrimination Against Women* U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981) ("CEDAW").

constitute a breach of obligation, thereby giving rise to state responsibility? Is a pattern required instead? What about willful neglect or the failure to implement policy? What about negligence? What if the state knew or ought to have known about the impending harm but failed to act? What about the situation where the state has the necessary constitutional framework but poor maladroit enforcement mechanisms? What about where the state has the political will but peculation and dereliction of duty hampers proper implementation of policy? What if the state is simply to poor to guarantee fundamental human rights effectively?

It is important to address and clarify all these issues specifically in light of section 39 1(b) of the Constitution that provides that South African courts *"must consider international law"* when interpreting the South African Bill of Rights. It is also important to consider international law due to the universality of human rights standards and values. As Venter asserts:

....the history of modern constitutionalism has reached a global fullness of development, from which emanates a distinct set of commonalities, principles, standards and values that have gained currency in constitutional dialogue all over the world. [15]

Recognizing that constitutional practices cannot simply be transplanted from one legal system to another, valuable lessons can nevertheless be learnt from the judicial enforcement efforts of other constitutional democracies.

[15] Venter 2000 *Utilizing Constitutional values* at 33.

1.4 Principal ***hypothesis and points of departure***

Everyone has a direct interest that citizens be safeguarded from human rights abuses at the hands of criminals. The *nervus probandi* of this thesis is that the State has a positive legal duty under both the South African Constitution[16] and International Human Rights Law to take reasonable measures to protect citizens against human rights abuses committed by non-state actors within the states borders.

The right to security and to be free from violent human rights abuses by both state and non-state actors is expressly guaranteed in the South African Constitution;[17] however, because most ordinary South African citizens' right to security and to be free from all forms of violence are perpetually violated and infringed, the section 12 (1) (c)[18] guarantee means little more than an empty promise not worth the paper it is written on. This, however, does not mean that the right is not justiciable and that its aims are not worth pursuing persistently. On the contrary, the *status quo* calls for decisive and fastidious engagement with the right and the means through which it may be developed and enforced to become a real living right to the citizens of this country. South Africa is a young constitutional democracy and not many cases have been tried on the issue of state responsibility for human rights abuses by non-state actors and, therefore, a detailed study of the emerging Constitutional jurisprudence and international law on the question is both important and necessary.

Internationally, the issue of state responsibility for human rights abuses by non state actors has developed over the last number of decades through treaties and treaty case law and there are currently a number of well established international legal principles regarding the question of whether or not states are responsible

[16] *Constitution of the Republic of South Africa*, 1996.
[17] *Constitution of the Republic of South Africa*, 1996.
[18] S 12 (1)(c) of the *Constitution of the Republic of South Africa*, 1996.

for human rights violations by non-state actors. These legal principles can serve as guidelines for South African Courts, institutions and academics for the interpretation and development of Section 12 (1) (c) of the South African Constitution[19] in line with section 39 (1) (b) of the South African Constitution.[20]

1.5 Research methodology

The research entails a comparative study of legal principles contained in the relevant international treaties as well and the various International Human Rights Courts and tribunals interpretation and application of those treaties, pertaining to state responsibility for human rights abuses by non-state actors. On a regional level, relevant legal principles of the Inter-American Human Rights System, the United States of America, the European Human Rights Protection System and the United Kingdom are investigated as part of the comparative research. This review includes international conventions, case law, commentators and reports by relevant commissions. Furthermore, an extensive literature study has been conducted. Relevant literature has been gathered at the North-West University, Potchefstroom Campus and the University of Pretoria and the following sources were consulted and avenues were explored: an initial literature search was conducted: the major books and journal articles on human rights in English were consulted; media reports were scrutinized; the Internet was used to further literature searches such as on the site of the Human Rights Watch, Westlaw, Majnet, Sabinet, and Legal Trac. The Internet was an extremely valuable source of international case law and treaty body information. All observations and recommendations were theoretically deduced after consultation of the relevant literature.

[19] Constitution of the Republic of South Africa, 1996.
[20] Constitution of the Republic of South Africa, 1996.

Between 1996 and 2004 various "safe" countries were visited including Austria, the United States of America, the United Kingdom, Estonia, Finland, France, Germany, Belgium, The Netherlands, Spain, Italy, the Cheq Republic, Hungary, Latvia, Lithuania, Taiwan, Thailand and China (Hong Kong) and life in a society with an effective security policy and criminal justice system was experienced first hand. The vast majority of citizens actually practically enjoy the fundamental human right to security and to be free from violence.

1.6 Limitations of study

This study has some inherent limitations. Although the state's responsibility to protect citizens from human rights abuses committed by non-state actors has moral, social, political and philosophical dimensions, this study is concerned with the juridical dimension. The substantive and especially the procedural aspects relating to the law of state responsibility are more extensive than may be potentially investigated in this study. Other aspects that are not canvassed in detail in this study are the application of the state's responsibility for human rights abuses committed by non-state actors to abuses committed by other states with which the state has political ties and to abuses committed by large trans-national corporations with operations in other countries. Sentencing and the calculation and determination of damages are also not dealt with in this study. This study has been restricted to those national and international laws and principles pertinent to the core issue of establishing state responsibility and legal liability for human rights abuses committed by non-state actors.

Over the last number of years and especially in the last year there have been a number of ground breaking cases in South Africa dealing with the state's positive legal duty to protect citizens from the violent actions of non-state actors. The research field is constantly developing and, therefore, requires that a time limit be imposed on a study of this nature. The time period that this study is accordingly

restricted to is up until 30 June 2004 and it covers developments pertaining to the field of state responsibility and liability for human rights abuses committed by non-state actors until this date.

1.7 Work already done in this field

From an extensive search on the topic *"State responsibility for human rights abuses by non-state actors"*, some articles and short publications were found commenting on and arguing for state responsibility for private acts of violence.

These include: [21]

Bigelow 1993 *Notre Dame J. L. Ethics & Pub. Pol'y*

> Bigelow AM "In the ghetto: the state's duty to protect inner city children from violence" 1993 *Notre Dame J. L. Ethics & Pub. Pol'y* 533-567

Bjorklund 1990 *Iowa L. Rev.*

> Bjorklund DA "Crossing DeShaney: can the gap be closed between child abuse in the home and the state's duty to protect?" 1990 *Iowa L. Rev.* 791-818

Cook 1994 *Harv. Hum. Rts. J.*

> Cook RJ "State responsibility for violations of women's human rights" 1994 *Harv. Hum. Rts. J.* 125-175

Dine 2002 *Cal. W. L. Rev.*

> Dine CM "Protecting those who cannot protect themselves: state liability for violation of foster children's right to safety" 2002 *Cal. W. L. Rev.* 507-525

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[21] No attempt is made to provide a detailed exhaustive list, the aim is to illustrate the type of articles that are available on the subject.

Ewing 1995 *Colum. Hum. Rts. L. Rev.*

Ewing AP "Establishing state responsibility for private acts of violence against women under the American Convention on Human Rights" 1995 *Colum. Hum. Rts. L. Rev.* 751-800

Farrior 1998 *Am. Soc'y Int'l L. Proc.*

Farrior S "State responsibility for human rights abuses by non state actors" 1998 *Am. Soc'y Int'l L. Proc.* 299-306

Fisher 1999 *Wash. & Lee L. Rev.*

Fisher LE "Anatomy of an affirmative duty to protect: 42 U.S.C. Section 1986" 1999 *Wash. & Lee L. Rev.* 461-518

Grodin 1997 *Hastings Const. L.Q.*

Grodin JR "Rediscovering the state constitutional right to happiness and safety" 1997 *Hastings Const. L.Q.* 1-34

Schriwer 2000 *U.S.F. L. Rev.*

Schriwer T "Establishing an affirmative governmental duty to protect children's rights: the European Court of Human Rights as a model for the United States Supreme Court" 2000 *U.S.F. L. Rev.* 379-408

No comprehensive body of work on the topic state responsibility for human rights abuses committed by non-state actors was found. No comprehensive study on the state's positive legal duty to protect citizens against private acts of violence was found either in the South African context or in an international context.

1.8 Framework and outline

Following this introductory chapter, this study will unfold as follows:

In Chapter Two, the history and origin of state responsibility for human rights abuses committed by non-state actors will be scrutinized and established. Various theories will be considered and highlighted. From this historical overview, it will be clear that the first and most basic duty of the state is the protection of its citizens against violence.

Chapter Three will be devoted to a detailed analysis of all the major human rights conventions and treaty body case law. The state's international *obligatio et iuris* with regards to its duty and responsibilities to prevent, investigate, punish and compensate human rights abuses committed by non-state actors will be established. Reference will also be made to relevant customary international law and international criminal law.

Chapter Four will be devoted to a comparative legal perspective on state responsibility for human rights abuses committed by non-state actors in the Inter-American Human Rights System and in the United States of America.

Chapter Five will also be devoted to a comparative legal perspective of the law of state responsibility for human rights abuses committed by non-state actors in the European human rights system, which is generally regarded as the best system for the protection of human rights in the world. Specific reference will be made to the United Kingdom.

In Chapter Six, recent South African Constitutional developments and case law will be investigated. The phenomenon of violent crime in South Africa will also be considered. The interpretation, application, scope and elements of the state's

positive legal duty to protect citizens from violent human rights abuses committed by non-state actors will be analyzed in detail.

In Chapter Seven the study will focus on the limitation of the right to be free from all forms of violence. The role that resource constraints play in the judicial enforcement of the states positive legal duties will also be investigated.

In Chapter 8 the study will be concluded with research findings.

2. HISTORY AND ORIGIN OF STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES

2.1	***Introduction***
2.2	***Origin of the state responsibility for human rights abuses***
2.2.1	*Greek Constitutionalism*
2.2.2	*The Roman Constitution*
2.2.3	*The English Common Law Tradition*
2.3	***Theories of natural rights and social contract***
2.3.1	*Thomas Hobbes*
2.3.2	*John Locke*
2.3.3	*Jean Jacques Rousseau*
2.4	***Eighteenth century constitutionalism***
2.4.1	*Francis Hutcheson*
2.4.2	*Jean Jacques Burlamaqui*
2.4.3	*William Blackstone*
2.5	***The revolutionary period***
2.5.1	*The American revolution*
2.5.2	*The first state constitutions*
2.5.3	*The French legacy*
2.6	***The right to protection***
2.6.1	*Liberty and protection*
2.6.2	*Status of free man*
2.6.3	*Recognition of legal rights*
2.6.4	*Enforcement of human rights*
2.6.4.1	Self defence
2.6.4.2	Civil action
2.6.4.3	Criminal law
2.7	***Prevention of violations***
2.7.1	*Requiring security of the peace*
2.7.2	*Protection by peace officers*
2.7.3	*State liability*
2.7.4	*The creation of modern police forces*
2.8	***Conclusion***

2.1 Introduction

The first and main duty of a government is to afford protection to its citizens and those residing in its territory.[1]

The development of the state's obligation to protect those within its jurisdiction as its first responsibility and duty is essentially a historical process. This historical process unfolded not only through the history of the formation of various states, but also in the history of the political ideas and instruments which have prompted their development.[2] The principle of state responsibility for human rights abuses by non-state actors is at once very old and very new; it is as old as Greek antiquity and as new as the twentieth century international human rights treaties and conventions. To consider what was intended to be is often as important as to consider what actually was, and this is even more true of the doctrine of state responsibility for human rights abuses by non-state actors which is still in the process of being moulded and remoulded by various international and domestic laws.

Traditionally it was considered that the international framework of human rights developed as a means of ensuring protection for individuals from the abuses of state power. England's Revolution of 1688 and the resulting Bill of Rights, the French Declaration of the Rights of Man and of the Citizen of 1789 and the American Constitution of 1776 were among the first documents to proclaim the "inalienable" rights of men, from which emerged the concept of fundamental human rights.[3] To ensure that the purpose behind the various international conventions and national constitutions that are currently in operation are actually being fulfilled, human rights discussions in recent years focused much attention on the need to protect people

1 Heyman 1991 *Duke L. J.* at footnote 1 quoting the CONG. GLOBE, 39th Cong., 2nd Sess., 101 (1867), remarks of Rep. Farnsworth (debating the reconstruction Act of 1867) ; *Vienna Declaration and Programme of Action* World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) 20-46 (1993) (adopted on June 25, 1993), reprinted in 32 I.L.M. 1661 (1993) para. 1: "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments".

2 Strong *Modern Political Constitutions* 15.

3 Danailov *Accountability of Non-State Actors* 6; American Law Institute *Restatement of the Law* 144: "... international law has long held states responsible for 'denials of justice' and certain other injuries to nationals of other states. Increasingly, international human rights agreements have created obligations and responsibilities for states in respect of all individuals subject to their

against abuses by private individuals or non-state actors.[4] There is a move away from the idea of *"protection against the state"* to *"protection by the state"*, which includes the protection by the state against human rights abuses committed by non-state actors. [5]

The state has been seen traditionally as the entity primarily responsible for upholding human rights on the international level as well as in the national sphere. To conceptualize this responsibility fully, it must be made clear who is responsible and to what degree, where that responsibility arises from, towards whom such responsibility exists and how such responsibility is asserted.[6] In the context of the state's responsibility for human rights abuses by non-state actors, the task is not only to identify the responsibilities, but also to reflect on whether and under what conditions states can be held liable for violations by private actors.

An overview of the principles contained in human rights law and its history clearly indicates that states are responsible for acts and omissions that breach their international obligations, including the obligation to protect those in their jurisdiction against human rights violations committed by non-state actors.

2.1 *Origin of the state responsibility for human rights abuses*

Section 39 (1) (b) of the South African Constitution 106 of 1996 provides that South African courts *"must consider international law"* when interpreting the Bill of Rights. To understand the international law that must be considered fully, it is important to understand the origin and history of the various international laws applicable to the state's positive legal duty to protect those who live within its jurisdiction.

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jurisdiction, including their own nationals, and a customary international law of human rights has developed and has continued to grow".

4 Amnesty International 2002 HYPERLINK http://www.oecdobserver.org/news/fullstory.php/aid/716/Globalise_this:_Human_rights.html 17 Jun. 2004 at 3-5.

5 Danailov *supra* note 3 at 21.

6 Farrior 1998 *Am. Soc'y Int'l L. Proc.* 300-301 ; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 8-15.

For purposes of understanding the origin of state responsibility for human rights abuses it is, therefore, necessary to explore the historical sources in detail. [7]

2.2.1 Greek Constitutionalism

The Ancient Greeks only knew the city state *(polis)*. Their whole political outlook was determined by this fact and even the greatest political philosophers that Greece produced were incapable of looking beyond this conception of a state. Aristotle, in laying down what he conceived to be the physical limits of an ideal state, said that it should be large enough to be economically self-sufficient *(autarkes)* and small enough to permit all of the citizens *(polites)* meeting together in one place.[8]

The Ancient Greeks recognized the existence of a higher law *(nomos)*. This higher law was derived through reason from nature *(phusis)* and they regarded this law as being universal, divine and immutable. According to Plato, human law is at best only an imperfect image of the ideal law of nature. Aristotle (384-322 BC) recognized various kinds of constitutions and classified them as good *(agathos)* or perverted, depending upon the ability of any particular system to achieve justice *(dikaiosune)* through the rule of law in the common interest of the community *(kononia)* by persons chosen for their ability to rule the people *(archon)*.[9]

For Aristotle, constitutionalism meant that governments must be responsible and accountable to the governed and that citizen's, or as he referred to them, *politia*, should be involved in the process of making the laws. The citizens are then obliged to obey these laws and however else men may be unequal, all men are equal under the law.[10]

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[7] Heyman *supra* note 1 at 507.

[8] Aristotle 350 B.C. HYPERLINK http://classics.mit.edu/Aristotle/politics.7.seven.html 16 Aug. 2004 at part 5;; Strong *supra* note 2 at 16; Halsall 1998(a) HYPERLINK http://www.fordham.edu/halsall/ancient/aristotle-politics1.html 16 Aug. 2004 at 3.

[9] Strong *supra* note 2 at 17; Miller 2002 HYPERLINK http://plato.stanford.edu/archives/fall2002/entries/aristotle-politics/ 16 Aug. 2004 at 5.

[10] *Ibid.*

Aristotle taught that the best type of government was the type of middle class government which he called the *polity*. It was his "golden mean" between the ideals of monarchy and aristocracy that was so difficult to attain and sustain and the perversions of tyranny, oligarchy, and democracy, which were undesirable. Aristotle's classification of constitutions can be summarised as follows:[11]

Figure 1: Aristotle's classification of constitutions

Type of Constitution	*Good or true forms*	*Bad or perverted forms*
Government of One	Monarchy or Royalty	Tyranny or Despotism
Government of the Few	Aristocracy	Oligarchy
Government of the Many	Polity	Democracy

There is much to learn from Aristotle's teaching. He emphasised that the object of all the citizens of a state must necessarily be the safety of their association. Aristotle pointed out that everything must be sacrificed to the maintenance of the constitution which is the basis of that safety and that any action on the part of any citizen outside the bounds of the constitution (whether an unconstitutional act carried out by the government of the day on the one hand, or human rights abuses by non-state actors, on the other), should not be tolerated for a moment. This argument has even greater force in a modern world (where crime syndicates operate and where innocent people suffer gross violations of their fundamental human rights at the hands of criminals) than it had in Aristotle's ancient polity.[12]

The state was a Greek citizen's whole scheme of association, a city wherein all his needs, material, physical and spiritual, were fulfilled. When Aristotle used the term "state" he comprehended within it all that we connote by the terms state, government, society, economic activity and religion. To him the state was a spiritual bond, not merely a governmental structure. The state existed, according to Aristotle, not

[11] Strong *supra* note 2 at 60; Miller 2002 HYPERLINK http://plato.stanford.edu/archives/fall2002/entries/aristotle-politics/ 16 Aug. 2004 at 5.
[12] *Ibid.*

merely to make life possible but to make life good. The state was the individual's means of realising his own dreams and aspirations.[13] For Aristotle, "*eudaimonia*" or "happiness" was a core concept in defining both human perfection and the goal of a community or a state.[14] Just as human perfection consists in the attainment of one's best ends, i.e. the full realization of one's nature, so the perfect society is one which is conducive to that attainment.[15] Social justice was identified with *"the things that tend to produce and safeguard happiness or parts of happiness for the political community".*[16] The main goal of the best constitution *(politeia)* was happiness, defined by Aristotle as *"the perfect...activity and employment of virtue".*[17] It has been suggested that Aristotle's theory of justice requires that the happiness and safety of each and every member of the polis be protected by the constitution and in this sense, entails a respect for individual human rights.[18] Although human rights as known today did not exist in the time of the ancient Greeks, the principle can clearly be seen that the main object of government was the safety and welfare of its citizens.[19]

2.2.2 The Roman Constitution

Rome, too, was a city-state in its beginnings but later pursued a policy of expansion which did not cease until the Roman Empire came to be coterminous with the civilised world. The importance of Rome in the history of constitutionalism lies in the codification and the development of law.[20] Initially Rome's law was *lex non scripta* and made up of *"a mass of precedents, carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon the methods of government, together with a certain number of*

13 Strong *supra* note 2 at 17.
14 Grodin 1997 *Hastings Const. L.Q.* at 11-12 ; Miller *Nature, Justice, and Rights* 18-19.
15 *Ibid.*
16 Grodin *supra* note 14 at 12 ; Miller 2002 HYPERLINK http://plato.stanford.edu/archives/fall2002/entries/aristotle-politics/ 16 Aug. 2004 at 68.
17 Grodin *supra* note 14 at 12 ; Miller 2002 HYPERLINK http://plato.stanford.edu/archives/fall2002/entries/aristotle-politics/ 16 Aug. 2004 at 157.
18 Grodin *supra* note 14 at 12 ; Miller 2002 HYPERLINK http://plato.stanford.edu/archives/fall2002/entries/aristotle-politics/ 16 Aug. 2004 Miller *supra* note 11 at 138.
19 Grodin *supra* note 14 at 12.
20 Strong *supra* note 2 at 18.

statutes".[21] Later Roman law was codified in the *Institutes* and *Digest* of the Emperor Justinian (AD 538-565), the great codifier of the Roman Law, centred at Constantinople. For Justinian, the precepts of the law were to live honestly, not to injure another and to give to each one that which belongs to him. The supreme legislative authority, according to Justinian's Code, rested with the Roman people. In theory, the Emperor's rights were delegated to him by the people.[22]

In Rome there was a gradual development of the concept of the rule of law and of the concept of the need for popular consent to law. Political and legal writers of the time agreed that the highest law in the community was the law of nature. Cicero held that the law of nature was the constitution of the world. In *De Re Publica* ("On the Republic") Cicero argued that *"true law is right reason in agreement with nature; it is of universal application, un-changing and everlasting ...".* Cicero asserted that it is impossible to annul or ignore this law of nature and that human beings can never be absolved from the obligation to obey it. The law of nature is derived from the gods, and he who disobeys it denies thereby his own true nature. The best state from Cicero's viewpoint was a mixed state that combined elements of monarchy, aristocracy, and democracy. For Cicero it was important that this state promoted the common good and had as chief aim the achievement of justice.[23]

The Roman law has had a significant impact upon the legal history of continental Europe. The customs and laws brought in by the invaders of the Roman Empire in the West fused with and merged into the Roman Code and this fusion produced the legal systems which prevail in Western civilisation today.[24]

The conception that the Emperor's legal rights were delegated to him by the people towards the end of the middle ages, led to the doctrine that the people, having originally delegated the sovereign power to the Emperor, might rightfully take it back

[21] Strong *supra* note 2 at 19; Halsall 2000 HYPERLINK http://www.fordham.edu/halsall/sbook.html 20 May 2004.

[22] Strong *supra* note 2 at 19; Scott 1932 HYPERLINK www.constitution.org/sps/sps.htm 20 May 2004.

[23] University of Chicago *et al Encyclopaedia Britannica vol. 5* at 85 ; Clayton 2001 HYPERLINK http://www.utm.edu/research/iep/c/cicero.htm 14 Aug. 2004 at 1-14.

[24] Strong *supra* note 2 at 22-23.

as well. This line of argument was the philosophical basis of the social contract theory and of modern day democracy. [25]

The Roman classical tradition importantly contained the concept "***salus populi suprema lex esto***".[26] *"Salus"* embraced physical safety, but furthermore, its root, *"sar"*, connotes being "safe and sound", a "sound or whole condition", including health, welfare and property preservation.[27] The term "the safety (welfare) of the people is the highest law" perhaps best captures the concept.[28]

Again although one cannot directly trace state responsibility for human rights abuses by non-state actors to the Roman Empire, the fact that the Emperor was delegated his authority by the people (albeit only in theory) together with the "*salus populi suprema lex esto"* concept, laid important foundations for the principle that the main aim of the government was to look after the wellbeing and security of the people.

2.2.3 The English Common Law Tradition

The state's responsibility for the protection of those who live within its jurisdiction has deep roots in the English common law history. As early as 901 AD in the "*Dooms of Edward the Elder*", the following phrases were asserted: [29]

King Edward admonished his witan, when they are at Exeter, that all should consider how the peace of their country be better kept than it had been, for it seemed to him that what he had previously ordained had not been enforced as it should have been.

1. No man shall refuse justice to another. If he does so, let him pay compensation as has been earlier provided: the first time 30s., the second time the same amount, the third time 120s. to the king.

2. It is also my will that everyone shall always have on his land men ready to guide those who wish to track their own (cattle), and that such guides shall in no way obstruct the search for the sake of bribes, nor shall they anywhere willfully or wittingly protect or foster guilt.....

[25] Strong *supra* note 2 at 22-23.
[26] Grodin *supra* note 14 at 12; Novak *People's Welfare* 52.
[27] *Ibid.*
[28] Grodin *supra* note 14 at 12; Novak *supra* note 26 at 52–53; Hiemstra and Gonin *Trilingual Legal Dictionary* at 282.
[29] Stephenson and Marcham (eds) 2002 HYPERLINK http://www.constitution.org/sech/sech_.htm 16 Aug. 2004; Halsall 2000 HYPERLINK http://www.fordham.edu/halsall/sbook.html 20 May 2004.

3. If, through conviction for theft, anyone, deserted by his kindred and knowing no one who will pay compensation in his place, loses his freedom and places himself under the hand of another, then let him be liable for as much slave labour as may be due, and his kindred shall forfeit all claim to his wergeld (should he be slain)....

4. It is my will that each reeve shall hold a court (gemot) every four weeks, (8) and that the reeves shall see that every man obtains folkright, and that every case shall have a day set when it is to be decided. And if any one (of my reeves) neglects this (duty), he shall be liable for the compensation already prescribed.

The Dooms of Edward the Elder were a clear attempt by the king to organise society so that those who live in it are safe and their possessions are protected and that they are entitled to justice. Also in the *Great Charter of the Magna Carta 1215*[30] that came about when the troubled reign of King John in 1215 tested the staying power of the legal reforms of Henry II , one find clear rules that afforded protection to citizens. King John, obsessed with regaining possession of French lands, abused the strong central government and system of taxation. Out of the rebellion that ensued, the

[30] Magna Carta, 1215 (Halsall 1996 HYPERLINK http://www.fordham.edu/halsall/source/mcarta.html 21 May 2004). Prior to 1215 the *Assize Of Clarendon of 1166,* although not as well known as the Magna Carta, also incorporated various principles of justice and the duty of the King to protect those within his jurisdiction. It asserted: "Here begins the Assize of Clarendon made by King Henry II, with the assent of archbishops, bishops, abbots, earls, and barons of all England. 1. In the first place the said King Henry ordained on the advice of all his barons, for preserving peace and maintaining justice, that inquiry be made through the several counties and through the several hundreds by twelve more lawful men of the hundred and by four more lawful men of each vill, upon oath that they will tell the truth, whether in their hundred or in their vill there is any man cited or charged as himself being a robber or murderer or thief or any one who has been a receiver of robbers or murderers or thieves since the lord king was king. And let the justices inquire this before themselves and the sheriffs before themselves. 2. And he who shall be found by the oath of the aforesaid cited or charged as having been a robber or murderer or thief or a receiver of them since the lord king was king, let him be arrested and go to the judgment of water, and let him swear that he was not a robber or murderer or thief or a receiver of them since the lord king was king, to the value of five shillings so far as he knows ... 8. Also it is the king's will that all come to the county courts to make this oath, so that no one stay away on account of any immunity which he has or court or jurisdiction which he has held; but they are to come to make this oath. 9. And let there not be any one within a castle or outside a castle, or indeed in the honour of Wallingford, who shall refuse to let the sheriffs enter his court or his land to view the frank-pledges and to see that all are under pledges; and let them be sent before the sheriffs under a free pledge ... 13. And if any one, in the presence of lawful men or the hundreds, make confession of robbery, murder, theft, or the reception of those committing them, and should later wish to deny it, let him not have law. 22. And the lord king wills that this assize be held in his kingdom as long as it shall please him". Also see The Laws of Ethelberht King of Kent 560-616 AD, The Laws of King Hlothaere and Eadric 673-686 AD, The Laws of King Withraed 690-720 AD, The Laws of King Alfred 871-901 AD, The Laws of King Athelstan 924-939 AD, The Laws of King Edmund 939-946 AD, The Laws of King Edgar 959-975 AD (Halsall 1998(b) HYPERLINK http://www.fordham.edu/halsall/source/560-975dooms.html 6 Sep. 2004); Stephenson and Marcham (eds) 2002 HYPERLINK http://www.constitution.org/sech/sech_.htm 16 Aug. 2004 at 12.

Magna Carta emerged that restrained the power of the crown and articulated political and civil rights. It is regarded as the first expression of constitutional principles. Various rights and liberties were granted to the people through the *Magna Carta*:

Article 1

In the first place we have granted to God and by this our present charter has confirmed, for us and our heirs forever, ...which is held most important and very essential....., which we shall observe and wish our heirs to observe in good faith forever.

We have also granted to all the freemen of our kingdom, for ourselves and our heirs for ever, all the liberties written below, to be had and held by them and their heirs from us and our heirs".

Article 20

A free man shall not be amerced for a small offence, except in accordance with the degree of the offence and for a grave offence he shall be amerced according to its gravity, without imperilling his status; and a merchant, similarly, without imperilling his stock-in-trade....

Article 24

No sheriff, constable, coroner or other of our officials shall hold pleas of our Crown. (Pleas of our Crown: grave criminal offences such as ambush, forcible entry, neglect of summons to local military service).

Article 38

In future no official shall put anyone to trial merely on his own testimony, without reliable witnesses produced for this purpose.

Article 39

No free man shall be arrested or imprisoned or deprived of his freehold or outlawed or banished or in any way ruined, nor will we take or order action against him, except by the lawful judgment of his equals and according to the law of the land.

Various articles in the *Magna Carta* bear great resemblance to some articles in the Canadian Charter of Rights and the American Constitution. Although some say that it is only the ill-informed that regard the Magna Carta as important,[31] it cannot be contested that the Charter of Magna Carta bestowed certain rights and liberties on the people that protected them from both government abuses and private abuses. Even if one argues that all that happened in 1215 at Runnymede was that some nobles stood up to King John, broke his autarchy and exacted some concessions for themselves; even that was a clear limitation on monarchy and a seed of constitutionalism and for the rights of the individual. Rights that the nobles obtained for themselves, later slowly spread to others. Unknowing, the nobles laid the foundations for parliament and representative government. The clause in Magna Carta that provides that a free man shall be punished only "by the lawful judgement of his peers or by the law of the land" came to establish the rule of law.[32]

[31] Centre for Constitutional studies Faculty of Law at the University of Alberta HYPERLINK http://www.iamm.com/uni-uni/caselaw.etc/magnacar.htm 2004/08/14: "Only the ill-informed can now regard the Great Charter as important because it originally converted into a limited monarchy one which had hitherto been arbitrary and oppressive. Medieval conditions made despotism undesired in theory and impossible in practice in all but a very few exceptional areas (of which certain city states of late medieval Italy were the most important) the popular law of the Dark Ages knew nothing of absolute rule nor did the Church countenance it at this time. The ceremony of coronation, if it increased the prestige of kingship, also made allegiance to the ruler conditional on promises of good government therein given. These premises, inevitably short and general, might well seem inadequate when a ruler arose who violated the spirit of compromise that inspired them. Such a one was William Rufus, whose arbitrary and violent conduct may have led to his own sudden death and certainly inspired a discontent which his successor, Henry I, found it desirable to placate by the issue of a special Charter of Liberties. This Charter, significantly, was an amplified version of the premises contained in the coronation oath, and, equally significantly, provided the basis of the Great Charter, when in a much more difficult and complex age there arose another king as unregulated as Rufus. What was new, therefore, about the Great Charter was certainly not the theory which lay behind it, but the very elaborate and forthright way in which that theory was given concrete form. For roughly two centuries it became the authoritative expression of the rights of the community against the Crown. As such it was seldom far from men's mind and royal confirmation of it was demanded and secured repeatedly. By the early fifteenth century many of its provisions had inevitably become antiquated and the mighty problems of the sixteenth century led men to regard royal authority as much more of a blessing than a curse; under such conditions the Great Charter was of little significance. The famous constitutional struggles of Stuart times was the beginning of what has been termed "*the myth of Magna Carta*," when the Charter was re-discovered and rapturously acclaimed as *"the most majestic instrument and sacrosanct anchor of English liberties")*. It must be noted that, contrary to the above view writers such as Coke, Blackstone, The Founding Fathers and in modern times Heyman saw the Magna Carta as extremely significant. Given that some of the Articles in the Magna Carta are today contained in some of the world's leading constitutions I concur with the latter opinion. Shorts and De Than *Human Rights Law* 3: "This charter is justly regarded as the foundation of English constitutional liberty. Among its thirty eight chapters are found provisions for regulating the administration of justice...".

[32] Henkin *Rights of Man Today* 10.

Also in terms of the Feudal System that emerged in the 11th century, a peasant owed his lord loyalty, obedience, aid, council and labour service and in turn, the lord owed the peasant justice and protection. Importantly, this protection included to be safeguarded from attacks by other peasants. Feudalism was an economic, social, legal, military and political system that lasted until the late 13th century. The feudal system was organised on the basis of land tenure. Society was divided into the clergy, the nobility and the agricultural workers or peasants. Each was dependant on the other in a web of mutual obligations and responsibilities. In theory, God gave spiritual charge of men to the pope and secular power over them to the emperor from whom kings held their kingdoms, whilst dukes, counts etc. in turn, received their land from the king. Nobility held their lands on condition of fulfilling certain obligations to those above and below them. When a noble received a **fief** or a piece of land he became a **vassal** of the lord who bestowed it. Vassalage and fief were the two principal institutions of feudalism.

Vassalage was a contractual arrangement between a noble and a king established by a ceremony of homage in which the vassal kneeled and placed his hands between the hands of his lord and swore to serve him faithfully. The vassal owed the lord loyalty, obedience, aid, council and attendance while the lord owed his vassal protection, security and justice and even received the vassal's sons into his own house and educated his sons for knighthood. Feudal tenures were abolished in England in 1660 long after they had become inoperative.[33]

Under the traditional English doctrine, every loyal subject was entitled to the king's protection.[34] This traditional doctrine received its classical expressions in the works of *Sir Edward Coke* who defined the relationship between sovereign and subject in terms of a "*mutual bond and obligation*".[35] Under this arrangement the subject owed "allegiance or obedience" while the king was bound to the duty of "government and protection" of his subjects. [36]

[33] Halsey (ed) *Collier's Encyclopedia* 680-681; University of Chicago *et al New Encyclopaedia Britannica vol. 4* 755.
[34] Coke *Institutes* at 130a ; Heyman *supra* note 1 at 507.
[35] Heyman *supra* note 1 at 507; Bigelow 1993 *Notre Dame J. L. Ethics & Pub. Pol'y* 556.

For Coke these reciprocal obligations were best defined by the maxim ***"protectio trahit subjectionem, et subjectio protectionem":*** **protection implies subjection and subjection protection.**[37] These reciprocal obligations and duties were inherent in the very nature of the relationship between the sovereign and the subject.[38] Coke made it clear that **the sovereign's duty of protection included the duty to protect subjects from the violence of other subjects.**[39] Protection was afforded through the king's laws and the legal process, which provided the means for the enforcement of human rights.[40] To be protected by the king was to be protected by the law.[41]

The aforementioned formulation of reciprocal duties of king and subject was soon accepted as a fundamental principal of English constitutional law. For Sir Edward Coke the relationship between sovereign and subject, as for Cicero, arose from the law of nature and as such was immutable and unchangeable.[42] Over the next 150 years, the basis of Coke's doctrine was transformed. Political obligation came to be regarded as not based on nature but on consent. Coke's doctrine was transformed into the *"original contract doctrine"* between sovereign and subject *under which the subject owed obedience in return for the ruler's protection.*[43] Under this constitutional conception,[44] the subjects had no duty to obey if the sovereign failed in his duty to protect their rights.

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36 Heyman, *supra* note 1 at 507; Bigelow *supra* note 35 at 556; Glendon 1992 *U. Chi. L. Rev.* 523-524.

37 Heyman *supra* note 1 at 513 and footnote 18 citing *Calvin's Case* (1608) 7 Co. Rep. 1 at 4b-51 and 77 E.R. 377 (1608) at 382; Bigelow *supra* note 35 at 556.

38 *Ibidem.*

39 Bigelow *supra* note 35 at footnote 116 quoting Heyman: "The object of the King's protection is to ensure that his subjects in all places may be protected from violence, and that justice may equally be administered to all his subjects"; Heyman *supra* note 1 at 513, footnote 20 citing *Calvin's Case* (1608) 7 Co. Rep. 1 at 8a and 77 E.R. 377 (1608) at 386: "The subject's right to protection entails the safety of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawful molestation or wrong".

40 Coke *supra* note 34 at 130a: the subject's right to protection entails "the safety of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawful molestation or wrong".

41 Coke *supra* note 34 at 126a: "For the law and the Kings writs are the things whereby a man is protected and aided, so as that is out of the kings protection, is out of the aid and protection of the law".

42 Heyman *supra* note 1 at 513 citing *Calvin's Case* 7 Co. Rep. 1 at 12b-14b and 77 E.R. 377 at 392-394; Kettner *Development of American Citizenship* 7-8 and 16-28.

43 Heyman *supra* note 1 at 513; Blackstone *Commentaries* on the theory of the original contract in the mid-eighteenth century; Reid *Constitutional History* 55-60; Wood *Creation of the American Republic* 268-273.

2.3 Theories of natural rights and social contract

The theories of natural rights and of the social contract are another major source of the state's positive legal duty of protection. In fact, the theoretical foundations of modern constitutionalism were laid down through the doctrine of natural rights and the social contract, especially by the English philosophers Thomas Hobbes and John Locke in the 17th century and the French philosopher Jean-Jacques Rousseau in the 18th century.[45]

They were writing in the aftermath of the Protestant Reformation. As a result of the Reformation, the basis of the notion of divinely sanctioned contractual relations was broken up. Subsequently, the Roman Empire was torn apart by the various wars of the Reformation. It became increasingly necessary to search for a new basis of government and of law, order, stability, loyalty and obedience. Political philosophers turned to the Biblical concept of a covenant or contract, such as the one between God and the Israelites of the Old Testament. The assumption was that God had constituted the political unit by choosing His partners in an eternal covenant. In a sense, the secular political theorists of the social contract reversed the process of choice. Instead of God choosing his people, a people chose its sovereign under God by means of the social contract. According to the theories of the social contract, the political unit is established as in the Biblical model by means of a promise or promises.[46]

2.3.1 Thomas Hobbes

One of the earliest and most famous exponents of the social contract theory was Thomas Hobbes *(1588-1679)*.[47]

He argued in his book *The Leviathan (1651)* that the state of nature was intolerably bad and that it was not a very convenient condition due to the lack of *"established,*

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44 Heyman *supra* note 1 at 513: "Under this conception if the King failed to protect the rights of his subjects their duty to obey was also at a end".

45 Strong supra note 2 at 34-35.

46 University of Chicago *supra* note 23 at 86.

47 Strong *supra* note 2 at 34.

settled and known law", the lack of *"known and impartial judges"* and the absence of an executive to enforce judgements. In this state of nature, a man's fundamental rights to life, liberty and property were very insecure. Accordingly, for the purpose of self preservation by unanimous consent, men abandoned the state of nature and entered into a social contract that created a government designed to protect their natural rights.[48] As Hobbes asserted:

The right of nature, which writers commonly call jus naturale, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto. And because the condition of man .....is a condition of war of everyone against everyone, in which case everyone is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies; it followeth that in such a condition every man has a right to every thing, even to one another's body. **And therefore, as long as this natural right of every man to every thing endureth, there can be no security to any man, how strong or wise soever he be**, of living out the time which nature ordinarily alloweth men to live. And consequently it is a precept, or general rule of reason: that every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war. The first branch of which rule containeth the first and fundamental law of nature, which is: to seek peace and follow it. The second, the sum of the right of nature, which is: by all means we can to defend ourselves.[49]

Hobbes' main contribution to constitutionalism lies in his radical rationalism.[50] The fact that the individual entered into the social contract to escape the insecurity of the state of nature and enter into a society where there are known laws and impartial judges and an executive that enforces the laws, obviously meant in practical terms that the government owed a duty to the individual to protect his individual rights in order for the individual to experience security and convenience. It would have made

[48] Hobbes *Leviathan* 1651 at xiv: "Whensoever a man transferreth his right, or renounceth it, it is either in consideration of some right reciprocally transferred to himself, or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some good to himself. And therefore there be some rights which no man can be understood by any words, or other signs, to have abandoned or transferred. As first a man cannot lay down the right of resisting them that assault him by force to take away his life, because he cannot be understood to aim thereby at any good to himself. The same may be said of wounds, and chains, and imprisonment, both because there is no benefit consequent to such patience, as there is to the patience of suffering another to be wounded or imprisoned, as also because a man cannot tell when he seeth men proceed against him by violence whether they intend his death or not. And lastly the motive and end for which this renouncing and transferring of right is introduced is nothing else but the security of a man's person, in his life, and in the means of so preserving life as not to be weary of it".

[49] Hobbes *supra* note 48 at xiv (emphasis added).

absolutely no sense for the individual to enter into a social contract to escape the insecurity and violence of the state of nature for his rights to be violated by the members of the society.

The main aim of the social contract and the first duty of government was to protect the rights of the individual, especially the right to security. Without security none of the other rights can be fully enjoyed.

2.3.2 John Locke

John Locke was another major proponent of the theory of natural rights and social contract which were based upon the individual's consent to form a society which existed and had a government for the purpose of preserving the individual's natural (human) rights.[51]

According to Locke's theory, man is not naturally subject to a sovereign. In a state of nature, which is *"a state of perfect freedom"*, each individual human being is free to do as he sees fit, without being subject to or depending on the will of others.[52] In his famous work *Two Treatises of Government* in *section 6 Locke* asserts that:

To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and

[50] University of Chicago *supra* note 23 at 86.

[51] Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. II s 4; Harpham (ed) *Locke's Two Treatises* in general: "John Locke's *Two Treatises of Government* has long been recognized as one of the great works of political philosophy. Three centuries after it was written, students and scholars continue to study it for insights into the intellectual origins of the modern world and for a better understanding of such fundamental concepts as natural rights, social contract, limited government, and the rule of law..."; Bigelow *supra* note 35 at 557; Kettner *supra* note 42 at 44-61; Ashcraft *Revolutionary Politics* 521-589, which states that Locke's natural rights theory was radical at the time Locke wrote it. Strong *supra* note 2 at 34.

[52] Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. II s 4 ; Heyman *supra* note 1 at 514.

confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.[53]

The natural state of humankind is a state of equality in which free men and women live out their lives without any subordination or subjection to a ruler. In a state of nature, men are not subject to positive laws but only to the law of nature.[54] The law of nature is a law that can be associated with and shares the same characteristics as the law of reason.[55] The law of nature teaches *"That being all equal and independent none aught to harm another in his life, health, liberty and possession".*[56] In this state of nature every person has the right to enforce the law of nature by acts of retribution, punishment or restraint against a potential or actual violator of his natural human rights.[57] In a state of nature, however, an individual often lacks the capability and capacity to defend himself against invasions or attacks by others rendering the actual enjoyment of his rights to life, liberty, security and property very insecure[58] and subject to violation. Due to this "very insecure" status of rights an individual agrees to give up his natural power to a community or society *"for the mutual preservation of their lives, liberties and estates".*[59] As *Locke* explains:

If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property. [60]

53 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. II s 6.
54 *Ibid.*; Heyman *supra* note 1 at 514.
55 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. II.
56 *Ibid.*
57 *Ibid.*
58 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. IX ss 123-126; Heyman *supra* note 1 at 515.
59 *Ibid.*; Bigelow *supra* note 35 at 557.
60 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. IX ss 123-124.

The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property... .

The individual's association with the state or community was entirely voluntary, resulting from the individual's inability to provide protection for himself. Consequently, the individual agrees to be regulated by the laws made by the society for the preservation of himself and the preservation of the rest of that society, in exchange for the *"protection from its whole strength".*[61]

According to Locke, the main aim of a government was to be the force of all the members of a society for the purpose of preserving and protecting the members of that society from injury and violence.[62] Because a government is established for the purpose of protecting the individual members, it is obliged and owes a duty to secure every individual's right to life, liberty and freedom. In the event of government acting contrary to this trust, the government must be dissolved and the community has the right to establish a new government. Such dissolution will occur either when the government itself invades and violates the rights of its subjects or where a government fails or omits to use its power to secure human rights.[63] Locke's natural rights theory was gradually absorbed into mainstream English thought during the following century.[64]

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61 *Ibid.;* Bigelow *supra* note 35 at 557 and accompanying footnote 119.

62 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. IX s 124; Locke *Third Letter* 214; Heyman *supra* note 1 at 515; Bigelow *supra* note 35 at 556; Farber and Sherry *History of the American Constitution* 11-13.

63 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. IX s 130; Heyman *supra* note 1 at 515: "Locke implies that the Glorious revolution of 1688 in which King James II was dethroned and replaced by William and Mary was justified on these grounds". Locke published the Two Treatises with the avowed object of justifying the Revolution. In a passage evidently referring to James's withdrawal from the kingdom during the Revolution, Locke wrote that the government was dissolved "when he who has the Supreme Executive Power, neglects and abandons that charge, so that the Laws already made can no longer be put in execution.... Where there is no longer the administration of Justice, for the securing of Men's Rights, nor any remaining Power within the Community to direct the Force, or provide for the Necessities of the public, there certainly is no Government left. Where the laws cannot be executed, it is all one as if there were no Laws...".

64 Heyman *supra* note 1 at 516: "...moreover, it was forcefully articulated during that period by a small group of radical Whig opposition writers, who had a crucial impact on the development of American political thought in the decades leading up to the Revolution. It was a canon of radical Whig thought that government existed to protect the natural rights of its subjects. As John Trenchard and Thomas Gordon wrote in Cato's Letters: "mutual Protection and Assistance is the only reasonable purpose of all reasonable Societies. To make such Protection practicable, Magistracy was formed, with power to defend the Innocent from Violence, and to punish those that offered it... In order to this.. end, the Magistrate is entrusted with conducting and applying the united force of the community and with exacting such a share of every man's property, as is

2.3.3 *Jean Jacques Rousseau*

In his *Social Contract (1762),* Rousseau argued that if man was born for freedom and yet was everywhere in chains, the only means of rendering the slavery legitimate lay in the retention of the sovereign power in the hands of the people who had made the contract which turned a multitude of individuals into a society. [65] *The* social contract secured the preservation of man's natural rights. According to Rousseau's doctrine, liberty results from the nature of man. Man's first law is to provide for his own preservation, his first cares are those which he owes to himself; and, as soon as he reaches years of discretion, he is the sole judge of the proper means of preserving himself, and consequently becomes his own master.[66] In this state of nature where man is his own master, he inevitably reaches the point where the obstacles and resistance facing him in his challenge to preserve his own rights are greater than the resources one man has at his disposal. In order to protect himself and to preserve the enjoyment of his natural human rights to life, health and security, man enters into a social compact and forms a society where the sum of forces are great enough to overcome the threat of violation of natural rights. As Rousseau asserts:

This sum of forces can arise only where several persons come together: but, as the force and liberty of each man are the chief instruments of his self-preservation, how can he pledge them without harming his own interests, and neglecting the care he owes to himself? This difficulty, in its bearing on my present subject, may be stated in the following terms: **The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. This is the fundamental problem of which the Social Contract provides the solution.** [67]

In the *Social Contract* in the chapter that deals with life and death he asserts that:

The social treaty has for its end the preservation of the contracting parties ...because it is only on that condition that he has been living in security up to the present, and

necessary to preserve the whole, and to defend every man and his property from foreign and domestic injuries".

65 Strong *supra* note 2 at 35-38.

66 *Ibid.*

67 Cole 1913 HYPERLINK http://etext.lib.virginia.edu/toc/modeng/public/RouSoci.html 20 May 2004: Rousseau *Social Contract (1762)* at chapter 6 (emphasis added).

because his life is no longer a mere bounty of nature, but a gift made conditionally by the State. [68]

In relation to security and the duty of the government to protect those who live within their jurisdiction by way of punishing criminals he writes:

Again, every malefactor, by attacking social rights, becomes on forfeit a rebel and a traitor to his country; by violating its laws he ceases to be a member of it; he even makes war upon it. In such a case the preservation of the State is inconsistent with his own, and one or the other must perish; in putting the guilty to death, we slay not so much the citizen as an enemy. The trial and the judgment are the proofs that he has broken the social treaty, and is in consequence no longer a member of the State. Since then, he has recognised himself to be such by living there, he must be removed by exile as a violator of the compact, or by death as a public enemy; for such an enemy is not a moral person, but merely a man; and in such a case the right of war is to kill the vanquished... **In a well-governed State, there are few punishments, not because there are many pardons, but because criminals are rare;** it is when a State is in decay that the multitude of crimes is a guarantee of impunity.[69]

Rousseau's *Social Contract* was probably the most epoch-making book ever written, not so much in itself as in its influence upon the constitution making which followed it.[70] For Rousseau, an essential element of the social contract was the willingness of man to subject himself to the "*general will*" to which only the popular sovereign can give expression. In taking this position, Rousseau may have been influenced by the experience of his native Geneva. The Swiss Confederation is still referred to officially, in German, as an *Eidgenossenschaft,* a term meaning "*fellowship of the oath*".[71] Rousseau merged all individual citizens into an all-powerful sovereign whose main aim was the preservation of all the individual members' basic human rights. In order to guarantee the legitimacy of government and its laws, Rousseau enforced universal participation in order to *"force men to be free",* as he paradoxically phrased it. In common with Hobbes and Locke, Rousseau required the assent of all to the original social contract. It is clear that according to Rousseau, the main object of

[68] Cole 1913 HYPERLINK http://etext.lib.virginia.edu/toc/modeng/public/RouSoci.html 20 May 2004: Rousseau *Social Contract (1762)* at chapter 6 (emphasis added).
[69] *Ibid.*
[70] Strong *supra* note 2 at 36.
[71] University of Chicago *supra* note 23 at 85.

government was to protect individuals from actual or potential violations of their fundamental rights.[72]

2.4 Eighteenth century constitutionalism

In the eighteenth century, the *salus populi suprema lex* concept (the safety of the people is the highest law) was incorporated into the social contract and philosophy of the period. Both the "purpose of government" language and the "rights of individuals" language of the relevant portions of state constitutions contain some version of the philosophy that men in a state of nature have certain rights which are inherent to them and due to the fact that they are human beings with certain "inalienable" rights, the government owes a duty to protect those rights in order for individuals to pursue their own happiness in security and peace.[73]

2.4.1 Francis Hutcheson

The writings of Francis Hutcheson, a key figure in the Scottish Enlightenment that were widely read in the American colonies, also supported the doctrine that the main aim of government was the protection of the individual's basic human rights.[74] In his 1747 essay, *A Short Introduction to Moral Philosophy*, Hutcheson wrote that:

> the end of all civil power is acknowledged by all to be the safety and happiness of the whole body, (and) any power not naturally conducive to this end is unjust, which the people, how rashly granted it under an error may, justly abolish again, when they find it necessary to their safety to do so.[75]

This proposition about regarding the main aim and duty of government is in turn premised upon Hutcheson's view of the nature of men – that men are *"necessarily determined to pursue their own happiness"*.[76]

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[72] Cole 1913 HYPERLINK http://etext.lib.virginia.edu/toc/modeng/public/RouSoci.html 20 May 2004; University of Chicago *supra* note 23 at 85; Strong *supra* note 2 at 35-38.
[73] Grodin *supra* note 14 at 11-12 and accompanying footnote 68; Novak *supra* note 26 at 52.
[74] Grodin *supra* note 14 at 13.
[75] Grodin *supra* note 14 at 13; Hutcheson *Short Introduction* at 302.
[76] Grodin *supra* note 14 at 13; Hutcheson *Short Introduction* at 302.

When Hutcheson wrote that the end of civil power is the "*safety and happiness of the whole body*", he clearly implied more than the principle that government should merely refrain from committing abuses itself. [77] He obviously implied some positive duties and responsibility on the part of government to ensure that the members of society are protected and safe in order for them to pursue their own happiness in a secure environment. Individuals must, therefore, not only be protected from government action but also from inaction on the part of government when a person's rights are being violated by other individuals. His moral theories embraced duties on the part of government as well. His focus was upon public rather than purely private happiness as reflected in his adoption of "*the greatest happiness of the greatest number*" as the test of a just society.[78]

2.4.2 Jean Jacques Burlamaqui

Writing at about the same time as Hutcheson, and along the same lines, was the Swiss philosopher Jean Jacques Burlamaqui.[79] Burlamaqui was also an advocate of the social contract theory. He saw man as a social creature for whom society and government are necessary for the development of his *faculta* or mental and physical abilities.[80] Foremost among those faculties is the desire of man for happiness, which according to Burlamaqui is *"as essential to man and as inseparable from his nature as reason itself*".[81] Since man is designed to pursue happiness, it is the function of society and the duty of government to assist him in attaining it.[82] When a person has a natural right, other people ought not to employ their strength and liberty in resisting him in this point. They should respect his right and assist him in the exercise of it.[83] A *"just society,"* in Burlamaqui's view was a society where the main aim of the government was to protect the people's rights so that the people can pursue their

77 Grodin *supra* note 14 at 13; Hutcheson *Short Introduction* at 302.
78 Grodin *supra* note 14 at 14 and accompanying footnotes 78-80.
79 Grodin *supra* note 14 at 15. For a thorough discussion of Burlamaqui's views, and of their influence upon American thought, see generally Harvey *Jean Jacques Burlamaqui.*
80 Grodin *supra* note 14 at 15; Harvey *supra* note 79 at 11-16.
81 Grodin *supra* note 14 at 15; Harvey *supra* note 79 at 18.
82 Grodin *supra* note 14 at 15; Harvey *supra* note 79 at 17.
83 Burlamaqui *Principles* 50: A just society is "... [No] more than natural society itself modified in such a manner, as to have a sovereign that commands and on whose will whatever concerns the happiness of society ultimately depends; to the end that, under his protection and through his care, mankind may surely attain the felicity, to which they naturally aspire".; Grodin *supra* note 14 at 15.

own happiness in a safe and secure society.[84] Burlamaqui emphasized that the nature of human beings placed certain affirmative obligations upon government by including an obligation to increase the happiness of its citizens. For Burlamaqui, man has a duty to pursue happiness and he posits an extension of that duty upon the state.[85] The state had a positive obligation to create an environment in which individuals can pursue their dreams and ideals. Burlamaqui reaches back to the earlier classical Roman tradition of *salus populi suprema lex esto*. For man to be happy or to pursue happiness, his basic fundamental rights to life; liberty, security and property must be protected and respected by government and other members of the society.[86]

Burlamaqui's works were widely read in America during the 18th century and his ideas are traceable in the writings of many American patriots. In 1774, James Wilson, basing many of his views on Burlamaqui's view, wrote an essay called *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,* in which he stated that:

> The happiness of the society is the first law of every government. This rule is founded on the law of nature: it must control every political maxim: it must regulate the legislature itself. The people have a right to insist that this rule be observed; and are entitled to demand a moral security that the legislature will observe it.[87]

Wilson also commented that in a state of nature, man has a natural right to property, character and liberty and importantly to safety that must be protected by government at all times and as its chief aim.[88] In terms of the eighteenth century understanding of the *salus populi* concept, happiness and safety implied more than physical safety, it in fact meant a state of wholeness or complete wellbeing.[89]

84 Burlamaqui *supra* note 83 at 135.
85 Grodin *supra* note 14 at 15; White *Philosophy* 231.
86 *Ibid.*
87 Grodin *supra* note 14 at 15; Wilson *Considerations* 721, 723.
88 Grodin *supra* note 14 at 16 and accompanying footnote 91.
89 Grodin *supra* note 14 at 16 and accompanying footnote 91.

2.4.3. *Sir William Blackstone*

Sir William Blackstone in the eighteenth century in his publications *Commentaries on the Laws of England 1765-1769,* [90] combined Coke's common law doctrine of allegiance and protection and Locke's theory of natural rights and the social contract theory into the mainstream of English constitutional theory. Blackstone contended that ***"it was a maxim of law that protection and subjection are reciprocal"***. [91] Blackstone's doctrine of reciprocal allegiance and protection was set in a broad framework of social contract that provided: ***"That the whole should protect all its parts, and that every part should pay obedience to the will of the whole"***, or, in modern terms, the state should guard the basic human rights of each individual member and in return for this protection, each individual will submit to the laws of the state. [92]

Blackstone revealed the structure of the positive and negative character of individual rights and duties exploring Coke and Locke's theories.[93] In a state of nature an individual has a right to be free from interference by others thus in a sense natural

[90] Blackstone *supra* note 43; Brown 2003 HYPERLINK http://www.iejs.com/Law/blackstone.htm 14 Jun. 2004:"Sir William Blackstone's *Commentaries on the Laws of England* covered such vast legal wilderness that multiple centuries have passed and still learned scholars investigate and debate the meanings of his four volumes. The quantity of the work in itself is enough to humble even the most advanced scholar. Indeed, his work can easily be classified as a legal revolution. His "books" were more than a mere overview of legal *possibilities*. Blackstone, in distinct language, issued the "rules" of *the game*. He logically developed the players (mankind and his Creator), he carefully explained the boundaries (reason and its part in the creation and removal of laws), he freely revealed the object of attention (the books of law), he explicitly detailed the penalties for exceeding the boundaries (punishment, both its means and its ends), and he displayed the beauty of winning and the terror of losing to the winner and the loser (civil society, along with its duties, rights and liberties; and the removal of life, via capital punishment). Sir William Blackstone's work stands, and will continue to stand, as one of the most important contributions to civil society in the history of mankind. Bigelow *supra* note 35 at 557.

[91] Blackstone *supra* note 43 at 233; Heyman *supra* note 1 at 517.

[92] Blackstone *supra* note 43 at 48; Heyman *supra* note 1 at 517.

[93] Bigelow supra note 35 at 557; Heyman *supra* note 1 at 517 and accompanying footnote 52 where he states: "It is important to distinguish two meanings of the term "positive". In one sense, it is opposed to "negative". A positive right or liberty is a right to act in a particular way, or to receive or possess a particular thing, whereas a negative right or liberty is a right to be free from interference or coercion", and continues "In a second sense, "positive" is contrasted with "natural". A positive right is one that derives from the positive law of the state as distinguished from the law of nature. The right to protection was a positive right in the first sense. Whether it can also be called a positive right in the second sense is somewhat more complex. For Coke, the right to protection was a natural right, arising from the natural bond between king and subject. For Locke and American writers, on the other hand, the right to protection derived not from the law of nature but from the social contract. In this sense, the right to protection was a positive rather than a natural right".

liberty is negative[94]. On the other hand in terms of the social contract theory, when a society is formed to obtain the advantages of association with others, the benefits are positive in nature. One of the most important benefits was the protection of one's human rights by the community.[95] At *Chapter One* of his book *Commentaries on the Laws of England Blackstone* writes the following on the rights of persons:

By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it. But with regard to the absolute *duties*, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal laws should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws: *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But, with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. Therefore, the principal view of human laws is, or ought always to be, to explain, protect and enforce such rights as are absolute, which in themselves are few and simple; and, then, such rights as are relative, which arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to,

94 Bigelow supra note 35 at 557; Heyman *supra* note 1 at 517.

95 Blackstone *supra* note 43 at 124. As Blackstone expressed it: "The principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities".; Heyman *supra* note 1 at 517.

though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do take notice of these absolute rights, and provide for their lasting security.[96]

Protection is a positive right claim on the society to provide something to which the individual is entitled. This encompassed a positive legal duty of protection not only from governmental oppression but also from private acts of violence.[97] In return for the benefits of protection by the society, the individual also assumes certain positive duties. These duties require that the individual contributes to the subsistence and peace of the society.[98] The citizen is *inter alia* obliged through the obligation of allegiance to pay taxes,[99] to aid in enforcing laws[100] and to defend the society against invasion.[101] The obligation of protection is, therefore, a reciprocal obligation. The individual not only has a right to protection from the society but also has a duty to protect the society and its citizens.[102] Under the classical view, a society that is a aggregate of people living together in a ordered community is also *an association of mutual protection.*[103] The society fulfils its duty of protection through the making of various laws, regulating society and by enforcing these laws effectively. The principal duty of the king is to govern his people according to law (*Nec regibus infinita aut libera potestas).* Blackstone asserts that the state has an obligation to enact laws for the protection and preservation of the natural rights of individuals.[104]

[96] Blackstone *supra* note 43 at chapter 1 (emphasis added).
[97] Bigelow *supra* note 35 at 557 and accompanying footnotes 124 and 125.
[98] Heyman *supra* note 1 at 517; Blackstone *supra* note 43 at 45; Henkin *supra* note 32 at 1-2: "...the right to security and to be protected is a basic human right and as such is a claim recognized "as of right", not a claim upon love, or grace, or brotherhood, or charity: one does not have to earn or deserve it. These rights are not merely aspirations or moral assertions but legal claims under applicable law. Human rights are rights against society as represented by the government and its officials. Government must protect the individual from neighbours or criminals. It must afford legal remedies against a wrongdoer, but, at bottom, the rights claimed are against the state, not against the neighbour or the criminal or the wrongdoer. The fundamental human right to protection and a secure environment also include that which society is deemed obligated to do for the individual...".
[99] Heyman *supra* note 1 at 518; Blackstone *supra* note 43 at 307; Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. IX s 140.
[100] Heyman *supra* note 1 at 519; Blackstone *supra* note 43 at 42-43 and 52-54.
[101] Heyman *supra* note 1 at 518.
[102] Heyman *supra* note 1 at 518-519, quoting Mill *On Liberty* 75 where he states that "Everyone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists first, in not injuring the interest of one another; and secondly, in each person's bearing his share ... of the labours and sacrifices incurred for defending the society or its members from injury and molestation".
[103] Heyman *supra* note 1 at 518; Blackstone *supra* note 43 at 52-53; Bigelow *supra* note 35 at 556.
[104] Heyman *supra* note 1 at 519; Blackstone *supra* note 43 at 127.

According to Blackstone, these laws do not render certain acts wrongfull but merely declare the law of nature, which forbids the infringement and violations of the natural rights of persons. To Blackstone, the legislative power of society has not merely the right, but the duty to make laws. Since the individual members of the society are bound to conform themselves to the will of the state, it is important that they receive directions from the state declaratory of the state's will. It is, therefore, incumbent on the state to establish general rules, for the perpetual information and direction of all persons on all aspects of the society, whether of a positive or negative nature. Because the law is comprehensive, it cannot remain neutral with respect to the legality of an act or omission, but must take a position either forbidding, allowing, or requiring it. In the case of murder, for example, the state's law, if it is to conform to natural law, must declare the act of murder to be a crime. [105]

The state's positive legal duty to protect and to safeguard citizens against abuses from private acts of violence further required of states to enforce the various laws effectively through the executive and judicial branches of government. Under English law, the executive power was vested in the king. [106] The function of the king as supreme executive power was to protect the community, and each individual therein, from violence, by executing the laws which the people themselves have consented to.[107] The king enforces the laws through his courts. These Courts of justice are instituted to accomplish the redress of private injuries, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs are prohibited.[108] Blackstone stresses that the state has a positive duty and obligation to dispense justice to individuals, the administration of justice is a matter not of discretion, but of right.[109]

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[105] Blackstone *supra* note 43 at 42-43 and 52-54, stating that *it is not merely the right, but the duty of the legislature to make laws for the direction of individuals*; Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ch. IX ss 123-124: "The first and primary end of human laws is to maintain and regulate these absolute rights of individuals".; Heyman *supra* note 1 at 519.

[106] Heyman *supra* note 1 at 519-520.

[107] Heyman *supra* note 1 at 519-520.

[108] Blackstone *supra* note 43 at 2; Heyman *supra* note 1 at 520.

[109] Blackstone *supra* note 43 at 2; Heyman *supra* note 1 at 520; Cooley *Treatise on the Law of Torts* at 379 where he wrote as follows: "Doing justice as between particular individuals, when they have a controversy before (a court), is not the end and object which were in view when (the) court was created.... Courts are created on public grounds, they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public. The individual advantage or loss results from the proper and

There is an important connection between the state's positive legal duty and the two other central doctrines of classical liberal thought: the rule of law and the separation of powers. The rule of law implies *inter alia* that the rights of individuals are not dependent for their protection upon the arbitraty will of the government, but are recognized and protected by law. The legislature has a duty to enact laws for the protection of individual rights, the executive has a duty to enforce them and the courts have a duty to apply them.[110]

From eighteenth Century constitutional writers' perspective, it is apparent that in terms of the reciprocal obligations theory there is a definite affirmative duty on the state to protect individuals from human rights abuses by non-state actors.

2.5 The revolutionary period

2.5.1 American revolution

During the American Revolutionary era, all the above theories of Coke, Locke, Rousseau, Hutcheson, Burlamaqui and Blackstone on state responsibility for the effective protection of its citizens were expressed into a coherent world view for Americans in the WHIG ideology.[111] In terms of the American WHIG or Republican ideology,[112] protection was a primary purpose of government.

thorough or improper and imperfect performance of a duty for which his controversy is only an occasion".

[110] Heyman *supra* note 1 at 520.

[111] Bailyn *Ideological Origins* 34-54 ; Wood *supra* note 43 at 14-17.

[112] Chojnowski 2003 HYPERLINK http://www.sspx.ca/Angelus/2003_April/What_Is_Whig.htm 16 Aug. 2004: "What is most important for understanding Whiggery as it affected the make-up of the nascent United States, is the role that John Locke, secretary to the Whig leader, the Earl of Shaftsbury and amateur philosopher, played in the intellectual justification for the Whig Revolution of 1688. According to Locke, not only are all men equal, but society and, ultimately, the State is constituted, not by human need or necessity, but by individual men establishing a contract between them that would "establish" civil society and, hence, the State. The significance here is that the State no longer is a natural institution required by the exigencies of human life, rather, it is established by free individuals for the convenience of free individuals. Since individual free men had established the "Social Contract," as he called it, they could, also, freely remove their consent, returning power and sovereignty to themselves. There is not the slightest doubt that the Declaration of Independence, written by a life-long, self-professed Whig, Thomas Jefferson, expressed the Lockean Whiggish view of how governments were constituted and how they could be dissolved. In fact, it is clear that the American Revolution was actually a civil war

The concept of "protection" encompassed three elements under the WHIG ideology: to be under the protection of the law meant to have the status of a free man and a citizen. Protection further meant that the law recognized and secured an individual's rights to life, liberty and property and finally, protection referred to the specific ways in which government prevented violations of human rights, or redressed and punished such violations.[113]

During the American Revolutionary period, Coke's doctrine of *"reciprocal obligations"* was at the forefront of American constitutional thought.[114] Americans, however, rejected the tenet *("tenere")* that the bond between king and subject was natural and, therefore, immutable. Instead they classified this relationship between sovereign and subject in terms of the original contract that determined that the ***sovereign was bound to protect the various rights of his subjects in turn for their allegiance and obedience.***[115] When the Americans decided to break from Great Britain, they justified their actions in terms of the fact that the king had abdicated government as a result of breaking the original contract between sovereign and subject.[116] *The American Declaration of Independence of 1776,* after naming a number of grievances that the king of Great Britain failed to redress, alleged that the king *"has abdicated government... by declaring us out of his protection and waging war against us".*[117] Therefore, by not protecting his subjects as he ought to have, the king broke the original contract and his subjects owed no allegiance or obedience to him.

between American Whigs and American Tories. The result of that war was a Whiggish United States and a Tory Canada. The American War between the States can, truly, be seen as a inter-Lockean and Whiggish dispute, since Locke is unclear as to how, exactly, one "gets out" of the Social Contract (e.g., US constitutional union) after one gets into it".

113 Bigelow *supra* note 35 at 556; Heyman *supra* note 1 at 520 where he asserts: "In this way, Coke's doctrine of reciprocal obligations came to the forefront of American constitutional thought. "The colonists," wrote James Wilson in an influential pamphlet "ought to be dependent on the king, because they have hitherto enjoyed, and still continue to enjoy, his protection.... Obedience is founded on the protection derived from government, for protection and allegiance are the reciprocal bonds, which connect the prince and his subjects".

114 *Supra* at 2.2.3.

115 Heyman *supra* note 1 at 520; Kettner *supra* note 42 at 160-167; Wood *supra* note 43 at 268-270.

116 Heyman *supra* note 1 at 520; Kettner *supra* note 42 at 169-171; Wills *Inventing America* 52-55, 64 ; Wood *supra* note 43 at 270.

117 Jefferson 1776 HYPERLINK http://www.yale.edu/lawweb/avalon/declare.htm 6 Sep. 2004 at para. 25. In his draft of the Declaration, Jefferson had written: *"declaring us out of his allegiance & protection".* See Wills *supra* note 116 at 376; Heyman *supra* note 1 at 521.

The American War of Independence subsequently broke out and ended in the establishment of a new political entity known as the United States of America, that was founded upon a constitution, promulgated in 1787, which came into operation in 1789 and is still in existence today. This Constitution embodies the principles enunciated in the *Declaration of Independence (1776)* which states categorically:

that all men are created equal; that they are endowed by their Creator with certain unalienable rights.... That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.

This was the true beginning of modern constitutionalism and the protection of fundamental human rights.

2.5.2 The first state constitutions

After their independence, Americans were strongly influenced by the social contract theory in the framing and forming of their new government.[118] In most of the first state constitutions it was made very clear that the first duty of the government was to protect the natural rights (basic fundamental human rights) of its citizens, in order for them to enjoy life, liberty and property in the pursuit of happiness.[119] Several states declared that:

... government is/or ought to be instituted for the common benefit, protection and security of the people.[120]

The *Virginia Declaration of Rights of 1776* was the first true Bill of Rights in the modern American sense, since it is the first protection for the rights of the individual to be contained in a constitution adopted by the people acting through an elected convention.[121]

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118 Strong *supra* note 2 at 37.
119 *Ibid.*; Wood *supra* note 43 at 125-255 ; Heyman *supra* note 1 at 522.
120 Heyman *supra* note 1 at 523, footnote 85.

Its opening lines and first three paragraphs read as follows:

A Declaration of Rights made by the Representatives of the good people of Virginia, assembled in full and free Convention which rights to pertain to them and their posterity, as the basis and foundation of Government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and persuing (sic) and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the People, that magistrates are their trustees and servants, and at all times amenable to them

3. That Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, of all the various modes and forms of government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration, and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be most conducive to the public (sic) weal. [122]

The Virginia Declaration of Rights spread to the other states through both private letters and public print and shortly thereafter, the Pennsylvania Declaration of Rights were adopted and contained as article 1 in the following language:[123]

That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[124]

Vermont, in article 1, section 1 of its 1777 constitution, followed. The *Vermont Declaration of Rights, 1777* states:

Whereas, all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it,

121 Grodin *supra* note 14 at 4.
122 Mason 1776 HYPERLINK http://www.yale.edu/lawweb/avalon/virginia.htm 16 Aug. 2004.
123 Grodin *supra* note 14 at 6; Rutland *Birth of the Bill of Rights* 43-44.
124 Anon. 1776 HYPERLINK http://www.geocities.com/CapitolHill/7947/PARght.htm 6 Sep. 2004; Grodin *supra* note 14 at 8 ; Schwartz *Bill of Rights* 264.

to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man, and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.[125]

Massachusetts, in 1780, modified the last phrase of its constitution to read "*.... that of seeking and obtaining their safety and happiness".* In 1783, New Hampshire, in its second constitution changed the language to read *"and in a word, of seeking and obtaining happiness".* [126]

During the pre-federal era, this "*right to safety*" language was the only form of "*rights"* language to appear in state constitutions. Other states which adopted constitutions prior to 1790, contained no declaration or "bill of rights," that placed positive legal duties on the state for the safety and wellbeing of the people.[127] In Pennsylvania in 1790, they adopted a new constitution and changed article 1, section 1 to declare that persons have the right of "*pursuing their own happiness*" in an environment created by government of safety and security.[128] Happiness conjoined with safety appears to be something more than happiness alone, and the right to pursue and obtain safety suggests something more positive than freedom from government abuses only. It implied that government, must through positive actions, create a society where man can pursue this happiness and moreover, government is also responsible for private acts of violence against citizens if it omitted to protect citizens properly against one another.[129]

Society was formed on a social contract basis and government had a positive legal duty to protect its citizens.[130] The Massachusetts constitution of 1770 stated:

The body-politic is formed by a voluntary association of individuals, it is a social compact by which the whole people covenants with each citizen and each citizen

125 Anon. 1777(b) HYPERLINK http://www.yale.edu/lawweb/avalon/states/vt01.htm#1 16 Aug. 2004; Grodin *supra* note 14 at 2.
126 Grodin *supra* note 14 at 8; Schwartz *supra* note 124 at 374-375.
127 Grodin *supra* note 14 at 7.
128 *Ibid.*
129 Grodin *supra* note 14 at 7.
130 Grodin *supra* note 14 at 8; Heyman *supra* note 1 at 523.

with the whole people that all shall be governed by certain laws for the common good...., that every man may, at all times, find his security in them. [131]

Each individual or subject in the society has a right to be protected by the society in the unhindered enjoyment of his or her life, liberty and property in the pursuit of happiness according to certain laws. In return, the subject owes certain positive duties and is obliged to contribute to the society his share of the expense of this protection, or to give of his personal service when necessary or required from him. [132]

Under the constitution, the Federal Government was responsible for protection of the states against foreign invasion and the states were responsible for protection of life, liberty and property of their citizens.[133] During that time it was written in the Federalist that:

protection was the first object of government and that justice was the end of government and that civil society meant that the weak must be protected against the violation of their rights by the strong.[134]

131 Anon. 1780 HYPERLINK http://www.nhinet.org/ccs/docs/ma-1780.htm 16 Aug. 2004.

132 Heyman *supra* note 1 at 523; Anon. 1777(a) HYPERLINK http://www.yale.edu/lawweb/avalon/states/ny01.htm 16 Aug. 2004. This point was made very clear in the New York Constitution: "It is the duty of every man who enjoys the protection of the society to be prepared and willing to defend it".

133 Heyman *supra* note 1 at 524; see generally Nedelsky *Private Property*.

134 Heyman *supra* note 1 at 524 and accompanying footnote 93 quoting from The Federalist No 51 at 267: "In the fifty-first Federalist, Madison argued in favour of establishing "the extended Republic of the United States" by means of an analogy to the state of nature and the social compact. Justice is the end of government. It is the end of civil society... In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger: And as in the latter state even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government, which may protect the weak as well as themselves; so in the former state, will the more powerful factions be gradually induced by a like

2.5.3 *The French legacy*

It would not be possible to assert that Rousseau's influence was directly felt by the Americans. It would be nearer the truth to say that the fathers of the American Constitution were coevally informed by the same spirit as that which inspired Rousseau's political philosophy.[135]

Rousseau, however, was directly behind those who led the early movements of the French Revolution. As stated above Rousseau's Social Contract was probably the most epoch making book ever written, not so much in itself as in its influence upon the constitution making which followed it. When the bankrupt government of France in 1789 resorted to the expedient of recalling into existence the States-General, it carried into the forum all the ideals, dogmas and philosophy of Rousseau and his followers, and, therefore, brought them into practical conjunction with the promulgation of a political constitution. The National Assembly of 1789 drew up the "***Declaration de l'Homme et du Citoyen***"[136] or "*Declaration of the Rights of Man and of Citizen*". This document was saturated with the dogmas of the contractual origin of the state, of popular sovereignty and of individual rights, as is clearly shown by the following phrases:[137]

Art 1

Men are born free and equal in rights.....

Art 2

The purpose of all civil association is the preservation of the practical and inmprescriptible right of man. These rights are liberty, property, security and resistance to oppression....

Art 4

Liberty consists in the power to do anything that does not injure others, accordingly, the exercise of the natural rights of each man has for its only limits those that secure

motive to wish for a government which will protect all parties, the weaker as well as the more powerful".

135 Henkin *supra* note 32 at 13-14.

136 Henkin *supra* note 32 at 13-14; Strong *supra* note 2 at 34.

137 Strong *supra* note 2 at 34; Singh *Enforcement of Human Rights* 4.

to the other members of society the enjoyment of these same rights. These limits can be determined by law....

Art 6

Law is the expression of the general will....it should be the same for all whether it protects or punishes.

Art 12

A public force being necessary to give security to the rights of men and of citizens, that force is instituted for the benefit of the community....

Art 13

A common contribution being necessary for the support of the public force.....

Art 15

The community has a right to demand of all its agents an account of their conduct.

Art 16

Every community in which a security of rights .....is not provided needs a constitution.

Art 17

The right to property being inviolable and sacred, no one shall be deprived of it.....[138]

The French Revolution and Declaration in the opinion of some were even more influential than the English and American in spreading them in many parts of the world. The French Declaration, moreover articulated some ideas that were at best implicit in the American Constitution, such as the presumption of innocence. It also propagated ideas more advanced than the American Constitution, some of which took long to reach and take root in the United States. For the French, liberty consisted in the power to do anything that does not injure another. The law had the right to forbid only such actions as are injurious to society. Taxes should be "*equally apportioned among all the citizens according to their means*". The French constitution of 1791 provided for public relief for the poor and free public education –

[138] Anon. 1789 HYPERLINK http://www.yale.edu/lawweb/avalon/rightsof.htm 16 Aug. 2004.

economic and social rights unknown in early United States constitutions.[139] Pertaining to the state's duty to provide security and protection to its citizens, it is interesting that 10 of the 17 articles of the Declaration of the Rights of Man and of the Citizen in some way or another address or refer to the issue of security of rights. In the declaration, the government's positive legal duty for the protection of the individual is spelled out clearly in the form of both punitive and preventative measures to be adopted. It is evident that the French realised that there can only be stability in a country if man's natural fundamental human rights are respected and protected by the government.

The final French Constitution, which followed in 1791, and to which the Declaration was prefixed, did not last for long due to the fact that the Legislative Assembly to which it gave birth was unable to deal with the state of anarchy within France and the state of war abroad. After the American Revolution, this was the second great stage in the development of modern constitutionalism and the recognition of certain inalienable fundamental human rights and freedoms. Although the constitutionalism of the early years of the French Revolution had to give way, first to the anarchy of the Reign of Terror and then to the despotism of the Napoleonic regime which arose from its ashes, the Revolution lighted a fire of political liberty which was never again to be permanently smothered. The modern French Constitution of 1946 affirmed all the principles of the 1789 declaration in its preamble. [140]

2.6 The right to protection

2.6.1 *Liberty and protection*

Liberty is defined as "*the state of being free from oppression*", "*a right or privilege especially a statutory one*" and as "*the power to act as one pleases*".[141] The right to protection under the classical legal tradition was informed by the understanding of liberty at the time. It is important to note that the conception of liberty was not merely

[139] Henkin *supra* note 32 at 13.
[140] Strong *supra* note 2 at 38.
[141] Pearsall (ed) *Concise Oxford English Dictionary* 667.

one of negative liberty but had a very important positive dimension, namely the protection of individual basic human rights under law.[142]

Blackstone's writings again provide a good starting point for analysis on the meaning of protection.[143] In the same vein as Locke, Blackstone describes *"natural liberty"* as the freedom that individuals enjoy in a state of nature and defines it as *"a power of acting as one thinks fit, without any restraint or control, unless by the law of nature"*.[144] This conception of natural liberty contains both positive and negative elements. The power of acting as one thinks fit is positive in the sense that liberty is not merely a lack of constraint, but the power and the capacity to act according to one's own reason and free choice without the interference of any other.[145] In a state of nature, the individual possesses the power to act without any restraint or control and is limited only by the law of nature. The law of nature, however, lacks effective means of enforcing individual rights. In a state of nature, individuals rights are very insecure and in this respect, natural liberty is a form of negative freedom.[146]

Unrestrained liberty is, for obvious reasons, self-destructive. If no one is subject to any external restraints, then no one can have any security against the invasion of his liberty by others. For this reason and in order to secure their liberty and to obtain the other benefits of a social life, individuals enter into society through the social compact and agree to obey its laws in return for the protection of the combined strength of the society. In entering this social compact, individuals sacrifice a part of their natural liberty and the unrestrained right to act as they think fit, but in the process they gain:

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142 Heyman *supra* note 1 at 527; Reid *supra* note 43 for an account of the eighteenth century conception of liberty.

143 Heyman *supra* note 1 at 527 and accompanying footnote 108 where he states: "Blackstone's account of liberty is of particular importance for several reasons: it was representative of much contemporary thought; it had great influence on the conception of liberty within the legal tradition prior to the Civil War; and it was relied upon during the congressional debates leading to the adoption of the Fourteenth Amendment".

144 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 s 6: "... though this be a state of liberty, yet it is not a state of licence: though man in that state has an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it..".; Blackstone *supra* note 43 at 124; Heyman *supra* note 1 at 527.

145 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ss 6, 131 and 136; Heyman *supra* note 1 at 527 and accompanying footnote 110.

146 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at s 57-59; Price *Observations* 3; Heyman *supra* note 1 at 527.

"civil liberty", which is the liberty that belongs to individuals as members of society.[147] Civil liberty is defined as *"natural liberty so far restrained by human laws as is necessary and expedient for the general advantage of the public"*.[148] This definition of civil liberty has both positive and negative elements.[149] The negative perspective of civil liberty entails that individuals must be left free from state control except where absolutely necessary and in the interest of the society as a whole. The positive element of the concept of civil liberty, on the other hand, restrains and prohibits a man from doing harm to or violating the basic human rights of his fellow citizens. As Locke puts it :

The great end of men's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the first and fundamental positive law of all.[150]

Although this decreases the natural liberty of a man, it increases the civil liberty of the society as a whole.[151] From a positive perspective civil liberty, therefore, consists of protecting the rights of individuals by the united force of society.[152] True liberty, therefore, required the protection, safety and defence of every man and woman in the peaceable enjoyment of his or her own rights, guaranteed and secured to them by the laws of the land, to which a full obedience and submission are due by all the individual members of society. Civil liberty was natural liberty protected by the law and entails that individuals are protected by government from violations of their natural rights to life, liberty and property by both state and non-state actors.[153]

Civil liberty ***"consists in being protected and governed by laws made by the representatives of the people, and conducive to the general welfare".***[154] Civil

147 Heyman *supra* note 1 at 528.
148 Blackstone *supra* note 43 at 123.
149 Heyman *supra* note 1 at 528.
150 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 (emphasis added).
151 Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at s 34; Blackstone *supra* note 43 at 125-126 ; Heyman *supra* note 1 at 529.
152 Blackstone *supra* note 43 at 251.
153 Heyman *supra* note 1 at 530; Bailyn *supra* note 111 at 77; McDonald *Novus Ordum Seclorum* 159-160; Reid *supra* note 43 at 6.
154 Kent *Commentaries* 1 (emphasis added); Heyman *supra* note 1 at 530.

liberty not only entails the absence of individual restraint, but when the term Civil Liberty is used, it always means a high degree of security and guaranteed protection against interference with important individual interest and fundamental human rights.[155]

2.6.2 Status of free man

The traditional doctrine identified freedom and liberty with protection and security. To be under the protection of law meant to be a free man, a person who's rights were recognized and protected by the law of society. The opposite of a free man was a slave, and slavery meant the absence of the rule of law.[156] In a legal sense, slavery was the subjection to the absolute power of a master, *without the protection of the law*, slaves were regarded as things or property, not as persons.[157]

Extending the protection of the law to former slaves was one of the main objectives of the *Fourteenth Amendment.* The right to protection by the state became a central concept and principle in the anti slavery constitutionalism. In the well known case of ***Corfield v Coryell,***[158] *"protection by the government"* was recognized as a fundamental right of citizenship and described as on an equal footing with the rights to life, liberty and property.[159]

Protection was one of the principal rights of citizenship that was guaranteed by the *Fourteenth Amendment.* This landmark decision reflected the classical view of the relationship between citizenship and protection that ***citizenship implies certain basic human rights which are to be protected by the government in return for the duty by the citizen of allegiance and obedience to the laws of the land.***[160]

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[155] Heyman *supra* note 1 at 530 and accompanying footnote 132 referring to Lieber *Civil Liberty* 24 and quoting Cooley *General Principles* 226: "Civil Liberty can also be defined as that condition in which rights are established and protected by means of such limitations and restrains upon the action of individual members of the political society as are needed to prevent what would be injurious to the other members of the society".

[156] Heyman *supra* note 1 at 531; Reid *supra* note 43 at 48; Bailyn *supra* note 111 at 232-246.

[157] Blackstone *supra* note 43 at 423-424; Kent *supra* note 154 at 253; Heyman *supra* note 1 at 531.

[158] *Corfield v Coryell* 6. F. Cas. 546 (1825).

[159] Heyman *supra* note 1 at 555, footnote 317.

[160] Heyman *supra* note 1 at 531; Maltz 1985 *San Diego L. Rev.* 499; Soifer 1979 *N.Y.U. L. Rev.* 651; *Somerset v Stewart* (1772) Lofft 1/98 E.R. 499 (1772); Wiecek *Sources of Antislavery Constitutionalism* 28-45.

Citizens were entitled to be protected by the government from any threats to the enjoyment of their fundamental rights to life, liberty and property.

2.6.3 Recognition of legal rights

The law protected individual human rights by declaring the rights and directing that they be respected by all.[161]

The classical legal tradition distinguished between two sorts of substantive rights, namely *"absolute rights"* and *"relative rights"*. Absolute rights were rights that belong to individuals in a state of nature.[162] Relative rights were rights that were incident to persons as members of society, and standing in various relations to each other.[163] According to Blackstone, the primary end of all human laws was to protect individuals in the full enjoyment of their absolute rights. The protection of relative rights was a secondary aim of human laws.[164] Absolute rights of individuals were defined as the rights of personal security, personal liberty and private property. *Personal security* was seen as a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. *Personal liberty* was defined as the power of moving "*without imprisonment or restraint, unless by due course of law"* and finally, the right of private property consisted of the free and unhindered use and enjoyment of all one's acquisitions, without any control or diminution.[165]

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[161] Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at s 136; Blackstone *supra* note 43 at 54-55.

[162] Blackstone *supra* note 43 at 123-124; Heyman *supra* note 1 at 532.

[163] Blackstone *supra* note 43 at 123; Heyman *supra* note 1 at 531.

[164] *Ibid.*

[165] Blackstone *supra* note 43 at 121, 129, 134; Heyman *supra* note 1 at 532; Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004 quoting the CONG. GLOBE, 39th Cong., 1st Sess. 1072–1118 (1866) where Representative Wilson, chairman of the Judiciary Committee, explained the background to the bill's phraseology "civil rights and immunities" and "full and equal benefit of all laws and proceedings for the security of person and property". Quoting Kent's *Commentaries*, Wilson explained: "I understand civil rights to be simply the absolute rights of individuals, such as — "The right of personal security, the right of personal liberty, and the right to acquire and enjoy property". Wilson added that "we are reducing to statute from the spirit of the Constitution", a clear reference to the Bill of Rights. Referring to "the great fundamental civil rights", Wilson pointed out:

> [Sir William] Blackstone classifies them under three articles, as follows:
>
> 1.The right of personal security; which, he says, "Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation".
> 2.The right of personal liberty; and this, he says "Consists in the power of locomotion, of changing

The fact that a right was absolute did not mean that it could never be restricted. Absolute rights were subject to regulation for the public good and in the interest of the society as a whole, especially to protect the rights of other citizens. Although absolute rights had their origin in nature, they were defined in terms of civil as opposed to natural liberty.[166]

It is also important to note that absolute rights were not merely natural rights but legal rights protected by the law. Personal security was defined not merely as a negative right against invasion of one's life and person, but as a positive right to legal protection. [167]Absolute rights were rights to the security of person and property and this security was provided by law, whose end was the protection of rights.[168] For example, the right to personal security could be violated by murder, as well as by unlawful execution.[169] Absolute rights were, therefore, understood to apply not only against governmental oppression, but also against private acts of violence.[170] The government could violate a person's right to life either by unlawful execution or by omitting to provide sufficient security measures that lead to a citizen being killed by a murderer.[171]

situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law".

3.The right of personal property which he defines to be "The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land".

To protect "the principal absolute rights which appertain to every Englishman", Blackstone explained that there are "auxiliary" rights to "maintain inviolate the three great and primary rights, of personal security, personal liberty and private property". Blackstone included among these rights "that of having arms for their defence suitable to their condition and degree, and such as are allowed by law", that made possible "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression". Together with justice in the courts and the right of petition, "the right of having and using arms for self-preservation and defence" were available to preserve the rights to life, liberty, and property.

166 Heyman *supra* note 1 at 533, footnote 152.

167 Blackstone *supra* note 43 at 129; Heyman *supra* note 1 at 532.

168 *Ibid.*

169 Blackstone *supra* note 43 at 133-134; Heyman *supra* note 1 at 533.

170 Blackstone *supra* note 43 at 51; Kent *supra* note 154 at 1-37. When Blackstone and Kent discuss the ways in which the law protected absolute rights, they reviewed not only the barriers against governmental oppression contained in Magna Carta and the American Bills of Rights, but also the protection against private aggression afforded by civil and criminal law.

171 Heyman *supra* note 1 at 533; Blackstone *supra* note 43 at 129-30 (abortion), 130-31 (mayhem, duress), 133 (homicide), 134 (assault and battery, defamation), 136-37 (false imprisonment); Kent *supra* note 154 at 15 (criminal and tort law), 16-17 (defamation), 26 (false imprisonment).

There was a definite duty and obligation on the state to protect the individual rights of members of the society against the violation of those rights at the hands of criminals. The state had a duty to create a safe and secure society where individuals can pursue their dreams and happiness in peace.

2.6.4 *Enforcement of human rights*

Laws recognizing substantive rights mean absolutely nothing if there is no method of actually enforcing these rights. In the most basic sense, protection refers to the means by which the state and its laws succeed in the enforcing of the observance of basic human rights.

The means of protecting and enforcing rights evolved over time, but in principle the sovereign's duty always extended to both the preventing and punishment of violations of rights. Under the traditional doctrine every loyal subject was always entitled to the king's protection. [172]

Despite the above principles being universally accepted, the state's capacity to prevent violence was very limited prior to the nineteenth century. During the nineteenth century modern police forces were created as a means to prevent crime and violence before they actually occur. The concept of protection, therefore, evolved to include the obligation on the part of government to take measures to prevent crime.

2.6.4.1 Self defence

In any situation where the sovereign was unable to protect a person against a violation of his rights, the law allowed that person to defend himself.[173] In the aforementioned situation the law of nature made the individual his own protector.[174]

[172] *Supra* at 2.3.2; Heyman *supra* note 1 at 536.
[173] *Supra* at 2.3.2; Heyman *supra* note 1 at 536; Blackstone *supra* note 43 at 180.

2.6.4.2 Civil action

Protection of the law in the common law tradition above all meant the ability to enforce one's rights in a civil action and, therefore, obtain a remedy for the violation.

In the case of *Marbury v. Madison,*[175] it was stated that:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.[176]

On *Chapter 29 of Magna Carta* which provided that justice should not be denied, Coke wrote:

every subject ... for injury done to him in goods, lands or person, by any other subject ... may take his remedy by the course of law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.[177]

In the classical legal tradition, it was axiomatic that where there was a legal right there was also a legal remedy, whenever that right was violated.[178] The common law accorded with the law of nature in recognizing fundamental rights and gave a remedy for all invasions of those rights,[179] therefore, the right to civil protection was substantive, not merely procedural or formal. Individuals were actually able to obtain remedies for the invasion of their rights by other private citizens or the government.[180]

174 Blackstone *supra* note 43 at 30; Heyman *supra* note 1 at 536: "on the other hand there was no right to self defence if the resort to the law was possible".
175 *Marbury v Madison* 5 U.S. 137 (1803).
176 *Marbury v Madison* 5 U.S. 137 (1803), Chief Justice Marchal.
177 Magna Carta 1225, ch. 29; Coke *supra* note 34 at 55.
178 Blackstone *supra* note 43 at 23; Heyman *supra* note 1 at 537.
179 Heyman *supra* note 1 at 535.
180 Heyman *supra* note 1 at 535.

2.6.4.3 Criminal law

Every person also had a right to protection under the criminal law. The personal security of every citizen is protected from lawless violence of criminals by the arm of government and the terrors of the penal code.[181]

In terms of the historical legal theory, criminal law has its roots in the law of nature.[182] The law of nature forbids violations and infringements of the natural rights of others, such as murder or theft.[183] In a state of nature, everyone has the power to punish offences against the law of nature.[184] When individuals enter into the social contract, they give this power of criminal punishment to society, to be exercised for the safety and protection of all its members.[185]

[181] Kent *supra* note 154 at 15; Heyman *supra* note 1 at 535.

[182] Blackstone *supra* note 43 at 41-43, 54.

[183] Blackstone *supra* note 43 at 41-43, 54; Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at s 6: "The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions".

[184] Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 ss 7-8: "7. And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of Nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of Nature is in that state put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation. For the law of Nature would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of Nature had a power to execute that law, and thereby preserve the innocent and restrain offenders; and if anyone in the state of Nature may punish another for any evil he has done, everyone may do so. For in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.
8.And thus, in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancy of his own will, but only to retribute to him so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint. For these two are the only reasons why one man may lawfully do harm to another, which is that we call punishment. In transgressing the law of Nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men for their mutual security, and so he becomes dangerous to mankind; the tie which is to secure them from injury and violence being slighted and broken by him, which being a trespass against the whole species, and the peace and safety of it, provided for by the law of Nature, every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on anyone who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and, by his example, others from doing the like mischief. And in this case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of Nature".

[185] Blackstone *supra* note 43 at 8; Heyman *supra* note 1 at 536 and accompanying footnote 175 quoting Tucker: "When a man quits the state of nature, and enters into a state of society, he resigns into the hands of society the right of punishing an offender, for an injury already done him, the society by the terms of the social compact, having engaged to punish every such

The state's responsibility for providing this protection was shared among the three branches of government. The legislature had an obligation to enact criminal laws for the protection of life, liberty and property, while the executive and the courts had a duty to enforce those laws to protect the community and its members against violence. This enforcement function was known in traditional English law as *the conservation of the peace.* It included the prevention of violence as well as the arrest, prosecution, and punishment of offenders *ex post facto.*[186]

2.7 Prevention of violations

The government's duty of criminal protection included the prevention as well as the punishment of violence. The traditional common law provided two important means of prevention: the process of requiring security of the peace and the authority of officers to keep the peace.

2.7.1 Requiring security of the peace

Every person was entitled to the preventative arm of the magistrate, as protection from threatened or impending danger.[187] The preventative arm of the magistrate meant the common law process of *requiring security for the peace.*[188]

Any person in the jurisdiction of the sovereign who feared a violent attack by another individual had a right to apply to a justice of the peace to have his adversary bound in order to keep the peace. The justice was bound to grant the application if the applicant showed just cause to fear death or bodily harm. The justice had broad authority to require security of the peace from persons who appeared likely to break it.[189] A party who was bound to keep the peace was required to find one or more sureties, who together with the party entered into a bond for a large sum of money

offender for him"; Locke 1690(b) HYPERLINK http://www.swan.ac.uk/poli/texts/locke/locke01.htm 16 Aug. 2004 at ss 128-130.

186 Heyman *supra* note 1 at 536, footnotes 176, 179.

187 Kent *supra* note 154 at 15; Heyman *supra* note 1 at 537.

188 Blackstone *supra* note 43 at 251-257.

that could be lost to the state in the event that he committed a breach of the peace against the applicant. An individual who did not find adequate sureties could be apprehended and kept in custody until he did.[190]

The right to require security of the peace was viewed as an important aspect of the general right to protection by the government. [191]

The important principle is that the right to require the security of the peace indicated an obligation on the part of government to protect citizens against potential human rights abuses by other citizens.

2.7.2 *Protection by peace officers*

In addition to the procedure of requesting security for the peace, the responsibility of officers to maintain the peace was another important means of preventing violence and other criminal acts.

The executive had a duty to enforce the criminal laws to protect the community and its members from violence. This function was performed by officers known as "conservators of the peace," a category that included justices of the peace, sheriffs, and constables.[192]
As their name indicates, it was the general duty of these officers to maintain the peace. That duty included preventing violence as well as apprehending offenders.[193]

189 Blackstone *supra* note 43 at 254-255; Heyman *supra* note 1 at 538.

190 Blackstone *supra* note 43 at 254-255; Heyman *supra* note 1 at 538. As Blackstone observed, wives had a right to demand security of the peace against their husbands, and vice versa. Dane *General Abridgement* 301-305; *Balistreri v Pacifica Police Department* 855 F. 2d 1421 (9th Cir. 1988) where the court of Appeals for the Ninth Circuit held that the police department violated the Due Process Clause by refusing to enforce a protective order that the plaintiff had obtained against her estranged husband. The Supreme Court implicitly disapproved this holding in *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989). As this history shows, however, the protective order is closely related to a procedure that was considered to be an integral part of the right to protection in the classical legal tradition.

191 Blackstone *supra* note 43 at 254-255; Heyman *supra* note 1 at 538; Dane *General Abridgement* 301-305 ; *Balistreri v Pacifica Police Department* 855 F. 2d 1421 (9th Cir. 1988); *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989).

192 Blackstone *supra* note 43 at 349-350; Heyman *supra* note 1 at 538.

193 Heyman *supra* note 1 at 538; Blackstone *supra* note 43 at 343, 353-54; *In re Neagle* 135 U.S. 1 (1890) at 69.

The duty of government to protect citizens against violations by other citizens is axiomatic.

2.7.3 *State liability*

During the mid-nineteenth century, a number of states responded to the lack of an effective remedy to prevent crimes by enacting various statutes. These statutes imposed liability on cities and counties for damage suffered by individuals to property and for personal injuries to individuals, caused by riots within their jurisdictions.[194] In enacting these laws, American states actually followed an old English tradition of *communal liability* for certain kinds of violence. Under legislation going back to the *Statute of Winchester* and even as far back as 959 AD in the *Laws Of King Edgar*,[195] the community known as the hundred was required to pursue felons and to compensate victims of robberies within its jurisdiction in cases where the community failed to apprehend the thief and bring the perpetrator to justice.[196] *The Riot Act of 1714* made the hundred liable for property damage caused by riots.[197] The important

[194] Heyman *supra* note 1 at 542

[195] The Statute of Winchester (1285) (Stephenson and Marcham (eds) 2002 HYPERLINK http://www.constitution.org/sech/sech_.htm 16 Aug. 2004); The Laws of King Edgar, 959-975 A.D (Halsall 1998(b) HYPERLINK http://www.fordham.edu/halsall/source/560-975dooms.html 6 Sep. 2004) that determined: "*This is the Ordinance how the Hundred shall be held.* 1. That they meet always within four weeks and that every man do justice to another. 2. That a thief shall be pursued..... If there be present need, let it be known to the hundred-man, and let him [make it known] to the tithing-men; and let all go forth to where God may direct them to go: let them do justice on the thief, as it was formerly the enactment of Edmund. And let the ceapgeld be paid to him who owns the cattle, and the rest be divided into two; half to the hundred, half to the lord, excepting men; and let the lord take possession of the men. 3. And the man who neglects this, and denies the doom of the hundred, and the same be afterwards proved against him; let him pay to the hundred thirty pence, and for the second time sixty pence; half to the hundred, half to the lord. If he do so a third time, let him pay half a pound: for the fourth time, let him forfeit all that he owns, and be an outlaw, unless the king allows him to remain in the country. 4. And we have ordained concerning unknown cattle; that no one should possess it without the testimonies of the men of the hundred, or of the tithing-man; and that he be a well trusty man: and, unless he have either of these, let no vouching to warranty be allowed him. 5. We have also ordained: if the hundred pursue a track into another hundred, that notice be given to the hundred-man, and that he then go with them. If he neglects this, let him pay thirty shillings to the king. 6. If any one flinch from justice and escape, let him who held him to answer for the offence pay the *anylde*. And if any one accuse him of having sent him away, let him clear himself, as it is established in the country. 7. In the hundred, as in any other gemot, we ordain: that folkright be pronounced in every suit, and that a term be fixed when it shall be fulfilled. And he who shall break that term, unless it be by his lord's decree, let him make bot with thirty shillings, and, on the day fixed, fulfil that which he ought to have done before. 8. An ox's bell, and a dog's collar, and a blast-horn, either of these three shall be worth a shilling, and each is reckoned an informer. 9. Let the iron that is for the threefold ordeal weigh three pounds; and for the single, one pound"; Heyman *supra* note 1 at 541- 542.

[196] Blackstone *supra* note 43 at 293-294; Heyman *supra* note 1 at 542.

[197] *Riot Act* 1714, ch. 5.

principle for purposes of this study is that when the state failed in their duty of protection, the state was held liable.

By 1868, nine states in America had enacted riot laws similar to the English acts.[198] In terms of a Pennsylvania state law, adopted in 1841, a individual could recover damages from the county for damage suffered as a result of an attack on his property on condition that the individual could show that he contacted (if there was enough time) the conservator of the peace prior to the attack taking place.[199]

The Pennsylvania statute reaffirmed the state's positive legal duty to protect the human rights of an individual against violation by other citizens. In the case of *In Re Pennsylvania Hall,* the Pennsylvania Supreme Court asserted that:

tax payers have a right to be indemnified for losses occasioned by lawless outrage, whenever the public are unable or unwilling to protect property.[200]

Similarly, in the case of *Darlington v City Of New York,*[201] the Court of Appeals of New York explained that the statute was intended to compensate:

those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent, and further and principally... to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence.... These ends are plainly within the purposes of civil government, and indeed it is to attain them that governments are instituted.

This view was echoed by the Supreme Court half a century later in the case of City of *Chicago v. Sturges*[202] *in 1911.* In Sturges, the city challenged the Illinois Riot Act under the Due Process Clause of the Fourteenth Amendment, rejecting this claim the court declared:

The obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil minded may be regarded as lying at the very foundation of the social compact... The law in question... rests upon the

198 Heyman *supra* note 1 at 542 and accompanying footnote 221.
199 Heyman *supra* note 1 at 542.
200 Heyman *supra* note 1 at 543 and accompanying footnote 224 citing *In re Pennsylvania Hall* 5 Pa. 204 (1847) at 209.
201 *Darlington v City of New York* 31 N.Y. 164 (1865) at 187.
202 *City of Chicago v Sturges* 222 U.S. 313 (1911).

duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but recognition of the obligation of the State to preserve social order and the property of the citizen against the violence of a riot or a mob.[203]

The *State Riot Act* confirms the government's duty of protection included the prevention as well as the punishment of violence. It further affirmed the notion that the state was not only responsible for human rights abuses by government but also for abuses and infringement of human rights by private non-state actors.

2.7.4 Origin of modern police forces

Law enforcement historically relied on the efforts of a few officers with the assistance of volunteer citizens where necessary to prevent violence and criminal acts. In the nineteenth century, this reliance on a *"haphazard collection of constables and night watchmen"*[204] became increasingly inadequate to combat violence in the urban areas. In reaction to growing concerns about riots and escalating violent crime, major cities created modern police forces of organised units whose main purpose was the prevention of crime and the protection of citizens.[205]

The various historical legislative debates over the creation of such forces in England and America clearly reflect the view that an efficient police force is essential for the effective protection of the basic human rights to life, liberty and property.

The first modern police force was established in London by *the Metropolitan Police Act of 1829.*[206] *Sir Robert Peel*, in a speech introducing the Act in parliament, asserted that the existing night watch system was inadequate to combat the sharply increasing levels of crime. He argued that legislative action was necessary *"not only to prevent such... outrage against the laws, but to provide more secure means of protecting the person and the property of the subject".*[207]

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203 Heyman *supra* note 1 at 543 and accompanying footnote 225 citing *Darlington v City of New York* 31 N.Y. 164 (1865) at 187. *Ely v Niagara County Supervisors* 36 N.Y. 297 (1867) at 300; *Luke v City of Brooklyn* 43 Barb. 54 (1864) at 56-58; *Curtis v County of Allegheny* 1 Phil. 237 (1851) at 239-240; *City of Chicago v Sturges* 222 U.S. 313 (1911).

204 Heyman *supra* note 1 at 543; Friedman *History of American Law* 287.

205 Heyman *supra* note 1 at 543; Hall *Magic Mirror* 176-178.

206 *Metropolitan Police Act* 1829.

207 Heyman *supra* note 1 at 544 quoting 21 PARL. DEB., (2d ser.) 867-884 (1829). Sir Robert Peel was the Home Secretary.

Several American cities established police forces based on the London model.[208] Congressional debates in 1858 over a proposal to reform the District of Columbia police made it clear that Americans shared the view of their English counterparts that effective protection of individual rights requires an organised effective police force. One member observed that it was *"the object of government to protect the people in their personal liberty, their personal security, and their rights of private property".* The conservation of life and of property was the main aim and function of the police force.[209]

Although it was the duty of the city authorities to maintain peace and order, they were unable to enforce and protect individual rights effectively. In 1858 according to history, the City of Washington was overwhelmed by an epidemic of crime and violence in which murder and robbery were a daily occurrence.[210] During the Thirty Fifth Congress, *Senator Stephen A Douglas* stated, that *"life is not safe in this city at present, men are cut down and shot at the doors of citizens who dare not open their doors to rescue the wounded for fear of being killed themselves".* Many members affirmed that it was the duty of the government to protect people against such violence. The Congress concluded that they had an obligation *"to provide for an adequate and efficient police in this city, so as to preserve the peace and secure the lives and property of individuals".*[211]

The function and rationale of the first police forces was to protect individual human rights. It was an attempt of states to comply with their duty of protection in terms of the social contract theory.

[208] Heyman *supra* note 1 at 544; Friedman *supra* note 204 at 287; Hall *supra* note 205 at 176.
[209] Heyman *supra* note 1 at 544; CONG. GLOBE, 35th Cong., 1st Sess. 1592, 1594 (1858) (remarks of Rep. Hughes, also remarks of Rep. Cochrane) (The office of a police is concededly that of the conservation of life and of property).
[210] CONG. GLOBE, 35th Cong., 1st Sess. 1461 (1858); Heyman *supra* note 1 at 544.

2.8 Conclusion

Upon a close reading of the English, French and American constitutional history, it is clear that the first and most basic obligation of government is the protection of its citizens against violence. From this historical overview, it further emerges that constitutional guarantees cannot be fully understood without reference to their origin.

As early as the time of ancient Greece, Aristotle pointed out with great emphasis that the main object of government must be the safety and security of the citizens and that everything must be sacrificed to maintain that safety.[212] The Roman constitutionalism gave the western world of today the reality of the law through the code of Justinian and also importantly introduced the concept of ***salus populi suprema lex*** (the safety of the people is the highest law).[213] The state responsibility to protect the rights of those who live within their jurisdiction is deeply rooted in the English Common Law Tradition. Under the traditional doctrine, every loyal subject was entitled to the king's protection. The relationship between sovereign and subject was defined in terms of a *"mutual bond and obligation"*. Under this arrangement, the subject owed *"allegiance or obedience"* while the king was bound to the duty of *"government and protection"* of his subjects. For Coke these reciprocal obligations were best defined by the maxim ***"protectio trahit subjectionem, et subjectio protectionem"***: protection implies subjection and subjection protection.[214] These reciprocal obligations and duties were inherent in the very nature of the relationship between the sovereign and the subject. It was clear that the sovereign's duty of protection included the duty to protect subjects from the violence of other subjects.

Historically human rights as we know and understand them today trace their authentic origins to the doctrines of the seventeenth and eighteenth century and the theories of natural rights and social contract are another major source of the state's affirmative duty to protect its citizens. Consequently, the individual agrees to "be regulated by the laws made by the society for the preservation of himself and the

[211] CONG. GLOBE, 35th Cong., 1st Sess. 1465 (1858); Heyman *supra* note 1 at 544.
[212] *Supra note* 2.2.1
[213] *Supra note* 2.2.2
[214] *Supra note* 2.2.3 ; Heyman *supra* note 1 at 508 citing *Calvin's Case* (1608) 7 Co.Rep. 1 at 4b-5a / 77 E.R. 377 (1608) at 382; Bigelow *supra* note 35 at 556.

preservation of the rest of that society, in exchange for the labour, assistance and society of others in the same community and for the *"protection from its whole strength"*. The main aim of a government under the social contract theory was to be the force of all the members of a society for the purpose of preserving and protecting the members of that society from injury or violence.[215]

The Eighteenth century constitutionalism expanded on the social contract theory and taught that *"it was a maxim of law that protection and subjection are reciprocal"*. This doctrine of reciprocal allegiance and protection was set in a broad framework of social contract that provided: *"That the whole should protect all its parts, and that every part should pay obedience to the will of the whole"*, or, in modern terms, the community should guard the basic human rights of each individual member and in return for this protection, each individual will submit to the laws of the community.[216]

The revolutionary period gave the modern world its first examples of documentary constitutions with human rights protection as their chief aim, thereby finding a way of reconciling man's fundamental human rights to life, liberty and property with organised government authority. The American and French Revolutions that ended in the Declaration of Independence in 1776 and the *"Declaration de l'Homme et du Citoyen* of 1789 respectively and the principles that inspired them, took natural rights or fundamental human rights and made them secular, rational, individual, democratic and universal. [217]

It is clear from the history of state responsibility to protect human rights that the obligation of government to protect was material in the formation and continued peaceful existence of society.

There is a legal phrase that asserts: a Law is imperfect which forbids something to be done, but if it has been done it neither declares it invalid nor provides any penalty for him who has acted against the law *"Imperfecta lex quae vetat aliquid fieri, et si*

[215] *Supra note* 2.3
[216] *Supra note* 2.4
[217] *Supra note* 2.5 and 2.6; Henkin *supra* note 32 at 13-23.

factum sit , nec rescindit peonam inuingit ei, qui contra legem facit" [218] For national and international human rights to be enforced properly and to not be an *imperfect law,* the state must practically protect those who reside within its territory.

[218] Hiemstra and Gonin *Trilingual Legal Dictionary* at 201.

3 STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES BY NON-STATE ACTORS UNDER INTERNATIONAL LAW

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3.1 Introduction

In the last number of years there have been enormous advances in the development of human rights law and the instruments to implement it. States are no longer "free" to do as they will in the domestic sphere, instead they are bound by provisions in international law that are aimed at protecting individuals from government acts and omissions.[1] In the aftermath of the 11 September 2001 attack on the World Trade Centre in New York by a group of radical fundamentalist, non-state actors; the international community is increasingly holding states responsible for human rights abuses by non-state actors.[2]

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[1] Human Rights Committee *General Comment* 7 U.N. Doc. HRI\GEN\1\Rev.1 at 7 (1994): in addition to the prohibition not to violate human rights, states also have a number of positive obligations. According to the Human Rights Committee, "states must ensure an effective protection through some machinery of control. Complaints about ill treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible and the alleged victims themselves have effective remedies at their disposal including the right to obtain compensation".

[2] Reuters *The Citizen* 16 Oct. 2003 25 On 15 October 2003 the NATO Response Force (NRF) was born. The NRF is a cutting edge force of war ships, fighter planes and some 20000 troops that is NATO's answer to post 11 September 2001 security threats wherever they might occur. The NRF could be fully deployed anywhere in the world within five days. NATO's General James Jones said the NRF was one of the most important changes in NATO in 54 years. Paust 1987 *Hastings Int'l & Comp. L. Rev.* 41 and 47: "Certainly, states can be guilty of "encouragement" of, "toleration" of, or "acquiescence" in violations of international law. The complicity of the state is proscribed whether or not other violations of international law can be "imputed" to the state. Indeed, general norms of customary international law proscribe

The recent international response to human rights abuses by Pinochet in Chile; General Mohammed Farah Aideed in Somalia, Kampanda in Rwanda, Milosovic in The Balkans,[3] The Taliban Regime in Afghanistan, Saddam Hussein in Iraq and most recently Charles Taylor in Liberia, show that even former heads of state are no longer immune from responsibility for gross and systematic human rights abuses. This symbolises a major victory in the long battle against impunity of heads of state. On 19 September 2003, the General Assembly of the United Nations voted in favour of a 15,000 strong peacekeeping force to be sent to Monrovia, the capital of Liberia [4] with the specific mandate to restore law and order and to protect basic human rights of citizens against criminals who murder, steal, rape and intimidate.

Nihil perfectum est dum aliquid restat agendum - nothing is perfect while something remains to be done and, therefore, international law is in the process of undergoing a paradigm shift that will have significant implications for the international legal and political arena. There is a major expansion of legal machinery, institutions and processes occurring in the international sphere[5]. Now more than ever the international community is insisting on a universally accepted set of legal norms that must be adhered to by all states. There is a move beyond the traditional long-standing Westphalian Statist model, which defined

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(condemns) state encouragement or toleration of terrorist and subversive acts by private persons directed against the legitimate government of another state".

[3] Security Council *Resolution 794* U.N. Doc. S/RES/794 (1992), authorising the use of all necessary means to establish a secure environment in Somalia for humanitarian relief operations as soon as possible. In December 1992, Operation Restore Hope commenced as a U.S. operation approved by the Security Council. Some 28,000 soldiers from twenty-eight countries participated. Five months later the UN replaced the United States led intervention with reduced troop strength and a broadened mandate including disarming local political armies; Security Council *Resolution 827* U.N. Doc. S/RES/827 (1993), where the Security Council expressed "...grave alarm at ...widespread and flagrant violations of international humanitarian law .....in Bosnia....including mass killings....detention and rape of women...and the continuance of .....Ethnic cleansing....." and set out "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them".

[4] Anon. 2003 HYPERLINK http://news.bbc.co.uk/1/hi/world/africa/3123966.stm 24 Jun. 2004.

[5] Teitel 2002 *Cornell Int'l L.J.* 359; Galligan and Sampford (eds) *Rethinking Human Rights* 77-79: "No one can deny the expansion of the international human rights regime. There are six major human rights treaties monitored by six treaty bodies which, over the years, have met for a total of almost 400 weeks, considered a total of 1200 state reports and issued 100 general interpretative general comments and 400 decisions on individual cases. Beyond the treaty system, the UN engages in a cyclical review of human rights issues through the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, the Commission on Human Rights, the Commission on the Status of Women, the Economic and Social Council, the Third Committee of the General Assembly and the plenary sessions of the General Assembly

international rule of law in terms of existing state boundaries and certain domestic policies. The emerging expanded humanitarian regime of international human rights law and international criminal law extends across national borders and places a higher value on global security than on national sovereignty[6]. No country today has the right to raise impenetrable barriers at their frontiers, behind which they can do what they please with their own citizens. Every nation, however apparently impervious, is to some extent concerned about the judgement of their actions which is made by other states. The expanded humanitarian legal regime re-establishes the meaning of the rule of law in the new global political arena, using international law for the actual protection and respecting of fundamental human rights for all human beings in all states. [7]

In the past, the international community used to become involved in humanitarian disasters *ex post facto.* International adjudicating processes and human rights relief efforts were deployed only after international conflicts prompted by state

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itself. These bodies cumulatively pass over 300 resolutions concerning human rights each year".

[6] Gibney, Tomaševski and Vedsted-Hansen 1999 *Harv. Hum. Rts. J.* footnote 4: "In some ways an equally remarkable change in international law and in the notion of state sovereignty has been the enormous growth in the transnational enforcement of human rights. Adding to previous developments relating to slavery and piracy in international criminal law, some human rights violations were defined as crimes - domestically and internationally - and opened the way toward transnational enforcement". Nunes 1994 *Pace Int'l L. Rev.* 44-54: "The loosely organised confederate Westphalian system comprised of co-equal Nation-States failed abysmally to check deprivations of human rights by limiting state power. Acting with the apparatus of the Nation-State alone could not assure the most basic human value of respect with constituent elements of reciprocal tolerance and mutual forbearance to facilitate the exchange and pursuit of other values. To create a new world order from multiple centres of community process, the subsidiary authorities and control of Nation-States have therefore been allocated to the most inclusive international organisation, the United Nations. This organisation offers in embryonic form policing functions, world court functions, health, education and labour functions. It organises on a constitutional basis the universal family of nations"; Teitel *supra* note 5 at 370; Walker and Mendlovitz *Interrogating State Sovereignty* 1, arguing that states no longer pretend to be autonomous and that the most important forces affecting people's lives are global in scale and consequence; Krasner *Sovereignty* 182-183, discussing the link between the rise of nationalism and international legal sovereignty; *United Nations Charter* Jun. 26, 1945, 59 Stat. 1031, U.S.T.S. No. 993 (entered into force 24 Oct. 1945) at arts. 51, 52 and 53 in light of art. 2, para. 4. These provisions attempt to reconcile the statist norm of sovereignty with the growing justifications for international humanitarian intervention. Increasingly, humanitarian intervention is being justified under U.N. Charter, art. 52(1)'s authorization of regional "enforcement action"; Henkin *et al* 1999 *Am. J. Int'l L.* 827-828, noting that proponents of a "living Charter" would support an interpretation of the law and an adaption of UN procedures".; Gray *International Law* 26-31, for critical discussion of the notion of an evolving right to humanitarian intervention, evaluating the notion of a legal doctrine of humanitarian intervention.

[7] Teitel *supra* note 5 at 369: "The broader significance of this transformation is that the now emerging rule of law transforms the historical values associated with the longstanding Westphalia international security arrangement, which is primarily understood in terms of state

violations of international human rights law occurred. Currently the international community in the interest of global peace and security become involved much earlier in human rights crises. The international community is moving beyond mere words [8] towards effective mechanisms and procedures to guarantee and protect human rights.[9]

Today many gross human rights violations are increasingly being committed by non-state actors.[10] In terms of international human rights law, governments are

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borders ..... the codifications transcended ordinary rule of law values while giving expression to dynamic norms that reconstruct the relevant understandings of international security".

[8] Anon. 2000(b) HYPERLINK http://www.unhabitat.org/HD/hdv6n2/partners_update.html 17 Jun. 2004. In a concluding statement, Congress President Penuell Mpapa Maduna of South Africa declared that the real test of delegates' work lay in the implementation of the decisions and recommendations of the Congress. ***"It does not benefit the citizens of the world for the delegates to produce documents and agreements that will remain on paper only"***, he said. Among other things, the Declaration urges a speedy conclusion of negotiations on the UN Convention against Transnational Organised Crime, a new international treaty that will strengthen international cooperation in combating that problem. It also establishes 2005 as the target year for achieving a significant decrease in trafficking in persons, especially women and children, as well as in the illicit manufacturing and trafficking of firearms. According to the Declaration, States should aim for 2002 as the target year they review and improve policies and practices regarding crime victims. (emphasis added).

[9] UN Secretary General 1993
HYPERLINK http://www.unhchr.ch/html/menu5/d/statemnt/secgen.htm 30 Sep. 2003: "I am tempted to say that human rights by their very nature, do sway with the distinction traditionally drawn between the internal order and the international order. Human rights give rise to a new legal permeability. They should thus not be considered either from the viewpoint of absolute sovereignty or from the viewpoint of political intervention. On the contrary, it must be understood that human rights call for cooperation and coordination between States and international organisations. In this context, the State should be the best guarantor of human rights. It is the State that the international community should principally entrust with ensuring the protection of individuals. However, the issue of international action must be raised when States prove unworthy of this task, when they violate the fundamental principals laid down in the Charter of the United Nations, and when - far from being protectors of individuals – they become tormentors. For us, this problem is a constant challenge, particularly since the flow of information and the effect of world public opinion make the issues in question even more pressing. In these circumstances, the international community – that is to say, international organisations, whether universal or regional – must take over from the States that fail to fulfil their obligations. This is a legal and institutional construction that has nothing shocking about it and does not, in my view, harm our contemporary notion of sovereignty. For I am asking – I am asking us – whether a State has the right to expect absolute respect from the international community when it is tarnishing the noble concept of sovereignty by openly putting that concept to a use that is rejected by the conscience of the world and by the law! When sovereignty becomes the ultimate argument put forward by authorization regimes to support their undermining of the rights and freedoms of men, women and children, such sovereignty – and I state this as a sober truth – is already condemned by history".

[10] Nowak HYPERLINK http://www.rwi.lu.se/pdf/seminar/nowak.pdf 15 May 2004 at 3: "There are many reasons why human rights abuses by non-State actors are on the increase and in certain countries by far outnumber those committed by State actors. The globalisation process driven by neo-liberalist forces necessarily leads to a decreasing importance of the traditional nation-State model as compared to global actors which range from inter-governmental organisations and international financial institutions via trans-national corporations to global networks of organised crime, trafficking in drugs and human beings and terrorism. The phenomenon of so-called 'failed states' is the most obvious example of this trend but even in highly developed and

responsible for abuses of non-state actors if they neglected to fulfil their international legal obligations. Human rights are declared to be universal, yet state responsibility for their violations is limited to a specific geographical territory. Each state is responsible for human rights violations occurring within its own territory.

The new international legalism insists on the effective enforcement of Human Rights Law and has as its main aim law, order, safety and security on a global level. The constitutive relation between human rights law and politics in the international sphere is complex and dynamic and makes use of a prodigious body of customary human rights norms and the legal norms contained in the various international treaties to hold states legally accountable for their actions and omissions under international law.[11]

The aim of this chapter is to examine the scope and content of state responsibility for human rights violations committed by non-state actors under contemporary international law.

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democratic States, the policies of deregulation and privatisation have led to an erosion of governmental power and responsibilities and the taking over of essential governmental functions (even in the filed of internal security and policing) by non-State actors. Another reason for the increase of human rights abuses by non-State actors is the fact that more and more of these abuses take place in the context of internal armed conflicts based on ethnic, religious or nationalistic tensions and intolerance".

[11] Moore 1999 *Colum. Hum. Rts. L. Rev.* 84-85: "As a result of centrifugal or (devolutionary) global trends in recent decades, individual and group rights are increasingly threatened by non-state agents, whether death squads, paramilitary forces, insurgent armies, organised criminal entities, family-based political cliques, clans, or sub-clans... (In)...the contexts in which non-state agents may violate human rights can be thought of as concentric circles of decreasing size: (1) time of war or peace; (2) time of internal conflict; and (3) state dysfunction. Moreover, the three contexts differ with respect to the essential relationship between the non-state agents and the state. ***In the first and potentially broadest context, while non-state agents may act in opposition to the state, they also may be tolerated by the state or even serve state interests,*** as with death squads in the context of a dirty war. In the second, more limited situation of civil war, non-state agents will often be engaged in armed struggle against the state. And in the third, most limited context of the failed state, non-state agents will tend to fight other non-state agents. An essential commonality is that claims to protection from violations of human dignity are raised in all three settings" (emphasis added).

3.2 The Universal Declaration of Human Rights

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Prior to World War II, the relationship between the ruler and the citizens of a particular country was treated as a completely "internal" matter, beyond the purview of the international community. This conception of sovereignty has changed. The new international human rights regime redefines the meaning of international security by substituting the understanding of security as defined in terms of state borders with a transformed construction where human rights are the supreme law of the world.[12] In the past half century there has been a veritable explosion of human rights instruments and mechanisms designed to protect individuals from cruel and arbitrary treatment by government and from private acts of violence in the jurisdiction of governments. [13]

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[12] Teitel *supra* note 5 at 360 and 373; Gibney, Tomaševski and Vedsted-Hansen *supra* note 6 at 267; United Nations Secretary General Kofi Annan observed that human rights abuses such as crimes against humanity and threats of genocide constitute legitimate justifications for Security Council military intervention under Chapter 7 of the United Nations Charter (*Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict* U.N.Doc.S/1999/957 (1999) at para. 67); *Vienna Declaration and Programme of Action* World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) 20-46 (1993) (adopted on June 25, 1993), reprinted in 32 I.L.M. 1661 (1993) (hereinafter referred to as the "Vienna Declaration") at section 5, determining that "Today the promotion and protection of all human rights is a legitimate concern of the international community"; The establishment of the *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY)* and *The International Criminal Tribunal for Rwanda (ICTR)* and most recently the permanent *International Criminal Court* (ICC) reinforces the principle that states can no longer do as they wish and hide behind diplomatic impunity. The attack on the World Trade Centre on 11 September 2001 and America's subsequent war on terror shows that states in today's world can no longer hide behind state sovereignty to commit human rights atrocities. This was not always the case. In 1991 Theo Van Boven (Van Boven 1991 *SIM Special* 91) wrote that the "tension between international concern for human rights and the principle of non-intervention in domestic affairs has not been overcome....As a result, in spite of the fact that contemporary international law heavily bends towards the duty of the international community to respond effectively to human rights violations, the political threshold with regard to preventive diplomacy and action in the area of human rights remains high. A convenient wait-and-see attitude prevails over the readiness to have report to preventive diplomacy and intercession".

[13] Moore *supra* note 11 at 89; *Universal Declaration of Human Rights* G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (hereinafter referred to as the "Universal Declaration"); *International Covenant on Economic, Social and Cultural Rights* 993 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) (entered into force Jan.

The international human rights movement is based on the concept that every nation has an obligation to respect the human rights of its citizens and that other nations and the international community have a right and responsibility to protest and intervene if states do not adhere to this obligation. International Human Rights Law consists of a prodigious body of international rules, procedures and institutions developed to implement this concept and to promote respect for human rights internationally.

The era of modern human rights law commenced in 1945 with the birth of the United Nations and a transformative vision of human beings as ends in themselves. Individuals, once considered mere objects of sovereign will, were now deemed subjects of international law with positive legal claims to protection, not only from state tyranny and oppression but also to protection by the state from human rights abuses by other individuals.[14]

3, 1976), reprinted in 6 I.L.M. 360 (1967) (hereinafter referred to as the "ICESCR"); *International Covenant on Civil and Political Rights* Dec. 16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), reprinted in 6 I.L.M. 368 (1967) (hereinafter referred to as the "ICCPR"); *Convention on the Prevention and Punishment of the Crime of Genocide* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (hereinafter referred to as the "Genocide Convention"); *International Convention on the Elimination of All Forms of Racial Discrimination* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), reprinted in 5 I.L.M. 352 (1966) (hereinafter referred to as "CERD"); *Convention on the Elimination of All Forms of Discrimination Against Women* G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/46 (1979) (entered into force Sep. 3, 1981), reprinted in 19 I.L.M. 33 (1980) (hereinafter referred to as "CEDAW"); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51 at 197, U.N. Doc. A/39/51(1984) (entered into force Jun. 26, 1987), reprinted in 24 I.L.M. 535 (1985) (hereinafter referred to as "CAT"); *Convention on the Rights of the Child* G.A. Res. 44/25, U.N. GAOR, 44th Sess., Annex, Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989) (entered into force Sep. 2, 1990), reprinted in 28 I.L.M. 1448 (1989) (hereinafter referred to as the "CRC").

14 Nunes *supra* note 6 at 43; Henkin *et al International Law* 597: "Real, full-blown internationalisation of human rights came in the wake of Hitler and World War II"; see also Janis *Introduction to International Law* 248–249: "(I)ndividuals ... are now to be properly considered subjects..... of public international law". Janis makes the important point that the traditional law of nations was applicable to both individuals and states. However, by 1789 and the publication of Jeremy Bentham's *Introduction to the Principles of Morals and Legislation* (Bentham *Introduction*), individuals had been relegated to a secondary status under the newly coined term "international law". Consistent with the positivist conception that international norms reflect the will of sovereign states, public international law was defined as "law for states alone" for one hundred and fifty years. It was not until 1945, with the drafting of the Charter of the United Nations and the convening of the International Military Tribunal at Nuremberg, that modern international law recognized "international legal rights that individuals could assert against states"; Moore *supra* note 11 at 91 and footnotes 13 and 14: "The recognition of the inherent dignity and legal status are enshrined in .....the Universal Declaration of Human Rights ... The international legal personality of individuals is also the

"*In affirmation of our solidarity as a human species; that the human race is a family, that dignity and equality shall be the inalienable right of all men and women*". On 10 December 1948, the General Assembly adopted and proclaimed the Universal Declaration of Human Rights ("the Universal Declaration") as a common standard of achievement for all peoples and all nations.[15] This was the first step in the promulgation of an International Bill of Human Rights. This event was a major step forward in the promotion of the rule of law at international and national levels. The Declaration comprises in one consolidated text nearly the entire range of what today is recognised as human rights and fundamental freedoms. The Universal Declaration of Human Rights is an impressive set of legal norms and one of the greatest single milestones in human history. Never before has an international forum committed itself to human rights as a precondition to justice and peace nor has an organisation of governments set forth human rights as a normative goal. [16]

Any deprivation of fundamental human rights should not be tolerated since the Universal Declaration requires that dignity and equality shall be the inalienable rights of all men and women.

In the preamble of the Universal Declaration of Human Rights, all member states declare that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world and commit themselves to achieve, in cooperation with the United

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bedrock of more than ten human rights conventions ....that have been adopted over the past fifty years...".; Humphrey *Universal Declaration* 21: "The catalyst to which we owe the Universal Declaration of Human Rights and indeed much of the new international law of human rights which has so radically changed the theory and practice of the law of nations, was the gross violations of human rights that were committed in and by certain countries during and immediately before the Second World War. For it was these atrocities that fostered the climate of world opinion which made it possible for the San Francisco Conference to make the promotion of respect for human rights and fundamental freedoms "for all without distinction as to race, sex, language or religion" one of the pillars on which the United Nations was erected and a stated purpose of the Organisation. It was on these foundations that the new international law of human rights was built".

[15] The Universal Declaration at Preamble; Ramcharan (ed) *Human Rights* 4 .

[16] Eide and Rosas *Economic, Social and Cultural Rights* 15; Kirby *Human Rights: an Agenda* 2; Nunes *supra* note 6 at 44.

Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.[17]

Member states further proclaimed and accepted the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.[18]

Of great importance in the aforementioned undertaking by member states is a commitment to secure the recognition and observance not only by the state parties themselves but also by all the peoples within their jurisdiction. States through the Universal Declaration of Human Rights committed themselves to both the respecting and observance of human rights by all in their jurisdiction, therefore, also non-state actors.[19]

Under international human rights normative standards as set out in the Universal Declaration of Human Rights, governments have a responsibility to respect, protect and fulfil the human rights of all people in their territory. If a government fails in this obligation, it shares responsibility with those who commit the abuse. When governments breach their duty to safeguard those in their territory from human rights abuses by non-state actors, they are violating their international obligations and should be held accountable.[20]

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17 The Universal Declaration at Preamble.

18 *Ibid.*

19 The term "non-state" actors: to refer to those acting as private individuals or groups, not as representatives of a government or of an armed political group.

20 Amnesty International 2003 HYPERLINK http://www.amnesty.org/report.2003/index-eng 22 Jun. 2004; Morris *59-AUT Law & Contemp. Probs.* at 29 - 30 "Ideally (insofar as the proper handling of heinous crimes can be considered "ideal"), full accountability for genocide, war crimes, crimes against humanity, and other serious human rights violations would be the norm. Holding perpetrators fully accountable would entail appropriate trial and punishment of each responsible individual for the actual crimes committed, together with appropriate reparations made by perpetrators to victims. In many contexts, one would wish also to utilize some form of truth commission to ensure the credible and authoritative revelation, documentation, and memorialization of the events in question as a comprehensive whole."

There are a number of Articles in the Universal Declaration of Human Rights that place specific positive duties on states to secure a safe and secure environment to the people within their jurisdiction:

Article 3
Everyone has the right to life, liberty and security of person[21]

Article 5
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment[22]

Article 6
Everyone has the right to recognition everywhere as a person before the law [23]

Article 8
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law [24]

Article 12
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks[25]

Article 28
Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised[26]

Article 30
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein[27]

The Universal Declaration of Human Rights meets a worldwide demand for adequate personal security through the universally accepted human rights norms reflected therein and the respect for the dignity of human beings. It communicates the demands, which men and women of all nations have held about freedom

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[21] The Universal Declaration.
[22] *Ibid.*
[23] The Universal Declaration.
[24] *Ibid.*
[25] The Universal Declaration.
[26] *Ibid.*
[27] The Universal Declaration

throughout human history.[28] The Declaration and the various binding treaties that followed moved the world community from a system where states have sovereignty over all that occurs within their territories to a system where human rights law is the supreme law of the new international legal order to which all states must adhere.[29]

The human rights as outlined in the Universal Declaration of Human Rights are needed to ensure minimum world public legal order. With the firm foundation of such a minimum global legal order, the world can be shaped to achieve security and full enjoyment of human rights for all.[30] The full enjoyment of all human rights in a secure environment are *sine qua non* for men and women to exist with dignity and honour in a society. Their primary goal is to foster the growth and protection of the individual. As President Kennedy asked *"Is not peace* (and security), *in the final analysis, basically a matter of human rights?"*[31] In the 65 years since the General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10 December 1948, there have been political, economic, social and cultural changes which have made an enormous impression on the concept of human rights, on the question of their protection and guarantee by national and international law, on their effectiveness and on the actual respect held for them in today's global village.

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[28]The Universal Declaration at Preamble; In the words of Mr E Lloyd in the foreword of Ramcharan *supra* note 15: "...there is nothing new in concern for human rights. For centuries this has been at the centre of political thinking and political aspirations. Demands for protection against the tyrannical acts of governments, for assurances against arbitrary arrest and inhumane punishments, for freedom of assembly and expression, for the rule of law, for the exercise of political rights through the universal franchise and the secret ballot, have been among the most insistent themes of all political activity in many countries. In many cases such aspirations took the form of an explicit demand for Bills of Rights or similar constitutional safeguards to protect those freedoms. The importance of the system of human rights protection established over the last *(85)* years through the Universal Declaration of Human Rights, is that those same demands were now for the first time put forward, not as claims made by the citizens of one country against their own government, but addressed by the peoples of all nations to governments all over the world. The concern about the human condition, which had been expressed so often within each national state is internationalised".

[29] Moore *supra* note 11 at 89; Nunes *supra* note 6 at 45-51; Teitel *supra* note 5 at 359-368; Sieghart *International Law* 11-12; Claude and Weston *Human Rights in the World Community* 27.

[30] Moore *supra* note 11 at 89; Nunes *supra* note 6 at 49; Teitel *supra* note 5 at 359-368.

[31]President John F Kennedy, Address at American University (June 10, 1963) (Kennedy 1963 HYPERLINK http://www.thespeechsite.com/famous/JFK-StrategyofPeace.htm 22 Jun. 2004), cited by Nunes *supra* note 6 49 and footnote 37.

It is difficult to find a period in the history of the world when the question of human rights has had a greater and more general significance in theory and practice than today.[32] There have been times when the matter held capital importance in a given state or region, but never has the question of human rights been the object of such broad global general attention as in the aftermath of the attacks on the World Trade Centre and the American led war on terror.

The universalization of the question of human rights, a characteristic phenomenon of our era never heretobefore seen in its present form, has also been associated with the legal and political internationalisation of human rights protection. Human rights and the actual effective protection thereof by states have become, both politically and legally, a matter of interest to the international community as a whole. From both a legal and political point of view, human rights have evolved from being an exclusive question of national law into an international question of law that compels states to fulfil their various international legal obligations in conformity with international norms and standards of achievement. There is no doubt that today human rights are ultimately and in the final instance regulated by international law.[33]

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[32] Concern over human rights matters is probably more widely aroused in 2003 than in any previous time. The international responses in Somalia, the former Yugoslavia, Rwanda, Afghanistan, Liberia, Iraq and Sudan and in general the war on terror is clear evidence of this. Every nation, however apparently impervious, is to some extent concerned at the judgement of their actions which are made in other states. Many governments, like Zimbabwe, nevertheless maintain strong resistance against the judgement made elsewhere of their human rights performance. Of course they maintain that their performance in this field in any case leaves nothing to be desired. How then can international concern make itself felt most effectively? A beginning can definitely be made by setting out the standards which the international community demands of governments everywhere in this respect. Such standards were laid down for *individual* governments in the Universal Declaration of Human Rights.

[33] *Proclamation of Teheran* U.N. Doc. A/Conf.32/41 at 3 (1968) at 4; Humphrey *supra* note 14 at 36: "...the Proclamation of Teheran which was unanimously approved on 13 May, 1968, by the International Conference on Human Rights, an inter-governmental conference convened by the United Nations at which 84 states were represented. Article 2 of this proclamation, which was later endorsed by the General Assembly in its resolution of 19 December 1968, and asserts that the Universal Declaration of Human Rights "constitutes an obligation for the members of the international community". If governments mean what they say – and it must be assumed that they do mean what their officially authorised representatives say on their behalf – then the Declaration is to be "faithfully and strictly" observed (words of the Declaration on the Granting of Independence to Colonial Countries and Peoples), that is to be "fully and faithfully" observed (words of the Declaration on the Elimination of all Forms of Racial Discrimination) that states shall "act in conformity" with it and that it therefore "constitutes an obligation for the members of the international community" which is binding on states as part of the law of nations. It is the only instrument universally applicable to all states, which catalogues and defines the human rights and fundamental freedoms, which, it is now generally recognized, the Charter binds states to respect, although it does not define or list them. By the development of a new customary rule the Universal Declaration of Human Rights has become an authentic interpretation of the

The Universal Declaration of Human Rights possesses high moral and political authority and became an international standard by which the conduct of governments is judged both within and outside the United Nations and has inspired a number of treaties that converted the broad and general language of the Universal Declaration into legally binding international instruments, that specifically holds states legally accountable for human rights abuses.[34]

On 14 June 1993 the World Conference on Human Rights was convened in Vienna.[35] The goal of the Conference was to *inter alia* reflect on the following key questions:

- What progress has been made in the field of human rights since the Universal Declaration of 1948?

- What are the obstacles and how are they to be overcome?

- How can implementation of the human rights protection be enhanced?

- How effective are the methods and mechanisms established by the United Nations?

- What financial resources should be allocated for the United Nations action to promote human rights?

Charter. The importance of the Conclusion can hardly be exaggerated. The conventional wisdom of certain jurists is to say that, while the Declaration may have great moral and political authority, it is merely, as its preamble says, "a common standard of achievement" and has no binding legal force; the Covenants on the other hand are binding on all states that ratify them. It is unlikely, however, that the Covenants will ever be universally ratified; but if, by the development of a new rule of customary international law, the Declaration has become an authentic interpretation of the human rights provision of the Charter, then its provisions, like those of the Charter itself binds all member states. If, in addition to becoming an authentic interpretation of the Charter the Declaration has become part of the customary law irrespective of the Charter, it is also binding on all states whether they are members of the United Nations or not. This would mean, amongst other things, that if, for example, a country were expelled from the Organisation under article six of the Charter, that country would nevertheless continue to be bound by the Declaration. In countries, moreover, in which the customary law of nations is part of the law of the land, the Declaration could be invoked before and applied by national courts".

[34] *Proclamation of Teheran* U.N. Doc. A/Conf.32/41 at 3 (1968) at 4; also see Conventions, *supra* note 13.

On 15 June 1993, 171[36] member states adopted the Vienna Declaration and Programme of Action.[37] On adoption of the Declaration, member states of the United Nations solemnly pledged to respect human rights and fundamental freedoms and undertook individually and collectively to actions and programmes to make the enjoyment of human rights a reality for every human being that lives within their various jurisdictions.[38]

Member states also agreed that the promotion and protection of human rights is a matter of priority for the international community [39] and that the Declaration must serve to enhance and promote a fuller observance of those rights.[40]

Member states further reaffirmed their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights, and to the commitment contained in article 56 of the Charter of the United Nations to take joint and separate action, placing proper emphasis on developing effective international cooperation for the realization of the purposes set out in article 55, including universal respect for and observance of human rights and fundamental freedoms for all.[41]

Member states also emphasized the responsibilities of all states, in conformity with the Charter of the United Nations, to develop and encourage respect for

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35 The *Vienna Declaration.*

36 UN Secretary General 1993 HYPERLINK http://www.unhchr.ch/html/menu5/d/statemnt/secgen.htm 30 Sep. 2003.

37 *Ibid.*; General Assembly *World Conference on Human Rights* U.N. Doc. A/RES/48/121 (1993). The final document agreed to in Vienna, which was endorsed by the forty-eighth session of the General Assembly, reaffirms the principles that have evolved during the past 45 years and further strengthens the foundation for additional progress in the area of human rights. The recognition of interdependence between democracy, development and human rights, for example, prepares the way for future cooperation by international organisations and national agencies in the promotion of all human rights, including the right to development. The Vienna Declaration and Programme of Action was the result of concerted efforts by 171 Member States of the United Nations whose representatives took part in conference deliberations and in four sessions of the preparatory committee, three regional and hundreds of other pre-conference meetings. In addition, thousands of preparatory documents, position papers and contributions by 95 international organisations, expert bodies, national human rights institutions and approximately 900 non-governmental organisations were considered as part of the World Conference process.

38 Office of the UNHCHR 1995 HYPERLINK http://www.unhchr.ch/html/menu5/wchr 20 Sep. 2003.

39 The *Vienna Declaration.*

40 *Ibid.*

41 The *Vienna Declaration*

human rights and fundamental freedoms for all[42] and that the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all states, has been the basis for the United Nations in making advances in standard setting as contained in existing international human rights law.[43]

Through the Declaration, all 171 member states rededicated themselves to the global task of promoting and protecting all human rights and fundamental freedoms so as to "*secure full and universal enjoyment of these rights.*"[44] The Vienna Declaration again placed a number of very specific duties on member states to comply with the human rights standards as set out in the Vienna Declaration of Rights and other international human rights law instruments to ensure that the citizens within their territories are satisfactorily protected to enjoy all their human rights in a secure environment. The most important are:

Section 1
The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for and observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question[45]

Section 4
The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purpose and principles, in particular the purpose of international cooperation. **In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community**[46]

Section 5
.....while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, **it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms**[47]

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[42] The *Vienna Declaration*
[43] *Ibid.*
[44] The *Vienna Declaration.*
[45] *Ibid.*
[46] The *Vienna Declaration* (emphasis added).
[47] *Ibid.* (emphasis added).

The processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations and international law[48]

Section 15

Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task of the international community. **Governments should take effective measures** to prevent and combat them[49]

Section 19
....the World Conference on Human Rights **reaffirms the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights** and fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities....[50]

Section 24
Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, ...States have an obligation to create and maintain adequate measure at the national level.....for the promotion and protection of the rights of persons in vulnerable sectors of their populations.....[51]

Section 27
Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and especially an independent judiciary and legal profession **in full conformity with application standards contained in international human rights instruments, are essential to the full enjoyment of human rights**.....[52]

The fact that for the first time in history such a large number of countries unanimously *endorsed all the basic principles*, which guides the promotion and protection of human rights worldwide, is frequently cited as the main achievement of the World Conference on Human Rights.[53] The Conference reaffirmed the

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[48] The *Vienna Declaration* (emphasis added).
[49] *Ibid.* (emphasis added).
[50] The *Vienna Declaration* (emphasis added).
[51] *Ibid.* (emphasis added).
[52] The *Vienna Declaration* (emphasis added).
[53] Office of the UNHCHR 1998. HYPERLINK http://www.unhchr.ch/html/50th/vdparev.htm 24 Jun. 2004: "The Vienna Declaration and Programme of Action undoubtedly constitute one of the major events in the United Nations history of human rights. If adequately implemented, it will be a milestone in this history". -from the report of the Secretary-General on the follow-up to the

universal nature of all human rights and that human rights and fundamental freedoms were the birthright of all human beings, and equally that it was the solemn commitment of all states everywhere to fulfil their obligations to promote and respect human rights.[54] Coupled with the legal principle of *nemo potest mutare concilium in alterius iniuriam* (no one can change his mind to the detriment or injury of another), states are bound to fulfil their international commitments. If states fail in their obligations to respect and protect human rights, they are responsible for the violations that occur within their jurisdiction. Importantly, in the framework of the purposes and principles of the United Nations, the promotion and protection of human rights is a legitimate concern of the international community and no state can claim that their lack of protection or poor human rights track record is an internal matter.[55]

All human rights are universal, indivisible, interdependent and interrelated. Human beings cannot enjoy any of their human rights unless they can enjoy all of them. Collectively, human rights are codified, universally shared, measurable and enforceable. They provide the framework within which development, democracy, and human security can be realised.[56] The Universal Declaration of Human Rights calls upon every individual and all states to promote respect for these rights and freedoms and to ensure their observance. The promotion and effective practical protection of all human rights is the first and main legal duty of the State.[57]

3.3 *State responsibility under International Human Rights Law*

Under the Doctrine of State Responsibility states are responsible and liable for breaching their international legal obligations. Such obligations can be positive or

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World Conference on Human Rights to the General Assembly at its forty-ninth session (A/49/448). 171 Countries endorsed the principles.

54 The *Vienna Declaration* at part 1, para. 1.

55 The *Vienna Declaration* at para. 4.

56 *Ibid.*

57 Amnesty International 2002 HYPERLINK http://www.oecdobserver.org/news/fullstory.php/aid/716/Globalise_this:_Human_rights.html 17 Jun. 2004.

negative and can give rise to direct and indirect responsibilities.[58] International legal obligations are derived from Conventions, where states expressly consent to retain legal obligations by ratifying the treaty or from international customary law where it is necessary to show a widespread practice by states conforming to the rule, together with evidence that states follow the practice due to the belief that they have the normative obligation to comply with the rule [59].

As the central actors of international law, states remain in the first instance responsible to protect and provide security to all who live within their jurisdiction in line with the universally accepted norms reflected in international custom and convention.

A UN Secretary-General report on minimum humanitarian standards affirms:[60]

"the development of international human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations. The challenge is to sustain that achievement and at the same time ensure that our conception of human rights remains relevant to the world around us. It also means that human rights violations committed by private persons against other private persons "cannot be placed outside the ambit of Human Rights Law..."..[61]

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[58] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 11; Hannum (ed) *Guide to International Human Rights Practice 8-11;* Danailov *Accountability of Non-State Actors* 8; Cook 1994 *Harv. Hum. Rts. J.* 128 asserts that: "The doctrine of state responsibility holds a state accountable for breaches of international obligations committed by or attributable to the state. Breaches may arise from violations of customary international law or binding treaties. Recent developments in the international law of state responsibility for violations of human rights widen the scope of international obligations and enhance the potential for enforcement of those obligations. States must now protect an individual's exercise and enjoyment of human rights, investigate alleged violations, punish proven violators, and provide effective remedies, including the compensation of victims". The basic law of state responsibility is undergoing codification through the extended work of the International Law Commission: see generally Rosenne (ed) *International Law Commission's Draft Articles*; Brownlie *State Responsibility*; Schachter *International Law in Theory*; Christenson 1991 *Mich. J. Int'l L.* 312; Ramcharan *supra* note 15; Roht-Arriaza 1990 *Cal. L. Rev.* 449; McGoldrick *Human Rights Committee* 269; Nowak *U.N. Covenant on Civil and Political Rights* 26; Buergenthal *To Respect and to Ensure* 72; Alston and Quinn 1987 *Hum. Rts. Q.* 156; Boulesbaa 1990 *Hum. Rts. Q.* 53.

[59] Hannum *supra* note 58 at 8-11.

[60] *Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21* Commission on Human Rights, U.N. Doc. E/CN.4/1998/87 (1998) at 16-17.

[61] Cook *supra* note 58 at 128; Danailov *supra* note 58 at 16; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 10–20.

Under International Human Rights Law, states have a legal duty to respect, protect and fulfil the human rights of all the people who live within their territory. If a government fails in this obligation to protect citizens against murderers who maim elderly people on their farms, or rapists who rape vulnerable women or paedophiles who abuse children, then the state is responsible and liable for the actions of the criminals because it neglected to fulfil its positive obligation of protection. The actions of the private actors are not considered as an act of state but the state is responsible because it failed to carry out a legal obligation to act to prevent or control the abusive actions of private actors.[62]

3.3.1 State responsibility under Human Rights Conventions

International human rights conventions are legally binding treaties between states that create legal obligations both positive and negative on the part of states to ensure the effective implementation of the commitments spelled out in the various conventions. Only states can be held accountable for human rights violations under the various international conventions whether they are committed by government agents or by private actors.[63]

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[62] *Supra* note 58; *Vienna Convention on the Law of Treaties* May 23, 1969, 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980), reprinted in 8 I.L.M. 679 (1969) (hereinafter referred to as the "Vienna Convention") at sections 19 and 24; States are responsible for their omissions and neglect. If it is well known and documented that elderly people are being attacked on their farms in a certain region, and that they are vulnerable targets and the government omits to do anything, then the government is liable for the violation of human rights by private actors or if it is well known and documented over a number of months or years, that a certain neighbourhood is prone to murder and rape and the state does nothing to improve the situation by reinforcing the police presence in the area, then the state is responsible for its neglect and omissions.

[63] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004; Petrasek *Ends and Means* 60. According to article 1 in the Optional Protocol to the ICCPR only States can be found to have violated the rights enumerated in the Covenant. Thus, article 1 reads as follows: "A State Party to the Covenant that becomes a Party to the present protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communications shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol" (*Optional Protocol to the International Covenant on Civil and Political Rights* 999 U.N.T.S. 302, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16 at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), reprinted in 6 I.L.M. 383 (1967) (hereinafter referred to as the "ICCPR-OP1").

The Vienna Convention on the Law of Treaties provides in article 26 that:

Every treaty in force is binding upon the parties and must be performed by them in good faith

and in article 31 that:

a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.[64]

Treaty wording must be interpreted in line with the intention of the treaty *Non oportet ius civile culumniari neque verba captari , sed qua mente quid diceritur animadverti covenit* (the law should not be used to effect misrepresentation, nor should words be twisted, but it is proper to consider with what intention each statement was made). The presumption of good faith justifies the conclusion that states parties intend treaties to be effective. Article 31(2) explains that the *"context"* for the purpose of interpretation of the treaty shall comprise its preamble and annexes and other specified agreements and subsequent practice. Article 31(4) provides that *"a special meaning shall be given to a (treaty) term if it is established that the parties so intended".* The failure of a state to enforce treaty provisions adequately would constitute a violation of the treaty.[65]

Traditionally Human Rights Conventions were designed to protect individuals from abuse of government power. In the changing global world of international crime syndicates and international terror organisations, there is a move toward protection by the state as opposed to protection from the state. Human rights treaties create legal obligations for the state to *respect and ensure* to all within that state's jurisdiction the rights enumerated in the various conventions. States

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[64] *Vienna Convention* at article 26: "Pacta Sunt Servanda Every treaty in force is binding upon the parties and must be performed by them in good faith".

[65] *Cabal and Bertran v Australia* Views adopted on 7 August 2003, Communication No. 1020/2001 (6 July 2001), UN. Doc No. CCPR/C/78/D/1020/2001; *Judge v Canada* Views adopted on 5 August 2003, Communication No. 829/1998 (1 August 1998), U.N. Doc. CCPR/C/78/D/829/1998; *Aliev v Ukraine* Views adopted on 7 August 2003, Communication No. 781/1997 (21 September 1997), U.N. Doc. CCPR/C/78/D/781/1997; *Filipovich v Lithuania* Views adopted on 4 August 2003, Communication No. 875/1999 (25 January 1997), U.N. Doc.

further have an obligation to extend the reach of human rights law to relations between private individuals, as Finell asserts:

Under international law States are duty-bearers, with regard to human rights treaties, and as such internationally responsible for what happens in their territory. **States must therefore take effective measure, in order to protect the rights enshrined in the conventions, also when private actors threaten the rights.**[66]

Many United Nations conventions contain explicit obligations for states to take effective measures to prevent private violations of human rights and impose duties on state parties to ensure an effective remedy to any person whose rights or freedoms have been violated by private acts of violence.[67] Many conventions require of states to achieve the full realization of rights recognized in it, therefore, providing for affirmative obligations upon states both domestically and internationally to protect and ensure enjoyment of fundamental human rights to all within their territory.[68]

CCPR/C/78/D/875/1999; *Casafranca v Peru* Views adopted on 22 July 2003, Communication No. 981/2001 (26 October 1999), UN. Doc. CCPR/C/78/D/981/2001.

66 Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 10 (emphasis added); Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 5: "Because the purpose of human rights law has been interpreted as protecting individuals against abuses perpetrated by the state and its officials, abuses committed by private actors have traditionally been excluded from the ambit of international human rights law and many forms of violence against women have thus not been viewed as violating imputable to the state. The international understanding of state responsibility has however, significantly widened in recent years and states are now obliged to accept the 'privatisation' of human rights as a "juridical fact" and may not argue that international treaties have no relevance for the activities of private persons". Clapham *Human Rights in the Private Sphere* 111; It must be noted, however, that also the customary understanding of state responsibility attributes responsibility to the state for acts (or omissions) committed by private actors not acting on behalf of the states in certain circumstances e.g. where the state does not exercise due diligence in the control of private persons. This doctrine has its origins in state responsibility for injuries to aliens, e.g. Brownlie *supra* note 58 at 160-163; Kamminga *Inter-State Accountability* 143; Meron *Human Rights and Humanitarian Norms* 164; Cook *supra* note 58 at 143 and Crawford *1999 EJIL* 435.

67 *Universal Declaration* at article 8; *Vienna Convention* at section 27; Danailov *supra* note 58 at 18: "The consequence is that failure to control private violations of human rights or acquiescence in human rights violations committed by non-state actors renders the State as guilty as if its officials had initially committed the violations, for it has breached its obligations to prevent, investigate and punish such violations. As Fernando Teson affirms it: "Liberal theory must therefore postulate an affirmative obligation in international law on the part of the state to have a reasonably effective legal system in which assaults against life, physical integrity, and property are not tolerated. Thus, a state is in breach of its international obligations not only if it violates human rights in the traditional sense but also if it fails adequately to protect it's citizens – if it fails to punish enough, as it were".

68 *Universal Declaration* at Preamble; *ICCPR* at article 2; *ICESCR* at article 2; CEDAW at article 2; *CRC* at article 2; *Vienna Convention* at Preamble; Cook *supra* note 58 at 142; Danailov *supra* note 58 at 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17–19; Farrior 1998 *Am. Soc'y Int'l L. Proc.* 300-301; Finell 2002 HYPERLINK

Below, the question whether and under which circumstances a state can be held liable for human rights violations perpetrated by non-state actors will first be addressed. This will be done through an examination of the obligations on the part of the state, to which the human rights conventions give rise.

Since the adoption of the Universal Declaration of Human Rights, six major human rights treaties have been adopted under the auspices of the UN that converted the declarations of the Universal Declaration into binding legal obligations. The first adopted in 1965 was the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[69] Soon thereafter, in 1966, it was followed by the International Covenant on Civil and Political Rights ("ICCPR")[70] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[71] In 1979, the international human rights regime was further supplemented by the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),[72] and in 1984 by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") [73] and most recently, in 1989, by the Convention on the Rights of the Child ("CRC").[74] Each of these treaties, with the exception of the ICESCR has established a treaty monitoring body in the form of a supervisory quasi-judicial institution, called a "committee".

The aforementioned six conventions are by no means the only human rights instruments adopted under UN auspices. Other human rights conventions include: the Convention on the Suppression and Punishment of the Crime of Apartheid,[75] the Convention on the Prevention and Punishment of the Crime of

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http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 20; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 7-11.

69 *CERD.*

70 *ICCPR.*

71 *ICESCR.*

72 *CEDAW.*

73 *CAT.*

74 *CRC.*

75 *International Convention on the Suppression and Punishment of the Crime of Apartheid* Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force Jul. 18, 1976), reprinted in 13 I.L.M. 50 (1974) (hereinafter referred to as the "Apartheid Convention").

Genocide,[76] the Convention on the Political Rights of Women,[77] the Convention on the Nationality of Married Women,[78] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[79] the Convention relating to the Status of Refugees[80] and the Protocol Relating to the Status of Refugees[81]

The ICCPR in its preamble recognizes that: "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil and political rights and the obligation of states under the Charter of the United Nations to promote universal respect for and observance of human rights and freedoms".[82]

Article 2 of the ICCPR determines that:

1. **Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant**, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [83]

2. Where not already provided for by existing legislative or other measure, each **State party to the present Covenant undertakes to take the necessary steps**, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[84]

3. Each State party to the present Covenant undertakes :

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[76] *Genocide Convention.*

[77] *Convention on the Political Rights of Women* Dec. 20, 1952, 193 U.N.T.S. 135 (entered into force Jul. 7, 1954) (hereinafter referred to as the "Convention on the Political Rights of Women").

[78] *Convention on the Nationality of Married Women* Feb. 20, 1957, 309 U.N.T.S. 65 (entered into force Aug. 11, 1958) (hereinafter referred to as the "Convention on the Nationality of Married Women").

[79] *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* Dec. 10, 1962, 521 U.N.T.S. 231 (entered into force Dec. 9, 1964) (hereinafter referred to as the "Convention on Consent to Marriage").

[80] *Convention Relating to the Status of Refugees* Jul. 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) (hereinafter referred to as the "Refugee Convention").

[81] *Protocol Relating to the Status of Refugees* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967), reprinted in 6 I.L.M. 78 (1967) (hereinafter referred to as the "Refugee Protocol").

[82] *ICCPR* at Preamble.

[83] *ICCPR*; English and Stapleton *The human rights handbook at 16.*

[84] *ICCPR.*

(a) **To ensure** that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.
(b) **To ensure** that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.
(c) **To ensure** that the competent authorities shall enforce such remedies when granted.[85]

With regard to the International Covenant on Economic, Social and Cultural Rights, the corresponding article stipulates:

1. **Each State party to the present Covenant undertakes to take steps**, individually and through international assistance and cooperation, especially economic and technical, **to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means**, including particularly the adoption of legislative measures.[86]

Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women determines that: [87]

State parties must condemn discrimination against women in all its forms, **agree to pursue by all appropriate means and without delay** a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and **to ensure, through law and other appropriate means, the practical realization** of this principle;
(b) To adopt appropriate legislative and other measures, including [88] sanctions where appropriate, prohibiting all discrimination against women;

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[85] *ICCPR* at Preamble (emphasis added); Farrior *supra* note 68 at 302: "I have heard it said that if Article 2 of the International Covenant on Civil and Political Rights does indeed extend to protection against private abuses, it does so only to the extent that the abuse is grounded in discrimination. In other words, Article 2 must be read conjunctively instead of disjunctively. I believe that such an interpretation would lead to a manifestively absurd result. It would mean that the state has an obligation to ensure the right not to be subject to torture, but only if the torturer tortures because of some discriminatory reason, if it is simply because the individual is a sadist, the state would have no obligation to act, whether the perpetrator is a state agent or not. The same holds true for the right to life. That right does not exist just in the face of someone who kills another because of racial bias for example".

[86] *ICESCR* at article 2 (emphasis added).

[87] *CEDAW* at article 2.

[88] *CEDAW* at article 2 (emphasis added).

(c) To establish legal protection of the rights of women on an equal basis with men and **to ensure** through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;[89]
(d) To refrain from engaging in any act or practice of discrimination against women and **to ensure** that public authorities and institutions shall act in conformity with this obligation;
(e) **To take all appropriate measures** to eliminate discrimination against women by any person, organisation or enterprise;
(f) **To take all appropriate measures**, including legislation, to modify or abolish existing laws, regulations, customs and practices which[90] constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3 of CEDAW determines that State parties shall:

take in all fields, in particular in the political, social, economic and cultural fields, **take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms** on a basis of equality with men. [91]

The Convention of the Rights of the Child states in *Article 2* that :

1. **States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction** without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[92]

2. **State parties shall take all appropriate measures to ensure that the child is protected** against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents' legal guardians, or family members.[93]

From the above it is clear that states commit and legally bind themselves to *"respect and ensure" "by all appropriate means" "the full realisation"* of the fundamental human rights set forth in the various covenants to all who live within their jurisdiction. The positive legal obligation to respect and ensure includes the

89 *CEDAW* at article 2 (emphasis added).
90 *CEDAW* at article 2 (emphasis added).
91 *CEDAW* at article 3 (emphasis added).
92 *CRC* at article 2 (emphasis added).
93 *CRC* at article 2 (emphasis added).

duty of states to make adequate provision in the law for the effective protection of fundamental human rights. This duty includes the effective enforcement of the law and taking reasonable steps of prevention by providing an effective police force and judicial system and by carrying out proper investigations, prosecuting offenders as well as providing for adequate remedies for victims in the event of the rights being violated by private acts of violence or government abuses.

State responsibility for private acts of violence are to be approached with reference to the specific treaty provisions.[94] The specific undertakings regarding *inter alia* the right to life,[95] the right to live free from torture and inhumane treatment[96] and the right to security[97] are to be read in context of the general undertakings to respect and ensure human rights by all appropriate means prescribed in the various conventions.

3.3.1.1 Respect and ensure

A state complies with the general duty *"to respect"* a right by not interfering with its exercise, but the obligation *"to ensure"* a right is substantially broader. Rights under the Covenants are "negative", in that states must not obstruct individuals' exercise of them, but also "positive", in that states must take affirmative measures to prevent violation of the human rights, also from private actors.[98]

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94 Cook *supra* note 58 at 147.

95 *ICCPR* at Article 6: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".; *CRC* at article 6: "State parties recognize that every child has the inherent right to life and "state parties shall ensure to the maximum extent possible the survival and development of the child".

96 *ICCPR* at article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, in particular, no one shall be subjected without his free consent to medical or scientific experimentation".

97 *ICCPR* at article 9(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"; *CRC* at article 3(2).

98 *Gutiérrez Vivanco v Peru* Views adopted on 26 March 2002, Communication No. 678/1996 (20 March 1995), U.N. Doc. CCPR/C/74/D/678/1996 where Committee held that "the state party has the obligation to ensure that similar violations do not occur in the future"; *Wanza v Trinidad and Tobago* Views adopted on 26 March 2002, Communication No. 683/1996 (11 March 1996), U.N. Doc. CCPR/C/74/D/683/1996 where Committee held that "the state party has undertaken to ensure to all individuals within its territory ...the rights recognized in the covenant..."; *Gedumbe v Democratic Republic of the Congo* Views adopted on 9 July 2002, Communication No. 641/1995, U.N. Doc. CCPR/C/75/D/641/1995; *Sahadeo v Republic of Guyana* Views adopted on 1 November 2001, Communication No. 728/1996 (10 November 1996), U.N. Doc. CCPR/C/73/D/728/1996; *Cagas, Wilson and Astillero v The Philippines*

In the case of *Herrera Rubio v. Columbia*, the Human Rights Committee held Columbia responsible for failure to take appropriate measures to prevent "disappearances" and the subsequent killing of Mr. Rubio and ordered the government of Colombia to remedy violations of liberty and dignity. The Commission held that:

State parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[99]

In March 2002 in the case of *Lantsov v Russian Federation*, the Human Rights Committee held that Russia breached its international legal treaty obligation with regards to the right to life as expressed by article 6(1) of the ICCPR when a 23 year old man died in prison due to inhumane prison conditions and lack of medical treatment within one month after being detained. The committee concluded that Russia failed to take appropriate preventative measures to protect Mr. Lantsov's life during detention and that Mr. Lantsov lost his life as a direct result of this failure. The Committee ordered Russia to:

ensure that similar violations do not recur in future....by taking immediate steps to ensure that conditions....are compatible with the state parties obligation ....under the covenant.[100]

Views adopted on 23 October 2001, Communication No. 788/1997 (17 September 1996), U.N. Doc. CCPR/C/73/D/788/1997, where the Committee held that "...the state part is under a obligation to ensure..."; Human Rights Committee *General Comment 3* U.N. Doc. HRI/GEN/1/Rev.1at 4 (1994); Cook *supra* note 58 at 150-161: An undertaking to "respect" rights is weaker; a state can claim observance through pronouncements not backed by institutional enforcement or funds... the duty "to respect" private and family life requires positive acts by states. Similarly, an undertaking to "pursue" the elimination of discrimination against women might imply positive obligations. This interpretation may depend for effect on auxiliary terms, such as "by all means", "by all reasonable means", or "by all appropriate means"; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 11: "The obligation to respect is a negative obligation asserting a direct prohibition on state violation....However the obligation to ensure goes further, indicating that a state must take positive steps to give effect to....rights"; Moore *supra* note 11 at 95; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 5-11; Klein *Duty to Protect* 296–297; *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988).

[99] *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983.

[100] *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997.

In the case of *Cabal and Bertran v Australia* the human rights committee found that Australia violated article 10 of the ICCPR by locking the plaintiffs in a triangular cage for an hour. The Committee held that *"The state party is under an obligation to ensure that similar violations of the covenant do not occur in future".* The committee also held that:

pursuant to Article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the covenant...". [101]

The Human Rights Committee's General Comment 3 emphasizes that the obligation under the ICCPR is not confined to the respect of human rights, but state parties have also undertaken *"to ensure the full enjoyment of these human rights to all individuals under their jurisdiction".* The Human Rights Committee again confirmed this important obligation in its General Comment 27 by holding that:

...a state party is under an obligation to ensure that the existence and exercise of (human) rights are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the state party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of (private) persons within the state party.

This aspect calls for specific positive actions by the states parties to enable individuals to actually and practically enjoy their rights. [102]

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[101] *Cabal and Bertran v Australia* Views adopted on 7 August 2003, Communication No. 1020/2001 (6 July 2001), UN. Doc No. CCPR/C/78/D/1020/2001. For similar findings by the Human Rights Committee see *Judge v Canada* Views adopted on 5 August 2003, Communication No. 829/1998 (1 August 1998), U.N. Doc. CCPR/C/78/D/829/1998; *Aliev v Ukraine* Views adopted on 7 August 2003, Communication No. 781/1997 (21 September 1997), U.N. Doc. CCPR/C/78/D/781/1997; *Filipovich v Lithuania* Views adopted on 4 August 2003, Communication No. 875/1999 (25 January 1997), U.N. Doc. CCPR/C/78/D/875/1999; *Casafranca v Peru* Views adopted on 22 July 2003, Communication No. 981/2001 (26 October 1999), UN. Doc. CCPR/C/78/D/981/2001.

[102] Human Rights Committee *General Comment 28* U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 13; *ICCPR* at article 27; Human Rights Committee *General Comment 23* U.N. Doc. HRI\GEN\1\Rev.1 at 38 (1994); Cook *supra* note 58 at 159 and footnote 194; *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 167 held that "the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with its obligation - it also requires the government to conduct itself so as to effectively ensure the full and free exercise of human rights".

Traditionally the state fulfils its obligation *"to respect"* by not infringing upon the individual's rights, while the obligation *"to ensure"* puts an affirmative duty upon states. The obligation to ensure implies a positive obligation, an obligation whereby a state must take action to secure human rights. Therefore, states must not only respect the right to life but also ensure[103] and must, therefore, take effective precautionary measures to prevent the deprivation of life of one person by another person.[104]

3.3.1.2 All appropriate measures

In international treaty law, there is a traditional distinction between obligations of means and obligations of ends, that is: between obligations to take specified steps toward aspirational goals[105] and obligations to achieve certain results. [106] Under the six major international conventions states parties have agreed to *"ensure"* by all necessary steps and all appropriate means, the various fundamental human rights set out in the conventions. This translates to an international legal obligation of means and of results. The obligation of result requires state parties to *respect and ensure* practically to all within their jurisdiction the rights enumerated in the conventions[107] and the obligation of means requires state parties to take all the necessary steps as may be necessary to give full effective

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[103] *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997 at 8-12; *Des Fours v The Czech Republic* Views adopted on 30 October 2001, Communication No. 747/1997 (21 November 1996), U.N. Doc. CCPR/C/73/D/747/1997, where the Committee held "...by becoming a state party to (the covenant) ....the state party has undertaken to ensure..."; *Cagas, Wilson and Astillero v The Philippines* Views adopted on 23 October 2001, Communication No. 788/1997 (17 September 1996), U.N. Doc. CCPR/C/73/D/788/1997; Kabaalioğlu *Obligations to 'Respect'* 160, 165.

[104] The United Nations Human Rights Commission (HRC) has emphasised that states have undertaken to ensure the enjoyment of the rights set forth in the Covenant to all individuals under their jurisdiction and that this aspect "calls for specific activities by the States parties to enable individuals to enjoy their rights" (Human Rights Committee *General Comment 3* U.N. Doc. HRI/GEN/1/Rev.1at 4 (1994) at para. 2). In relation to right to life the HRC has gone further and noted that the notion of an 'inherent right to life' "cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures," and that states parties should take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics (Human Rights Committee *General Comment 6* U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994) at para. 5).

[105] Cook *supra* note 58 at 159 and accompanying footnote 200; Alston and Quinn *supra* note 58 at 164-186.

[106] Cook *supra* note 58 at 159; Rosenne *supra* note 58 at 215.

[107] *ICCPR*, *ICESCR*, *CEDAW*, *CRC* and *CAT* in general.

practical realization to fundamental human rights.[108] Because the object of human rights treaties is to ensure the effective protection of human rights, due weight must be given to the *principle of effectiveness.* State parties to conventions accept a duty to act to achieve the stated objectives effectively in accordance with international standards of performance.

The *all-appropriate measure* provision obliges state parties to first and foremost prevent and deter private acts of violence from occurring, secondly to investigate and punish the private acts of violence, and thirdly to provide compensation for the victims. [109] In the case of *Azer Garyverdiogly Aliev v Ukraine,* the Human Rights Committee held that "*the state party is under an obligation to take* (all appropriate) *measures to prevent similar violations in future"* [110] and in the case of *Ricardo Ernesto Gomez Casafranga v Peru* ordered the government of Peru to *" release Mr Gomez Casafranga and pay him appropriate compensation..."*[111]

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[108] Cook *supra* note 58 at 162; Danailov *supra* note 58 at 19; Meron *supra* note 66 at 372-383.

[109] *Universal Declaration* in general; Cook *supra* note 58 at 161; *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988); *Godinez Cruz Case* Judgment of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989) contains substantially the same language as the Velasquez Rodriguez case; the Human Rights Committee held the same view in *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983; *Delgado Páez v Colombia* Views adopted on 12 July 1990, Communication No. 195/1985 (4 October 1985), U. N. Doc. CCPR/C/39/D/195/1985, where it was found that Colombia was seen to have failed in its duty to secure Mr. Delgado's right to security of the person; Shelton *State Responsibility* 272; *Vienna Convention* at Preamble; Danailov *supra* note 58 at 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17–19; Farrior *supra* note 68 at 300-301; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 20; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 7-11.

[110] *Aliev v Ukraine* Views adopted on 7 August 2003, Communication No. 781/1997 (21 September 1997), U.N. Doc. CCPR/C/78/D/781/1997 at 9; In *Sahadeo v Republic of Guyana* Views adopted on 1 November 2001,Communication No. 728/1996 (10 November 1996), U.N. Doc. CCPR/C/73/D/728/1996 at 11 the Committee held that "the state party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future".

[111] *Casafranca v Peru* Views adopted on 22 July 2003, Communication No. 981/2001 (26 October 1999), UN. Doc. CCPR/C/78/D/981/2001 at 9. Other cases where states were ordered to compensate: *Gedumbe v Democratic Republic of the Congo* Views adopted on 9 July 2002, Communication No. 641/1995, U.N. Doc. CCPR/C/75/D/641/1995 at 6.2; *Ashby v Trinidad and Tobago* Views adopted on 21 March 2002, Communication No. 580/1994 (6 July 1994), U.N. Doc. CCPR/C/74/D/580/1994; *Cagas, Wilson and Astillero v The Philippines* Views adopted on 23 October 2001, Communication No. 788/1997 (17 September 1996), U.N. Doc. CCPR/C/73/D/788/1997 at 9; *Francis et al. v Trinidad and Tobago* Views adopted on 25 July 2002, Communication No. 899/1999 (14 May 1997), U.N. Doc. CCPR/C/75/D/899/1999 at 7; *Chira Vargas-Machuca v Peru* Views adopted on 22 July 2002, Communication No. 906/2000 (15 September 1997), U.N. Doc. CCPR/C/75/D/906/2000 at 9.

All appropriate measures means that states must do their very best including sufficient provision in a state's national budget for the effective *protection and ensuring* of fundamental human rights.

All appropriate measures also includes the adoption of national legislation to give full effect to the object of the treaty.[112] The Human Rights Committee has linked the right not to be subjected to torture or ill treatment under Article 7 of the ICCPR to an obligation to provide protection, through "*legislative and other measures*", against torture or ill treatment inflicted by private individuals. The Committee held that:

The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individuals. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

In the case of *Des Fours v The Czech Republic,* the Human Rights Committee ordered the Czech Republic to:

review its legislation .... To ensure that all persons enjoy both equality before the law and equal protection of the law.[113]

National legislation and executive action must correspond with the actual wording of the protected right and the object and purpose of the treaty that expresses it. International human rights tribunals have held uniformly that autonomous international criteria and standards will ultimately determine and judge whether a human rights violation has occurred and whether the state has breached its

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[112] *Vienna Convention* at section 27; *ICCPR* at section 2; *ICESCR* at section 2; *CEDAW* at section 2; *CRC* at section 2; Human Rights Committee *General Comment 20* U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994) at para. 2; Amnesty International *Protection Against Abuses* s 3.8.

[113] *Des Fours v The Czech Republic* Views adopted on 30 October 2001, Communication No. 747/1997 (21 November 1996), U.N. Doc. CCPR/C/73/D/747/1997; same findings in *Fábryová v The Czech Republic* Views adopted on 30 October 2001, Communication No. 765/1997 (28 May 1997), U.N. Doc. CCPR/C/73/D/765/1997; *Brok v The Czech Republic* Views adopted on 31 October 2001, Communication No. 774/1997 (23 December 1996), U.N. Doc. CCPR/C/73/D/774/1997; *Karakurt v Austria* Views adopted on 4 April 2002, Communication No. 965/2000 (13 December 2000), U.N. Doc. CCPR/C/74/D/965/2000.

international obligations or not.[114] This rule is consistent with the general rules of interpretation of treaties specified in the Vienna Convention on the Law of Treaties.[115] To respect their obligations under international conventions, states may be required to repeal or amend legislation that abridges individuals' human rights. Alternatively, states may be called on to give effect to rights through positive legislation. If it can be shown that *"but for"* the government's lack of legislation or inaction a particular injury would probably have been avoided, a state will be liable.[116]

All appropriate measures further include that states must allocate sufficient resources to ensure that the rights as spelt out in the conventions can in fact be achieved and enjoyed. This includes sufficient resources for the police for the effective enforcement of the law and the taking of reasonable steps to prevent violations from occurring; it also includes measuring the state's own achievement. National data is very important to determine how effective a state's human rights apparatus is functioning.[117] The nature of the violation to a large extent defines the data that needs to be employed. A distinction is drawn between events-based data and standards-based data. Events-based data relate to individual violations of human rights, particularly civil and political rights[118] while standards-based data indicate state compliance with, or violation of economic, social and cultural rights. Meticulously documented events-based data may show that human rights abuses

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[114] *Van Duzen v Canada* Views adopted on 7 April 1982, Communication No. 50/1979 (18 May 1979), U.N. Doc. CCPR/C/15/D/50/1979; Cook *supra* note 58 at 152.

[115] *Vienna Convention* at article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Art. 31(2) explains that the "context" for the purpose of interpretation of the treaty shall comprise its preamble and annexes and other specified agreements and subsequent practice. Id. Article 31(4) provides that "a special meaning shall be given to a (treaty) term if it is established that the parties so intended".

[116] *Vienna Convention* at article 31(1); *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997 at 8–11; Clapham *supra* note 66 at 385 (Where the "but for test" is discussed in detail") .

[117] Garonna and Balta 2002 *Statistical Journal of the United Nations Economic Commission for Europe* 292; Cook *supra* note 58 at 135: *"Data can play an instrumental role in triggering the legal accountability of states for violations of internationally protected human rights. While states may be held to account for violations before international tribunals, evidence of abuse can also affect the way in which states conduct their international relations. States resent but also react to characterization as pariahs in the community of nations, and may amend their practices while denying the justice of their condemnation. Thus "promoting change by reports facts" is a powerful tool for improving the situation of women".* The moratorium that the South African government placed on the release of certain crime statistics is cause for concern and the recently released crime statistics by the South African government is not viewed as credible by most objective commentators (Redakteur *Beeld* 24 Sep. 2003 8).

represent policies (or a lack thereof) rather than mere individual violations. Specific cases that are recorded can point out the absence of government efforts to eliminate violations, remedy abuses and indicate trends over time. Cases litigated before international and national tribunals and events publicized by non-governmental human rights organisations may direct attention to the underlying causes of the human rights violations. Moreover, the individual case, raised to popular consciousness through a victim's name, illuminates transcending oppressions and injustice. Rather than explain the history and dimensions of oppression, human rights advocates can speak to injustice by invoking the name of Nelson Mandela and Steven Biko in the past, and recently in South Africa, Hester Rawstone and six-month-old Kayla Rawstone who were the victims of a brutal hijack murder where three generations of the same family were murdered. Individual names will come to personify the abuse of basic human rights in a certain country.

Critical to the credibility of events-based data, is the integrity of the evidentiary source. Integrity is a product of fastidious collecting and verification of incidents and statements, including official documentation, reports and quotations in journals of record. Standards-based data are used in international human rights monitoring, where states' programmatic obligations are the units of analysis.[119] Credible and useful data include accompanying references to international standards.

3.3.1.3 Effective remedy

The positive obligation to provide effective remedies may be discharged by states through the exercise of the states' national executive, judicial and legislative functions. Importantly, however, states' parties do not satisfy their responsibilities by providing judicial remedies to individuals who have suffered denials of human rights at the hands of other individuals when the state fails to address systemic

[118] Jabine and Clause (eds) *Human Rights and Statistics* 12; Cook *supra* note 58 at 136.
[119] Jabine and Clause *supra* note 118 at 12-13; Cook *supra* note 58 at 136.

causes of violation. The provision of judicial remedies is only part of state responsibility.[120]

Article 8 of the Universal Declaration states that:

Everyone has the right to an effective remedy by the competent national tribunals for an act violating the fundamental rights granted to him.

Article 2 (3) (a) of the ICCPR asserts that states must:

ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.[121]

Under an International Human Rights Convention, a state has the duty to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights by all citizens.[122]

In the case of *Sahadath v Trinidad and Tobago*[123] where a mentally ill person was convicted of murder and kept in unsatisfactory prison conditions without any medical care, the Human Rights Committee held that:

The state party is under an obligation to provide the (plaintiff) with an effective remedy including appropriate medical and psychiatric care and to ...improve the present conditions .....or to release him...and to prevent similar violations of occurring in the future.

Similarly in the case of *Simpson v Jamaica*, the Human Rights Committee held that the plaintiff:

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[120] Cook *supra* note 58 at 169.

[121] *Universal Declaration*; *ICCPR*; also see *CEDAW* at article 2; *CRC* at article 2; *Vienna Declaration* at section 27.

[122] *Universal Declaration* in general; Cook *supra* note 58 at 161; *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988); *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983; *Vienna Declaration* at Preamble; Danailov *supra* note 58 at 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17–19; Farrior *supra* note 68 at 300-301; Finell *supra* note 63 at 20; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 7-11; *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997.

[123] *Sahadath v Trinidad and Tobago* Views adopted on 2 April 2002, Communication No. 684/1996 (13 March 1996), U.N. Doc. CCPR/C/74/D/684/1996; *Gedumbe v Democratic Republic of the Congo* Views adopted on 9 July 2002, Communication No. 641/1995, U.N. Doc. CCPR/C/75/D/641/1995 at 6.2; Paust *supra* note 2 at 51; Shelton 1989 *Fordham Int'l L. J.* 1.

is entitled to an appropriate remedy, including adequate compensation, an improvement in present conditions of detention and due consideration for an early release.[124]

In the case of *Boodoo v Trinidad and Tobago*,[125] the Human Rights Committee held that Mr. Boodoo is:

entitled to an appropriate remedy including compensation for the treatment he was subjected to...the state party is under an obligation to ensure that similar violations do not occur in the future.

Effective remedy, therefore, includes adequate compensation and the duty to prevent the violation from recurring.

3.3.1.4 The due diligence standard

It is axiomatic that states that are bound by international convention to *respect and ensure* the rights set out in the convention must adhere to international criteria to protect, respect and promote the rights and must implement treaty provisions effectively in line with their international legal obligations and internationally excepted norms and standards.[126]

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[124] *Simpson v Jamaica* Views adopted on 31 October 2001, Communication No. 695/1996 (19 March 1996), U.N. Doc. CCPR/C/73/D/695/1996; Also see *Wanza v Trinidad and Tobago* Views adopted on 26 March 2002, Communication No. 683/1996 (11 March 1996), U.N. Doc. CCPR/C/74/D/683/1996; *Sahadath v Trinidad and Tobago* Views adopted on 2 April 2002, Communication No. No. 684/1996 (13 March 1996), U.N. Doc. CCPR/C/74/D/684/1996; *Sahadeo v Republic of Guyana* Views adopted on 1 November 2001,Communication No. 728/1996 (10 November 1996), U.N. Doc. CCPR/C/73/D/728/1996; *Fábryová v The Czech Republic* Views adopted on 30 October 2001, Communication No. 765/1997 (28 May 1997), U.N. Doc. CCPR/C/73/D/765/1997; *Cag as, Wilson and Astillero v The Philippines* Views adopted on 23 October 2001, Communication No. 788/1997 (17 September 1996), U.N. Doc. CCPR/C/73/D/788/1997; *Rogerson v Australia* Views adopted on 3 April 2002, Communication No. 802/1998 (20 April 1996), U.N. Doc. CCPR/C/74/D/802/1998; *Francis et al. v Trinidad and Tobago* Views adopted on 25 July 2002, Communication No. 899/1999 (14 May 1997), U.N. Doc. CCPR/C/75/D/899/1999; *Chira Vargas-Machuca v Peru* Views adopted on 22 July 2002, Communication No. 906/2000 (15 September 1997), U.N. Doc. CCPR/C/75/D/906/2000; *Müller and Engelhard v Namibia* Views adopted on 26 March 2002, Communication No. 919/2000 (29 October 1999), U.N. Doc. CCPR/C/74/D/919/2000; *Karakurt v Austria* Views adopted on 4 April 2002, Communication No. 965/2000 (13 December 2000), U.N. Doc. CCPR/C/74/D/965/2000.

[125] *Boodoo v Trinidad and Tobago* Views adopted on 2 April 2002, Communication No. 721/1996 (13 June 1994), U.N. Doc. CCPR/C/74/D/721/1996.

[126] Cook *supra* note 58 at 153; Finell 2002
HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 9. With reference to non-legally binding standards, one can also mention the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, which has been part of the on going international discussion on fundamental standards of humanity, applicable in all circumstances and to all

The standard most frequently articulated has been the due diligence standard. The due diligence standard was first articulated in the *Valasqeas-Rodrigues case* where the Inter-American Court of Human Rights drew from this early body of law and applied the due diligence standard in declaring that the government of Honduras would be responsible, even if the seizure and disappearance of Manfredo Velasquez was caused by private persons unconnected with the government.[127] The Inter-American Court of Human Rights held that the

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acts. This instrument was approved by a group of experts, and can be seen as a part in the process aimed at strengthening the protection of fundamental rights during various states of emergency. It is formulated as a declaration to be adopted by the UN, and it contains norms that should be applicable in all circumstances, including internal violence, disturbances, tensions and public emergency, and which cannot be subject to derogations. It also contains a provision on the protection of minorities. Article 16 provides: "*In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity*". This instrument is, however, not legally binding, but should rather be seen as a soft-law type of instrument. It has, however, gained some kind of recognition, as a revised version of it was transmitted to the Commission on Human Rights in 1994 by the government of Finland and Norway and it has been on the agenda of the Commission since then (*Report from the Expert Meeting on Fundamental Standards of Humanity* Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/1995/116 (1995)). Within the Commission the Turku Declaration has been part of the discussion on fundamental standards of humanity. In this respect the analytical reports on fundamental standards of humanity, presented by the Secretary-General to the Commission, concluded that the most important purpose of identifying such standards is to enhance protection of all persons, and that a document identifying such standards would be useful for education and training purposes as well as for improving respect for all and compliance with norms (*Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21* Commission on Human Rights, U.N. Doc. E/CN.4/1998/87 (1998) at paras. 89-95 and *Report of the Secretary-General submitted pursuant to Commission Resolution 1998/29* Commission on Human Rights, U.N. Doc. E/CN.4/1999/92 (1998). Moreover it has also been referred to by the ICTY in the *Tadic case* (*Prosecutor v Dusko Tadic* Case No. IT-94-1-AR-72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995). The Declaration has since that been revised and submitted to the UN Commission on Human Rights.

[127] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 19; Farrior *supra* note 68 at 302. This principle has been drawn from the traditional state responsibility doctrine governing the protection of aliens from private violence"; Meron *supra* note 66 at 384; *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988). The Inter-American Court of Human Rights imposed liability on Honduras for its lack of due diligence in preventing unexplained "disappearances". Liability of the state arose in its failure "to ensure" respect for human rights, whose violation could not be attributed either to state officers or to private actors. "States are responsible to respond appropriately to potential or actual private conduct and to organise the governmental apparatus and, in general, all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights"; Moore *supra* note 11 at 116: "The Court found that Honduras's failure to prevent Velasquez's disappearance ....was a violation of its obligation to ensure to all persons ....free and full exercise of .....convention rights and freedoms. While the court speculated that the death squad violence likely occurred with government sponsorship it held that regardless of official involvement Honduras had a official responsibility to prevent....such conduct, and its unwillingness to do so was a violation of its international legal obligations". Also the *Godinez Cruz Case* Judgment of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989) at paras. 182 and 192: In finding the government of Honduras for the disappearance of Godinez the Inter American court held that "an illegal act which violates human rights and which is initially not directly imputable to a state....because it

obligation of states' parties to the American Convention on Human Rights to ensure the exercise of rights recognized by that Convention:

implies the duty of States' parties to organise the governmental apparatus and, in general, all the structure through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights;

and that:

an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, 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 Convention.[128]

Just what does the "*due diligence*" standard entail? Broadly the legal concept of due diligence describes the minimum effort a state must undertake in order to fulfil its international treaty obligations to protect individuals from abuses of their fundamental human rights.[129] *Due diligence* include steps to prevent abuses,

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is the act of a private person ....can lead to international responsibility ....because of the lack of due diligence to prevent the violation". See also the *Declaration on the Elimination of Violence Against Women* G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49 at 217, U.N. Doc. A/48/49 (1993) at article 4 (c). There are however, also disadvantages with the adoption of an instrument identifying fundamental standards of humanity. The most serious disadvantage, identified by the same report is that the adoption of such a document might undermine existing international standards, and imply that norms not included are less important (Committee on the Elimination of Discrimination Against Women *General Recommendation 19* U.N. Doc. A/47/38 at 1 (1993)at para. 9).

128 *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 166 and 172.

129 Danailov *supra* note 58 at 17–20 also quoting the due diligence standard as laid down in the Velasquez Rodriquez case and arguing for effective implementation of treaty provisions; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17; Farrior *supra* note 68 at 301. An early case applying the "due diligence" standard though one in which the injured party was a state, comes from the U.S. Civil War era. Just after the war, the United States claimed compensation against Great Britain for damage caused by a warship that had been built and equipped by non-state actors in British territorial waters. An arbitral tribunal found for the United States, applying a due diligence standard under which the action due was that commensurate with the risks that might result from a failure on the part of the state to act. This standard provoked immediate controversy, and over the years various other approaches have been used or suggested."; *Universal Declaration* in general; Cook *supra* note 58 at 161; *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988); *Godinez Cruz Case* Judgment of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989); *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983; *Delgado Páez v Colombia* Views adopted on 12 July 1990, Communication No. 195/1985 (4 October 1985), U. N. Doc. CCPR/C/39/D/195/1985; Cook *supra* note 58 at 162; Shelton supra note 109 at 272; *Vienna Declaration* at Preamble; Cook *supra* note 58 at 142; Finell 2002

investigating them when they do occur, prosecuting the perpetrators and ensuring adequate reparation to the victims. *Due diligence* involves concepts of positive duties and failure to exercise due care, in other words, a negligence analysis. The duty encompasses an obligation to marshal the full apparatus of the state to prevent, investigate, punish and compensate. States have been found responsible under the "due diligence" standard for "inaction " or "inadequate action" in a range of situations, including failure to provide police protection to prevent private violence, failure to investigate or to investigate adequately killings by private individuals and failure to punish adequately or punish at all.[130]

If a state omits or neglects to take all reasonable measures to prevent, investigate and punish a violation of human rights, it breaches its obligations stemming from human rights treaties, even when the violation itself was not committed by the state. The State has then violated its obligation, if it tolerates infringements in rights by non-state actors or private individuals. The Maastricht Guidelines on Violations of Economic Social and Cultural Rights determines that:

The obligation to protect includes the states responsibility to ensure that private entities or individuals ...over which they exercise jurisdiction do not deprive individuals of their economic, social and cultural rights.[131]

HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 20; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 7-11; Kozma and Dauer 2001
HYPERLINK http://static.highbeam.com/o/offourbacks/december012001/domesticviolenceastortureintegratingahumanrightsfr/ 15 Jun. 2004.

130 Human Rights Committee *General Comment* 7 U.N. Doc. HRI\GEN\1\Rev.1 at 7 (1994): In addition to the prohibition not to violate human rights, states also have a number of positive obligations. According to the Human Rights Committee "states must ensure an effective protection through some machinery of control. Complaints about ill treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible and the alleged victims themselves have effective remedies at their disposal including the right to obtain compensation; Farrior *supra* note 68 at 302.

131 Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004 at paras. 6 and 18; Finell 2002
HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 9-21; *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983 at 10.3. **The Human Rights Committee** held that states' parties should take specific and effective measures to prevent human rights violations from occurring and establish effective procedures to investigate violations when they do occur. The Commission held "that States' parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".

The duty to exercise the due diligence in relation to abuses by private actors has been reaffirmed by the Human Rights Committee. The Human Rights Committee in its General Comment 16 of 1994 held that states must protect people from:

all ...interferences and attacks whether they emanate from state authorities or from natural or legal persons.[132]

In General Comment 23 of 1994 the Human Rights Committee again held that:

a state party is under an obligation to ensure that the existence and the exercise of (human rights) are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[133]

The doctrine of due diligence to protect the full enjoyment of rights, as stated in the case law confirms that states' have a duty to prevent, investigate and punish violations committed by non-state actors. It is important to note that the primary duty of states is to prevent violations from occurring at all and secondly to investigate and punish. In almost all the recent cases of the Human Rights Commission where there have been violations of fundamental human rights, the committee stressed that states are under an obligation to prevent similar violations from occurring. On 18 September 2003, the Human Rights Committee in the case of *Gi-Jeong Nam v Republic Of Korea* found that *"the state party is under an*

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[132] Human Rights Committee *General Comment 16* U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994); Human Rights Committee *General Comment 23* U.N. Doc. HRI\GEN\1\Rev.1 at 38 (1994); Most recently *Res. 2002/36* on extra judicial, summary or arbitrary executions, particularly, para. 6, where the Commission "Reaffirms the obligation of Governments, to ensure the protection of the inherent right to life of all persons under their jurisdiction and call upon Governments concerned to investigate promptly and thoroughly cases of killings committed in the name of passion or in the name of honour ... and to bring those responsible to justice before a competent, independent and impartial judiciary, and to ensure that such killings are neither condoned nor sanctioned by government officials or personnel". Further, *Resolution 2002/52* on violence against women condemns all acts of gender-based violence *and emphasises the duty on states to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence* against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State, by private persons or by armed groups or warring factions, and to provide access to just and effective remedies and specialised, including medical, assistance to victims" (para. 4). Honour crimes are included in the definition of violence against women (para. 3). See also para. 14 of the resolution which stresses the *affirmative duty* of states to protect and promote human rights of women. See also previous resolutions *1996/49, 1997/44, 1998/52, 1999/42, 2000/45* and *2001/49*. All resolutions except the latest resolution on extra judicial executions were adopted without a vote.

[133] Human Rights Committee *General Comment 23* U.N. Doc. HRI\GEN\1\Rev.1 at 38 (1994).

obligation to ensure that similar violations do not occur in future".[134] In the case of *Judge v Canada* decided on 13 August 2003, the HRC again found that "*the state party has an obligation to ensure that similar violations do not occur in future".* In the case of *Teesdale v Trinidad and Tobago*, the Human Rights Committee held that *"the state party is under an obligation to ensure that similar violations do not occur in the future".*[135]

Importantly in the case of *Lantsov v Russian Federation*, the committee held that *"the state party should take effective measures to ensure that similar violations do not recur in the future ....by taking immediate steps ..."* The Committee further held that *"lack of financial means cannot reduce this responsibility of states"* to prevent violations from occurring.[136] Farrior elaborates further and asserts that:

even in a state with very few resources, there is an obligation to allocate those resources on a basis of non-discrimination. Non-discrimination is a fundamental principle that undergirds virtually all-human rights law. If resources are not allocated to protecting women, for example, from a host of possible abuses, I would argue that the allocation of resources is biased, and therefore the state may be told that it has failed to meet its obligation under international law. Even if a particular state's resources might be so few and the problems it faces so great that it simply cannot address those problems, and that we must therefore refrain

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[134] *Gi-Jeong Nam v Republic of Korea* Views adopted on 28 July 2003, Communication No. 693/1996 (14 February 1996), U.N. Doc. CCPR/C/78/D/693/1996.

[135] *Judge v Canada* Views adopted on 5 August 2003, Communication No. 829/1998 (1 August 1998), U.N. Doc. CCPR/C/78/D/829/1998. For other recent cases determining that states have a priority and duty to prevent violations from occurring see Human Rights Committee 1996 HYPERLINK http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2bc95d21c85f073cc12569e0005a4f02?Opendocument 9 Sep. 2004; also see *Cabal and Bertran v Australia* Views adopted on 7 August 2003, Communication No. 1020/2001 (6 July 2001), UN. Doc No. CCPR/C/78/D/1020/2001; *Casafranca v Peru* Views adopted on 22 July 2003, Communication No. 981/2001 (26 October 1999), UN. Doc. CCPR/C/78/D/981/2001; *Aliev v Ukraine* Views adopted on 7 August 2003, Communication No. 781/1997 (21 September 1997), U.N. Doc. CCPR/C/78/D/781/1997; *Teesdale v Trinidad and Tobago* Views adopted on 1 April 2002, Communication No. 677/1996 (16 March 1995), U.N. Doc. CCPR/C/74/D/677/1996; *Gutiérrez Vivanco v Peru* Views adopted on 26 March 2002, Communication No. 678/1996 (20 March 1995), U.N. Doc. CCPR/C/74/D/678/1996; *Sahadath v Trinidad and Tobago* Views adopted on 2 April 2002, Communication No. No. 684/1996 (13 March 1996), U.N. Doc. CCPR/C/74/D/684/1996; *Boodoo v Trinidad and Tobago* Views adopted on 2 April 2002, Communication No. 721/1996 (13 June 1994), U.N. Doc. CCPR/C/74/D/721/1996; *Sahadeo v Republic of Guyana* Views adopted on 1 November 2001,Communication No. 728/1996 (10 November 1996), U.N. Doc. CCPR/C/73/D/728/1996; *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997; *Chira Vargas-Machuca v Peru* Views adopted on 22 July 2002, Communication No. 906/2000 (15 September 1997), U.N. Doc. CCPR/C/75/D/906/2000.

[136] *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997 at 9.2; Farrior *supra* note 68 at 302.

from criticizing the state for its inaction. Such a situation has not, however, prevented states from being held responsible for allowing torture to continue, even in the case of very poor states with few of the resources necessary to take the steps to stem torture committed directly by state agents. Similarly, such situations should not prevent states from being held responsible for inaction in the face of for example, abuses of physical and mental integrity committed by private individuals.

It has even been argued that the obligation to "ensure" implies a duty to prosecute successfully those who violate human rights. In the case of *Muteba v Zaire* concerning acts of torture in Zaire, *the Human Rights Committee* held that the government of Zaire was under a duty to conduct an enquiry and to punish those found guilty of torture.[137] In the case of *Baboeram-Adhin et al. v. Suriname* concerning extra-legal executions in Suriname, *the Human Rights Committee* urged the government to take effective steps.... "*to investigate the killings and to bring to justice any persons found to be responsible.*[138] Regarding the duty of government to prosecute one could also mention the view adopted by *the Human Rights Committee* in the case of *Almeida de Quinteros v. Uruguay* involving disappearances in Uruguay, in which the Committee held that the state should take effective steps to bring those responsible to justice.[139] A state's *nolle prosequi* (refusal to prosecute) can lead to international responsibility.[140] When it comes to violations of certain fundamental human rights, it is beyond doubt that states have an obligation to prosecute the violators. This is especially true concerning such human rights violation, which at the same time constitute international crimes. Article 5 of The Genocide Convention stipulates that states undertake:

to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular to provide effective penalties for persons guilty of genocide.[141]

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[137] *Muteba v Zaire* Views adopted on 24 July 1984, Communication No. 124/1982 (30 January 1982), U.N. Doc. CCPR/C/22/D/124/1982.

[138] *Baboeram-Adhin et al. v Suriname* Views adopted on 4 April 1985, Communication No. 154/1983 (5 July 1983), U.N. Doc. CCPR/C/24/D/154/1983.

[139] *Almeida de Quinteros v Uruguay* Views adopted on 21 July 1983, Communication No. 107/1981 (17 September 1981), U.N. Doc. CCPR/C/19/D/107/1981.

[140] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 18–19; Meron *supra* note 66 at 379: "The duty to prevent and the duty to punish are critical issues"; *contra* Scharf 1996 *Law and Contemp. Probs.* 59. Scharf asserts that the case law suggests that at a minimum states must conduct an investigation, and impose some form of punishment on those identified as responsible. In additional to a not so strict tone in the views, Scharf bases his conclusion on the fact that states rejected a proposal, which would have required states to prosecute violators, when the ICCPR was negotiated.

[141] *Genocide Convention* at article 5.

The UN Torture Convention als o requires prosecution or extradition.[142] With regards to crimes against humanity there are also several General Assembly resolutions calling for the prosecution of individual violators. [143]

The views of *The Human Rights Committee* mean that:

- States are responsible for human rights abuses by non-state actors if they failed to meet their international obligations. A state is not internationally responsible for a private act of violence *per se* but for its lack of *due diligence* to prevent the incidence of private violence from occurring.[144]
- Human Right treaties must be implemented effectively in line with *the principle of effectiveness.* When human rights conventions establish an obligation of result and that result is frustrated by private violations, the argument for holding a state accountable due to lack of due diligence is compelling. [145]
- In as much as the prohibition of violence against private citizens by private actors is conceived as infringement of human rights and in as much as human rights are seen as "inherent" and "inalienable",[146] it can be said that everyone has a right not to be subjected to violence whether at the hands of a public official or of a private individual.

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[142] *CAT.*

[143] General Assembly *Resolution 2625* U.N. Doc. A/8028 (1970); General Assembly *Resolution 2712* U.N. Doc. A/8233 (1970).

[144] General Assembly *Resolution 2625* U.N. Doc. A/8028 (1970); General Assembly *Resolution 2712* U.N. Doc. A/8233 (1970); Cook *supra* note 58 at 142, 151and 162 and footnote 144; Moore *supra* note 11 in general on duty of due diligence to observe international law when breach originated in private conduct; *Universal Declaration* in general; *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988); *Godinez Cruz Case* Judgment of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989); The Human Rights Committee held the same view in *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983; *Delgado Páez v Colombia* Views adopted on 12 July 1990, Communication No. 195/1985 (4 October 1985), U. N. Doc. CCPR/C/39/D/195/1985; Shelton *supra* note 109; *Vienna Declaration* at Preamble; Cook *supra* note 58 at 142; Danailov *supra* note 58 at 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17–19; Farrior *supra* note 68 at 300-301; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 20; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 7-11.

[145] Danailov *supra* note 58 at 19; Meron *supra* note 66 at 263.

[146] The Preamble to the ICCPR and the Convention against Torture refer to "the equal and inalienable rights of all members of the human family" and state that these rights "derive from the inherent dignity of the human person". The Preamble to the Universal Declaration of Human Rights similarly refers to "inalienable" rights and to the "inherent" dignity of human beings.

- The obligation of states parties to international human rights treaties to respect and ensure the violation of human rights entails not only an obligation to prevent the commission of acts of violence by public officials, but also an obligation to take measures to protect people under their jurisdiction against acts of violence committed by private individuals. These measures include ensuring that the framework of the law provides adequate protection and taking reasonable steps to avoid a risk of human rights violations of which the authorities know or ought to know.
- In the event of a human rights violation, the victim must have an effective remedy and the state may be required to provide appropriate compensation to the victim or his/her family.

In summary it can be said that legal responsibility arises for private acts of violence when a state breaches its international human rights law obligations. Such obligations can be negative or positive and can give rise to direct and indirect responsibilities. Direct responsibility follows when the state itself is the agent of harm and indirect responsibility follows when private actors are the perpetrators. A state bears liability in failing to act to prevent an anticipated violation of human rights. The pervasive perpetual violating behaviour of private individuals may be indicative of a state's lack of due diligence.[147]

International human rights tribunals have expanded the law of state responsibility beyond its classical origins through international human rights conventions. One cannot but conclude that the state is responsible for human rights violations committed by non-state actors when it fails to control, prevent, investigate, punish and remedy their actions in contrast with its international human rights obligations.[148]

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[147] Meron *supra* note 66 at 263: "Evidence that state does not intend to diligently prohibit and punish human rights violations may reinforce independent evidence of complicity or wilful negligence. When state officers are inactive in the prevention or prosecution of reasonably predictable or suspected human rights violations, state responsibility arises for the state's omission. In international human rights law as in classical international law concerning aliens, the inaction of a state under the duty of reasonable prevention or prosecution is conduct attributable to the state regardless of the immediate perpetrator of the wrong".

3.3.1.5 Implimentation and monitoring of international conventions

Human Rights Conventions created new standards and obligations to which all ratifying states should conform. The most effective way to implement human rights on a global scale is through each country's own legal system.[149] Human rights conventions require that parties incorporate relevant obligations into their domestic law and that they provide appropriate local remedies. This provides the rationale for the common requirement that domestic remedies must be exhausted before an international body will investigate a complaint of human rights violations.

Actual practical implementation is key to making the system of international protection of human rights effective. The approach adopted at the universal level by the United Nations general assembly had the following key features:[150]

- the establishment of specialist bodies charged with the oversight of treaty performance, each concerned with a specific treaty.

- regular reporting obligations for states' parties. The assumption is that the examination of reports would lead to a dialogue between each state and the relevant treaty body and to progressive improvements in compliance with the relevant treaty.

The first such body, the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), first met in January 1970 and by 1991, five of the six major human rights treaties had established a treaty monitoring body in the form of a supervisory quasi-judicial institution called a Committee.[151]

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[148] Meron *supra* note 66 at 263.; Human Rights Committee *General Comment 23* U.N. Doc. HRI\GEN\1\Rev.1 at 38 (1994).

[149] UN 2003 HYPERLINK http://www.unog.ch/news2/documents/newsen/ct0322e.htm 17 Jun. 2004.

[150] Alston and Crawford (eds) *Future of UN Human Rights Treaty Monitoring* 1; Haas *Human Rights and International Action* 1; Hannum *supra* note 58 at chapter 2.

[151] Alston and Crawford *supra* note 150 at 1.

Over the years the treaty bodies have developed various methods of considering reports and have pioneered the institution of general comments.[152] In light of the experience provided by thirty three years of state reporting, one is unfortunately forced to conclude that the reporting system has not been very successful, specifically due to the large number of overdue reports. On the other hand, the jurisprudence that was created by the various committees and the individual complaint procedures have been successful.[153]

Figure 2: Participation in UN Human Rights Treaties
(as at 10 October 2003)

Treaty	Date of Adoption	Time to enter into force (number of parties required)	Time to reach 100 parties	Present number of parties
CERD	21 Dec 1965	3 yr 1 m (27)	12 yr 10 m	168
CESCR	16 Dec 1966	9 yr 1 m (35)	14 yr 10 m	147
ICCPR	16 Dec 1966	9 yr 3 m (35)	15 yr 1 m	149
Optional Protocol	16 Dec 1966	9 yr 3 m (10)	----------	104
CEDAW	18 Dec 1979	1 yr 9 m (20)	10 yr 7 m	173
CAT	10 Dec 1984	2 yr 6 m (20)	11 yr 6 m	133
CRC	20 Nov 1989	11 m (20)	2 yr 1 m	192

Notes : Acronyms, for the UN human rights treaties are CERD – Convention on the Elimination of Racial Discriminations; CESCR – International Covenant on Economic, Social and Cultural Rights; ICCPR – International Covenant on Civil and Political Rights; CEDAW – Convention on the Elimination of Discrimination against Women; CAT – Convention against Torture; CRC – Convention on the Rights of the Child.[154]

[152] Alston and Crawford *supra* note 150 at 3-4.
[153] *Ibid.*; Meron *supra* note 66 at 385.
[154] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003: Participation in the treaties themselves have grown exponentially as Table A shows; Alston and Crawford *supra* note 150 at 5.

Figure 3: Overdue reports under UN Human Rights Treaties
(as at 10 October 2003)

	Number of Parties		Parties with overdue reports		Total overdue reports
Treaty	2003	1998	2003	1998	2003
CERD	168	151	467	124	467
CESCR	175	138	65	97	175
ICCPR	166	140	112	97	166
CEDAW	173	162	250	134	250
CAT	133	110	36	72	147
CRC	192	191	221	124	221

Notes : Acronyms, for the UN human rights treaties are CERD – Convention on the Elimination of Racial Discriminations; CESCR – International Covenant on Economic, Social and Cultural Rights; ICCPR – International Covenant on Civil and Political Rights; CEDAW – Convention on the Elimination of Discrimination against Women; CAT – Convention against Torture; CRC-Convention on the Rights of the Child.

The underlying problem of the outstanding reports is the limited will of states' parties to participate in and improve the system. There is a view that inclusion of more states' parties is to be preferred to the integrity of the treaty, and this manifests itself in:

- lack of reaction by many states,
- questionable reservations,
- overdue or inadequate reports,
- failure of compliance.

For those dedicated to the application of universal human rights standards, the position regarding overdue reports can appear negative. [155] The international human rights system is, however, capable of responding strongly on occasion.[156] When North Korea purported to withdraw from the ICCPR, the position taken by the United Nations as depositary, by the Human Rights Committee itself and by

[155] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003; Alston and Crawford *supra* note 150 at 10.
[156] *Ibid.*

member states was that it could not validly do so [157] and it continues to be treated as a member *malgré lui.*[158] After the 9/11/2001 attacks on the Twin Towers in New York city, the system acted with one voice in condemning the Taliban and their leaders for harbouring terrorists in Afghanistan and supported the American military action that followed.[159]

3.3.1.5.1 The Human Rights Committee

3.3.1.5.1.1 Background

The International Covenant on Civil and Political Rights ("ICCPR") was adopted by the UN General Assembly in 1966.[160] The enforcement body established under this treaty is the Human Rights Committee ("HRC").[161] The Committee has three main functions:

- It considers periodic state reports.[162]
- In respect of those states that have made declarations under *Article 41* of ICCPR, the HRC considers inter-state communications.[163]
- The HRC considers communications submitted by individuals from states like South Africa that have accepted the First Optional Protocol *("ICCPR-OP1")* to the Covenant.

The HRC has an extended mandate in respect of states like South Africa that have ratified the Second Optional Protocol to the ICCPR *("ICCPROP2").*[164] Views

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[157] In response to an attempted withdrawal by the democratic People's Republic of Korea from the ICCPR, the Secretary-General ruled that 'a withdrawal from the Covenant would not appear possible unless all States' parties to the Covenant agree with such a withdrawal'. Human Rights Committee *General Comment 26* U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (1997).

[158] The position under the Optional Protocol is of course different: Article 14 specifically allows withdrawal.

[159] Collective military action based on Chapter Seven of the UN Charter is the ultimate defence mechanism for the protection of human rights.

[160] *ICCPR*; Viloen 1997 *The realisation of human rights in Africa* 90.

[161] *ICCPR* art. 28.

[162] *ICCPR* art. 40.

[163] *ICCPR* art. 41.

[164] *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex, Supp. No. 49 at 207, U.N. Doc. A/44/49 (1989) (entered into force Jul. 11, 1991) (hereinafter referred to as "ICCPR-OP2").

issued by the Committee that impose obligations on a state party now include a clause to the effect that a state, by becoming a party to the protocol, has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to Article 2 of the ICCPR , the State party has undertaken to ensure to all individuals within its territory the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Consequently the Committee requests from the state party, within ninety days of the issuance of views, information about what measures it has taken to give effect to those views.[165]

States' parties to the Second Optional Protocol must report to the HRC on measures which they have adopted to give effect to the provisions of the Protocol.[166] In respect of states' parties that have accepted the HRC's competence to consider inter-state and individual communications, other states and individuals may base communications against states that have ratified the provisions of the Second Optional Protocol.[167]

3.3.1.5.1.2 Composition

The HRC is composed of eighteen members who are elected by the state parties to the ICCPR for renewable terms of four years.[168]

3.3.1.5.1.3 Ratification, reservation and derogation

South Africa ratified the ICCPR [169] on 10 March 1999 without any reservations and the ICCPR Optional Protocol 1 & 2 on 28 November 2002. South Africa also

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[165] *ICCPR* art. 40; Viljoen *supra* note 160 at 91.

[166] *ICCPR-OP1* entered into force on 23 March 1976, simultaneously with the ICCPR. The Preamble of the Optional Protocol states that it is aimed at further achieving the purpose of the ICCPR and at improving implementation thereof. Art 1 provides that states' parties to the Protocol recognise the competence of the HRC "to receive and consider communications from individuals subject to its jurisdiction" (*ICCPR-OP2* at article 4).

[167] *ICCPR-OP2* art. 4 and 5.

[168] ICCPR art. 28, 29, 30 and 32; Current committee members can be seen at Office of the Office of the UNHCHR 2004(a) HYPERLINK http://www.unhchr.ch/tbs/doc.nsf/Committeefrset?OpenFrameSet 24 Jun. 2004; Viljoen *supra* note 160 at 91.

legally recognized the committee to receive and process individual complaints and communications.[170]

3.3.1.5.1.4 Reporting obligations

The primary duty of states that have ratified the ICCPR is to present initial reports within two years of ratification and periodic reports (every five years thereafter). Initial reporting is required by Article 40 of ICCRP and periodic reporting was introduced by the Committee.[171]

3.3.1.5.1.5 Realisation

As far as general international realization goes it can be said that much progress have been made in the protection of fundamental human rights.[172] Almost two thirds of the states' parties to the ICCPR have ratified ICCPR-OP1 which gives the HRC jurisdiction over the states' implementation and enforcement of the ICCPR.[173] Well over a billion people inhabit the states that have ratified the ICCPR OP1. In the HRC's annual report of 2002, forty six cases were reported that were successfully decided.[174] One of the main problems is that many states do not respond to requests made by the Committee.[175]

The more indirect influence of the ICCPR is more difficult to assess. It has come to be accepted as one of the primary international human rights instruments and has served as role model for human rights standard setting in the domestic

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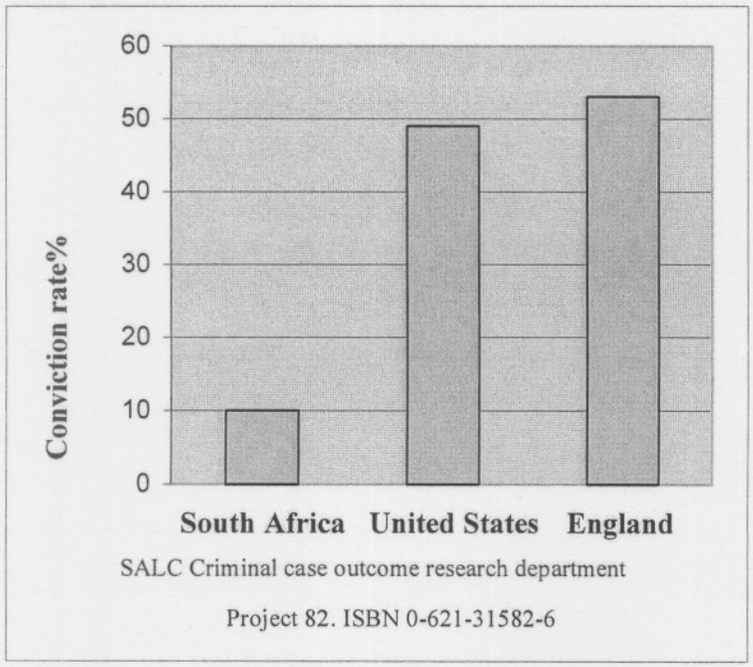
[169] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
[170] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003;
[171] ICCPR art. 40; It does not faal within the ambit of this study to analize reports submitted to the monitoring bodies by South Africa. What this section *inter alia* seeks to establish is that the South African government are bound by international law to provide effective protection to its citizens.
[172] Human Rights Committee 2003 HYPERLINK http://www.unhchr.ch/pdf/annualrep03.pdf 17Jun.2004 in general.
[173] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
[174] Human Rights Committee 1996 HYPERLINK http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2bc95d21c85f073cc12569e0005a4f02?Opendocument 9 Sep. 2004.
[175] *Ibid;* Viljoen *supra* note 160 at 103.

sphere. Another indirect form of influence is the judicial reliance on ICCPR provisions as interpretative guides.[176]

In terms of realizing the objectives and purposes of the ICCPR in the South African context, the crime statistics paint a bleak picture. The most basic human right to life to security and to be free from violence and torture are being violated on a daily basis in South Africa; with the most vulnerable in our society oftentimes being the victims. In a survey conducted by the South African Law Commission regarding conviction rates, it found that of 100 cases of violent crimes (e.g. murder, rape of women under 18, rape of women over 18 and robbery with aggravating circumstances) reported to the South African Police Services, 75 cases do not go to court, 10 are withdrawn, 5 are not guilty, 4 are trial ongoing, 6 are found guilty and 10% are withdrawn in court. [177]

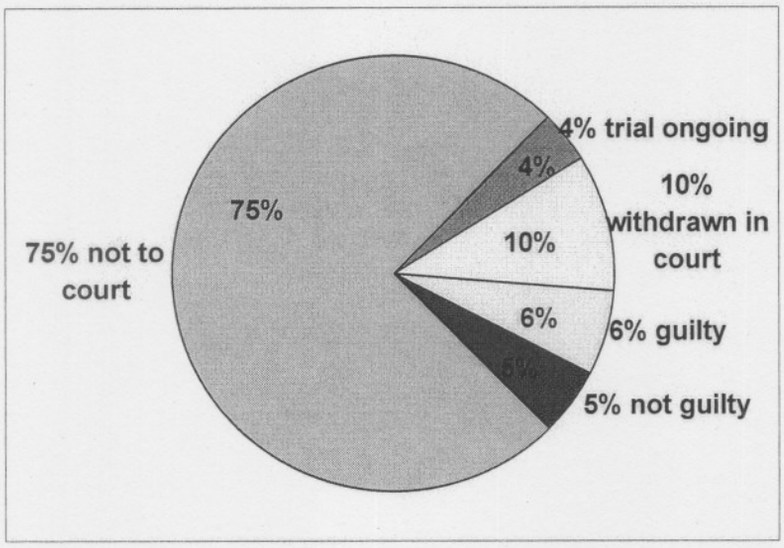
Figure 4: South African conviction rate %



[176] UN 2003 HYPERLINK http://www.unog.ch/news2/documents/newsen/ct0322e.htm 17 Jun. 2004. National tribunals increasingly referred to the Committee's decisions and in some instances the decisions informed the *ratio dicidendi* of national courts; *Ex parte Gauteng Provincial Legislature* 1996 (3) SA 165 (CC) at para. 71; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at [63]-[67] and *S v Williams and Others* 1995 (3) SA 632 (CC) at [21] and [26].

If one compares South Africa's conviction rate for murder with that of the United States and England it looks like is this :

Figure 5: South African conviction rate compared with the United States and the United Kingdom



In the words of the President of the South African Constitutional court, Justice Chaskalsen, in the case of *S. v. Makwanyane*:

> The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is currently lacking in our criminal justice system and it is at this level and through addressing the causes of crime that the state must seek to combat lawlessness.[178]

It is now almost nine years since the Makwanyane case and the crime statistics have not improved. If anything, crime has risen dramatically. Almost all South African citizens have in some way or another been affected by violent crime. Without effective policing and prosecution, crime is bound to flourish. Prevention, investigation, prosecution and punishment of violators will have to improve significantly in South Africa.

The South African legal framework and human rights efforts will be discussed in detail in chapter six and seven of this study.

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[177] South African Law Commission *Conviction Rates* 14. When dealing with the realisation of ICCPR obligations by South Africa this study specifically and intentionally only focuses on the right to security and to be free from violence as agreed to in the ICCPR.

3.3.1.5.2 The Committee on Economic, Social and Cultural Rights

3.3.1.5.2.1 Background to and functions of the committee

The International Covenant on Economic, Social and Cultural rights ("ICESCR") is one of the main human rights treaties that converted the declarations of the Universal Declaration of Human Rights into binding legal obligations. The ICESCR was adopted in 1966 and entered into force in 1976. Supervision of the treaty is by means of states' reporting. A supervisory body, the Committee On Economic, Social and Cultural Rights (the "ICESCR Committee"), is responsible for the examination of state reports.[179]

3.3.1.5.2.2 Composition

The eighteen members of the ICESCR Committee are elected by all ratifying members of the ICESCR. In electing members, "due consideration" is to be given to "equitable geographical distribution and to the representation of different forms of social and legal systems This was interpreted as allowing each of the five regional groupings three members to the Committee, with the additional three being divided between Latin America, Africa and WEO states.[180]

3.3.1.5.2.3 Ratification

South Africa ratified ICESCR on 4 October 1994 without any reservations. [181]

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[178] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 443.

[179] *ICESCR*; Viljoen *supra* note 160 at 106.

[180] When ratifications by region are considered, the division of UN members into five regional units, as grouped together mainly for lobbying and electoral purposes, is adopted in this study. The five regions are the African, Asian, Eastern, European, Latin America and Caribbean and the "Western and Other" ("WEO") unit. While the first four geographical groupings are more or less self-explanatory, the last is quite a diverse conglomerate of nations. Current committee members can be seen at Office of the UNHCHR 2004(a) HYPERLINK http://www.unhchr.ch/tbs/doc.nsf/Committeefrset?OpenFrameSet 24 Jun. 2004; Viljoen *supra* note 160 at 106.

[181] Office of the UNHCHR 2004(b) HYPERLINK http://www.unh.chr.ch/pdf/report.pdf 20 Oct. 2003.

3.3.1.5.2.4 Reporting obligations

An Optional Protocol to ICESCR that will allow for individual complaints is being considered. If implemented, it will convert the approach from monitoring of "*progressive realisation* " to a "*violations"* based approach.

3.3.1.5.2.5 Realisation

Generally worldwide conditions of poverty, illiteracy and general underdevelopment testify to the failure of many developing countries to secure viable socio-economic environments to their citizens. In South Africa on the other hand, enormous progress has been made. Well over 1 400 000 houses have been built for the poor.[182] More people than ever have electricity and running water.

3.3.1.5.3 The Committee on the Elimination of Discrimination Against Women

3.3.1.5.3.1 Background

Various human rights instruments have been adopted to deal with aspects of the position of women around the world. The most comprehensive of these is the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). Others are the Convention on the Political Rights of Women,[183] the ILO Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value, the Convention on Consent to Marriage,[184] Minimum Age for

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[182] Sapa *Beeld* 6 Oct. 2003 8: "Die voormalige minister van behuising me. Sankie Mthembi-Mahanye word vandag in Rio De Janeiro vereer vir haar rol in die verskaffing van meer as 'n miljoen huise binne agt jaar.....sy word vereer vir die verskaffing van 1,45 miljoen huise ter waarde van 20 miljard rand. Dit beteken dat 6 miljoen mense 'n dak oor hulle kop gekry het".

[183] *Convention on the Political Rights of Women.*

[184] *Equal Remuneration Convention* Jun. 6, 1951, ILO No. 100, 165 U.N.T.S. 303 (entered into force May 23, 1953).

Marriage and registration of Marriages and the Convention on the Nationality of Married Women.[185]

3.3.1.5.3.2 Composition and functions

The Committee on the Elimination of Discrimination Against Women ("the CEDAW Committee") consists of 23 experts, elected by the states' parties to CEDAW[186] that meets yearly to consider state reports submitted in terms of CEDAW.[187] The Committee may make suggestions and recommendations based on the examination of reports and information received from the various states' parties to CEDAW.[188] The suggestions and recommendations of the committee are contained in the Committee's Annual Report.[189]

3.3.1.5.3.3 Ratification

As at 10 October 2003, CEDAW has been ratified by 174 states. South Africa ratified CEDAW on 14 January 1996[190] without any reservations. South Africa has at 10 October 2003 not ratified CEDAW OP.[191]

3.3.1.5.3.4 Reporting

On 10 October 2003 there were a total of 250 outstanding reports.[192]

3.3.1.5.3.5 Realisation

Sexual inequality is reinforced by custom and culture in most of South Africa. Women continue to suffer pervasive and perpetual humiliation and violation at the hands of murderers and rapists in South Africa. On Friday 10 October 2003, a

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185 *Convention on the Nationality of Married Women;* Viljoen *supra* note 160 at 109.
186 *CEDAW* art. 17; Viljoen *supra* note 160 at 111.
187 *CEDAW* art. 20.
188 *CEDAW* art 21(1).
189 *Ibid.*; Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
190 Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
191 *Ibid.*
192 Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.

daily newspaper the Beeld carried as front page story the rape and murder of the eighteen year old Tanya Flowerday who was sold to two Nigerian men for R3000 (three thousand rand) by a friend. The men repeatedly raped and assaulted Tanya while video taping the events as a "snuff movie". When the violent rape stopped, Tanya was killed. Officers that found the body said the body looked like it was involved in a car accident. Despite the seriousness of the offence the Police did not investigate the matter seriously until there was a public outcry. On 13 October 2003, Radio Jacaranda News reported that another man was arrested in the Western Cape for raping a three-month-old baby girl. The aforementioned are not isolated cases in South Africa but part of a pervasive criminal trend that continues to plague South Africa. Women in South Africa are not enjoying their fundamental human rights and continue to suffer gross and most severe violations of their fundamental human rights at the hands of criminals. [193]

3.3.1.5.4 The Committee on the Elimination of Racial Discrimination

3.3.1.4.4.1 Background and functions

The first comprehensive and binding multilateral treaty concluded under UN auspices was the Convention of the Elimination of Racial Discrimination ("CERD"). It was adopted on 21 December 1965.

A CERD Committee was instituted in terms of the convention. The CERD Committee consists of eighteen independent suitably qualified experts, nominated and elected by the various member states.[194] The main functions of the committee are:

- considering and evaluating progress reports presented to it by states' parties within a year of ratification, and thereafter, every two years;[195]
- considering inter-state complaints;[196]

[193] Basson *Beeld* 10 Oct. 2003 1; Viljoen *supra* note 160 at 193.
[194] *CERD* art. 8; Viljoen *supra* note 160 at 86.
[195] *CERD* art. 9.
[196] *CERD* art. 11–13.

- in the case of states like South Africa, that have accepted the committee's jurisdiction to do so, it examines communications submitted to it by individuals or groups.[197]

3.3.1.4.4.2 Composition

Committee members are elected by states' parties for terms of four years. In the establishment of the Committee, three factors must be considered:

- equitable geographical distribution,
- representation of different forms of civilization, and
- representation of the principal legal systems.[198]

3.3.1.4.4.3 Ratification

South Africa signed the Convention on 9 January 1999 [199] without reservation. Some fifty countries worldwide have entered reservations or made declarations on accession or ratification.

3.3.1.4.4.4 State reporting

As at 10 October 2003, there were 467 overdue reports outstanding.[200]

3.3.1.4.4.5 Individual communications

The CERD Committee examines communications in respect of those states that have made a declaration in terms of Article 14.[201]

3.3.1.4.4.6 Realisation

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197 *CERD* art.14.
198 *CERD* art. 8(2); Viljoen *supra* note 160 at 87.
199 Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
200 Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
201 *CERD* art. 14.

The unified opposition against Apartheid that led to the birth of the new South Africa, is one of the great achievements of the Convention. South Africa has made great progress in racially integrating all sectors of society since 1994's first general elections.

Unfortunately few states complied with their primary duty under the Convention to submit state reports.

3.3.1.5.5 The Committee Against Torture

3.3.1.4.5.1 Background and function

The UN General Assembly on 10 December 1984 adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment ("CAT"). [202] The main aim of the Convention is to provide measures to strengthen the prohibition of torture and cruel and inhumane treatment of human beings.[203] The Committee Against Torture ("CAT Committee") was established to implement the provisions of CAT.[204]

3.3.1.4.5.2 Composition

Ten experts are selected as Committee members for renewable terms of four years by the ratifying state parties to CAT.[205] The first CAT Committee was elected in 1987. [206]

3.3.1.4.5.3 Ratification

South Africa ratified CAT on 9 January 1999 without any reservation. One hundred and thirty three states ratified the convention.[207]

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202 *CAT.*
203 *CAT* generally.
204 *CAT* art. 17 and 18.
205 *CAT* art. 17(1) and 17(5).

3.3.1.4.5.4 Reporting obligations

States must report on measures taken to give effect to the treaty within one year of ratifying it. Thereafter, states must report every four years.[208] As is the case of reporting to other treaty bodies, many states lag behind in their reporting duty.

3.3.1.4.5.5 Confidential enquiry

Article 20 of CAT provides for an investigative procedure. [209] When the CAT Committee receives "*reliable information which appears to contain well-founded indications that torture is being practised systematically in the territory of a state party*",[210] the Committee may investigate and report on the matter. If the information meets the threshold test contained in Article 20(1), it must refer the matter to the state to seek its input. The committee may obtain information from other sources in its inquiry. An *in loco* inspection visit to the state concerned may only take place with the state's consent. [211] Once the inquiry is completed, the results are forwarded to the state party concerned. The state party then has an opportunity to comment on the report of the committee. The CAT Committee may then publish the report in its annual report.[212] The procedure in terms of Article 20 is binding on all ratifying states.[213]

3.3.3.4.5.6 Individual complaints

Article 22(1) of the CAT Convention determines that state parties may recognize the Committee's competence to receive communications from or on behalf of

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206 *CAT* at art. 17(1); Current committee members can be seen at Office of the UNHCHR 2004(a) HYPERLINK http://www.unhchr.ch/tbs/doc.nsf/Committeefrset?OpenFrameSet 24 Jun. 2004; Viljoen *supra* note 160 at 118.

207 133 of the total of 192 states (Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003).

208 *CAT* art. 19(1).

209 *CAT* art. 20.

210 *CAT* art. 20(1).

211 *CAT* art. 20(3).

212 *CAT* art. 20(3).

213 Unless the state explicitly opts out; Viljoen *supra* note 160 at 120-121.

individuals.[214] This article read with Rule 107(1)(b) of the Committee's Rules of procedure provides that the communication must be submitted by :

- the individual himself, or
- by his relatives or designated representative, or
- by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf.[215]

3.3.1.4.5.7 Realisation

The most promising aspect of implementation under CAT is the Article 20 investigations. In the absence of an effectively functional judicial system, CAT provides important redress possibilities in individual cases.

In South Africa the ideals as set out in CAT are far from being achieved. Violent criminals torture and maim innocent citizens on a daily basis.[216] Since 1991, more than 1580 white farmers have been brutally butchered in South-Africa, many of them were tortured for hours on end with hot irons and boiling water.

3.3.1.4.6 The Committee on the Rights of the Child

3.3.1.4.6.1 Backgound and functions

One of the most recent conventions adopted under the auspices of the UN is the Convention on the Rights of the Child ("CRC").[217] The final version of the Convention was adopted in November 1989. The Convention entered into force in September 1990, less than a year after its adoption.

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214 *CAT* art. 22.
215 *CAT* art. 22; Viljoen *supra* note 160 at 121-123.
216 Genocide Watch 2002 HYPERLINK http://www.genocidewatch.org/BoersSlain01.htm 17 Jun. 2004.
217 *CRC.*

The Committee on the Rights of the Child is the enforcement mechanism under CRC and reporting by states' parties is the main method of ensuring compliance with the provisions of the CRC.

3.3.1.4.6.2 Composition

The Committee consists of ten experts in the field of children's rights and is elected by states' parties. [218] Members are elected for a term of four years.[219] In electing members to the Committee, consideration should be given to equitable geographical distribution, as well as to the principal legal systems.[220]

3.3.1.4.6. 3 Ratification and reservations

As at 10 October 2003, 192 states were party to the convention culminating in universal ratification of the CRC.[221]

The Republic of South Africa ratified CRC on 16 July 1995 without any reservations and CRC OPAC on 6 February 2002.

3.3.1.4.6.4 Reporting obligations

On 31 December 1995 a total of 141 reports under the convention were overdue.[222]

3.3.1.4.6.5 Realisation

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[218] *CRC* at Article 43(2).
[219] *CRC* at Article 43(b); Current committee members can be seen at Office of the UNHCHR 2004(a) HYPERLINK http://www.unhchr.ch/tbs/doc.nsf/Committeefrset?OpenFrameSet 24 Jun. 2004.
[220] *CRC* at article 43(2); Viljoen *supra* note 160 at 124-125.
[221] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.
[222] Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.

In South Africa the state of aids orphans has reached epidemic proportions. The news is full of young children being sexually abused and murdered. To realize the objects set out in CRC much proactive work and planning still needs to take place in South Africa.

All six of the major human rights treaties require states to produce reports in compliance with the treaty obligations and to submit them to the treaty monitoring bodies. When the human rights treaties were introduced, enforcement was intended largely to depend on this system of state reporting. According to the original rationale, state reports could further human rights protection by serving as an exercise in internal self-analysis and self-motivated change, followed by scrutiny and exposure by independent expert bodies which would also encourage change. In practice, the process of drafting state reports is generally understood as a bureaucratic exercise and not as an opportunity for self-analysis and the amendment of national laws or practices.

In the case of three of the six human rights treaties, provision was also made for individual complaints of treaty violations as a secondary means of enforcement. If states do not voluntarily adhere to treaty obligations or participate in a viable state reporting scheme, it might be expected that individual victims would serve to activate the system.[223]

South Africa ratified all six of the major International Conventions without any reservations. South Africa is legally bound to ensure and protect the right to life and the right to security in terms of its international obligations.

3.3.1.5 Limitation on state responsibility

As stated above, state parties may enter formal reservations to certain obligations of international conventions at the time of ratification.[224] International conventions

[223] *ICCPR-OP1*; *CERD* at article 14; *CAT* at article 22.

[224] Galligan and Samford *supra* note 5 at 78. Such reservations negate the treaty's central purpose of identity overriding international human rights standards. The international human rights community has emphasized universal ratification as the primary goal. Reservations have been tolerated in order to achieve that goal. While such reservations are now coming under increasing scrutiny for their legal validity by the human rights treaty monitoring bodies,

allow reservations that are compatible with a treaty's objects and purposes. Article 19 of the Viena Convention on the Law of Treaties states that a state may enter a reservation unless *"the reservation is prohibited by the treaty*, or *the treaty only provides for specified reservations"* or if the reservation *is "incompatible with the object and purpose of the treaty."*[225]

In determining whether a treaty is legally binding on a particular country, it is important to ascertain:

- whether the treaty contains express language requiring the parties to respect the particular human rights at issue;
- whether the state involved ratified the treaty,
- whether the state in question has filed any reservations.

A state may also claim a *"margin of appreciation"* for the application of its international human rights obligations to its specific circumstances.[226] The margin of appreciation granted to a state may range from total deference of the state to a very stringent standard of scrutiny, by which an international tribunal investigates compliance in close detail. [227]

Cook asserts that:

The breadth of a state's margin of appreciation is proportional to the universality of the human rights. The wider the margin of apreciation allowed, the less the commitment binds universally. [228]

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they are not seriously challenged by other state parties, the UN Commission on Human Rights or the General Assembly. The political will to confront the limit the scope and nature of reservations to human rights treaties does not exist.

225 *Vienna Convention* at article 19; Cook *supra* note 58 at 173.

226 Cook *supra* note 58 at 173: "...subject to the rule that a treaty member may not invoke its internal law as justification for its failure to perform an international treaty obligation".; See generally International Court of Justice 1951 *I.C.J.* 15.

227 Cook *supra* note 58 at 173; Cook 1990 *Va. J. Int'l L.* 643, 693-696 and 714. In the Women's Convention, for instance, the compulsory jurisdiction clause favouring the ICJ is widely reserved.

228 Cook *supra* note 58 at 173; *Vienna Convention* at 27; also see Macdonald *Margin of Appreciation* 84: Judge Ronald St. J. Macdonald of the European Court of Human Rights has observed that the "the margin of appreciation can be seen as a label about the appropriate scope of [international judicial] supervisory review. The scope of review refers to the intensity of judicial scrutiny of a challenged decision In order to see if it amounts to an unjustifiable breach of standards".

Generally it can be stated that a state is legally bound when it ratified or signed an international convention without explicitly entering a formal reservation.

3.3.2 State responsibility under Customary International Law

A second source of international human rights law is international custom. In order to establish the existence of a rule of customary international law, it is necessary to demonstrate a widespread practice by states conforming to the rule, with evidence that they have followed the practice because the state believes that it is under a normative obligation to comply with that rule.[229] Customary international law comprises two components, consistent state practice and *opinio iuris.*[230] Customary international law is generally binding upon all states, regardless of whether they have expressly consented. Customary Law Doctrines of state responsibility are applicable to violations of human rights, which is of

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[229] Hannum *supra* note 58 at chapter 3: "The concept to customary law is technical and proving the existence of a customary rule can be difficult. The 1987 *Restatement (Third) of the Foreign Relations Law of the United States* takes the position that customary international law protects at least certain basic human rights. Section 702 of the *Restatement* provides, "A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights". Even if particular international human rights instruments such as treaties or declarations are not *legally* binding on a particular state (either because the state has not ratified the treaty or because the particular rule is not recognized as customary law), such instruments are likely to possess a moral or political force that may be useful in persuading government officials to observe human rights standards"; Dugard *International law* at 27 -32.

[230] Harris *Cases and Materials* 26; Charlesworth and Chinkin *Boundaries of International Law* 63: "State practice may take different forms, including treaties, decision of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organisation and policy statements"; Randelzhofer and Thomuschat *State Responsibility* foreword: "...even outside a specific treaty regime a private person may be entitled to claim reparation for harm sustained by them as a consequence of a violation of a human rights standards encapsulated in customary law".

particular importance for countries that have not ratified human rights conventions.[231]

The law of state responsibility has evolved over the centuries as a principal area of concern within public international law and has become the subject of authoritative codification.[232] Under a U.N. General Assembly mandate, the International Law Commission (ILC) produced Draft Articles on State Responsibility. The General Assembly adopted Part 1 of the Draft Articles (Articles 1-35) between 1973 and 1980. The second reading of the draft Articles on International state responsibility was concluded in 2001.[233] According to Draft Article 3:

There is an internationally wrongful act of a State when :

a. Conduct consisting of an action or omission is attributable to the State under international law; and
b. That conduct constitutes a breach of an international obligation of the State.[234]

Article 11(1) of the ILC Draft Articles states that :

the conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law. [235]

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[231] Legal Information Institute ? HYPERLINK http://www.law.cornell.edu/topics/international.html 23 Oct. 2003; ICRC ? HYPERLINK http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:Treaties_and_customary_law?OpenDocument 17 Jun. 2004.

[232] Cook *supra* note 58 at 142; Danailov *supra* note 58 at 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 14; Farrior *supra* note 68 at 301.

[233] International Law Commission *Report, 53rd Sess.* U.N. Doc. A/56/10 (2001).

[234] International Law Commission *Draft Articles* U.N. Doc. A/CN.4/I.600 (2000); Crawford, Bodeau and Peel 2000 *Am. J. Int'l L.* in general; Crawford 2000 HYPERLINK http://www.asil.org/ajil/Crawford.htm 18 Aug. 2004; Cook *supra* note 58 at 142; Danailov *supra* note 58 at 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 14; Farrior *supra* note 68 at 301: "Conduct is attributable to a state in the discharge of its executive, legislative, or judicial power by acts of omissions. It has been emphasized, however, that allocating fault among the various agents of the state has little international consequence. Rather, one should ask whether in the given case the system of administration has produced a result, which is compatible with the pertinent principle or standard of international law. In many instances, the source of the breach will be a particular official or a particular organ such as the judiciary. However, in a number of important cases the breach of international law is the product of a combination of factors ... In such cases it is the system or general policy, and the implementation thereof, which is in issue, rather than responsibility for the acts of particular officials or particular types of organs".

Under the *Draft Articles*, acts of private individuals not acting on behalf of the state are not attributable to the state but state responsibility is triggered when the state breaches its obligation under international law.[236] Article 16 provides that:

(t)here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17 states that:

an act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, convention or other, of that obligation.

The word "act" is interpreted as including "omission". It is the omission on the part of the state, not the act by the private actor for which the state may be responsible.[237]

A number of subsequent draft Articles, address a wide range of international legal obligations relevant to human rights protection: an obligation of conduct *(Article 20)*, an obligation of results *(Article 21)* and an obligation to prevent a given event *(Article 23)*. Circumstances relieving the state of responsibility include force majeure and fortuitous events *(Article 31)* and necessity *(Article 33)*, but such circumstances do not necessarily preclude compensation for damage caused by the wrongful act *(Article35)*.[238]

Under customary international law there are a number of *obligatio erga omnes* and peremptory norms *jus cogens* that states must adhere to. [239] International law

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[235] Cook supra note 58 at 143.
[236] Farrior *supra* note 68 at 301.
[237] Farrior *supra* note 68 at 301.
[238] Farrior *supra* note 68 at 301.
[239] Bassiouni 1996 *Law & Contemp. Probs.* 63-74 at 67: "The term *"jus cogens"* means *"the compelling law"* and as such a jus cogens norm holds the highest hierarchical position among all other norms and principles. As a consequence of that standing jus cogens norms are deemed to be peremptory and non derogable".; Meron *supra* note 66 at 373, 381; International Law Commission *Report, 50th Sess.* U.N. Doc. A/53/10 (1998) at para. 3310. *Jus cogens* norms apply to all states as peremptory norms of customary international law (*Vienna Convention* at articles 53 and 64). The status of *jus cogens* is, however, unclear, as questions are raised both as to its content and even as to its mere existence. Despite this lack of clarity at least the prohibitions against genocide, slavery, murder, torture or cruel, inhuman or degrading treatment or punishment and the prohibition of retroactive penal measures can be

recognizes a number of principles that attach legal responsibility to a state for acts or omissions of private persons that can be regarded as customary law. Of these customary principles,[240] the lack of due diligence in the control of private individuals is the most relevant. States are obliged in accordance with the duty to exercise due diligence to take such measure of prevention that a well administered government could be expected to take in similar circumstances.[241] Others obligations include state agency, ratification or adoption,[242] state complicity in wrongs precipitated by private actors[243] and state failure to exercise due diligence in control of private persons.[244] The exhaustion of local remedies,

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regarded as *jus cogens;* American Law Institute *Restatement of the Law* 165, §702; Gormley *Right to Life* 148.

240 Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 13 and footnote 67; Cook *supra* note 58 at 143; Farrior *supra* note 68 at 300.

241 Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004 at 13 and footnote 68: "The ICJ held in the case of Barcelona Traction, Light and Power Co. Case, Belgium v. Spain ICJ Reports 1970, 3, 32 that some obligations are so basic that they apply equally to all states (including principles and rules concerning the basic rights of the human person; "including the protection from slavery and racial discrimination), and that every state has the right to help protect such rights. When a state breaches such obligations erga omnes, it injures every state and every state is thus competent to bring action against the breaching state. Although it is unclear which rights are included in the concept of "basic rights of the human person" it can be argued that the obligation to ensure the right to life would be included as a basic right. Further, it remains to be seen when and for what reasons a state would be willing to bring action against another state for not exercising due diligence to protect the right to life Teheran Hostages case (United States Diplomatic and Consular Staff in Tehran United States v. Iran ICJ Reports 1980, 3, 29-30, where the ICJ held that Iran was responsible for acts committed by militants occupying the American embassy in Tehran 1979. Although the acts were not directly attributable to the state, the fact that the Iranian government condoned the acts made the Iranian state responsible for them".

242 Cook *supra* note 58 at 143 and footnote 86; Farrior *supra* note 68 at 301.

243 Cook *supra* note 58 at 143 and footnote 87; Farrior *supra* note 68 at 301; *Janes (United States) v The United Mexican States* (Docket No. 168), 21 *Am. J. Int'l L.* 362 (1927): "Culpability for complicity may be less than for a private wrong. It was observed in the Janus Case that even if non-punishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this ... as just as serious as if the Government had perpetrated the killing with its own hands".

244 Clapham *supra* note 66 at 111: "It must be noted, however, that also the customary understanding of state responsibility attributes responsibility to the state for acts (or omissions) committed by private actors not acting on behalf of the states in certain circumstances e.g. where the state does not exercise due diligence in the control of private persons. This doctrine has its origins in state responsibility for injuries to aliens"; Cook *supra* note 58 and footnote 88: "arts. 5-10 of the draft Articles govern when states may delegate powers to private persons and agencies, and when private persons or agencies may become empowered to act on behalf of a state. Indeed, Brownlie has observed of Article 11 that: (t)his distinction between "act of State" and other conduct not attributable would appear to be an entirely theoretical question of "essence" without any practical significance. In the precise context of state responsibility conduct not so attributable may none the less provide a basis for state responsibility".

however, remains a precondition to claims for an individual violation of the rights.[245]

A state bound by *erga omnes* law is bound to protect and uphold this law for the whole community of nations, not just for its own citizens. To these *obligatio erga omnes* belong: the prohibition of genocide, slave trade, racism, crimes against humanity, extermination and ethnic cleansing.[246] By their very nature the former are the concern of all states. Article 49 (1) of the ILC Draft Articles states:[247]

.... Any State other than an injured state is entitled to invoke the responsibility of another State if:

(a) The obligation breached is owed to a group of States including that State and is established of the protection of a collective interest;
(b) The obligation breached is owed to the international community as a whole.

This category recognizes that other states, by virtue of their participation in a multilateral regime or as a consequence of their membership of the international community, have a legal interest in the performance of certain multilateral obligations.[248]

Although the Draft Articles primarily focus on state responsibility for the actions of governmental organs and officials, they also provide for situations where acts of private persons can give rise to state responsibility. Article 12 of the ILC Draft Articles states that there is a breach of an international obligation when the act in question is not in conformity with an obligation "regardless of its character". Existence of a breach of obligation will depend on whether and how national legislation to protect is given effect. Therefore, inaction by state organs, not

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[245] Cook *supra* note 58 at 142 and footnote 89: "A state must be given an opportunity to remedy wrongs through its own institutions and is internationally accountable for denials of justice. Local remedies for alleged wrongs by state and non-state actors can be achieved through national courts, but also through a variety of executive and legislative initiatives"; Farrior *supra* note 68 at 301.

[246] Bassiouni 1996 *Law & Contemp. Probs.* 63-74 at 65-67; Von der Wense 2003 HYPERLINK http://www.ishr.org/activities/index.html 17 Jun. 2004.

[247] International Law Commission *Draft Articles* U.N. Doc. A/CN.4/I.600 (2000) at article 49(1).

[248] Crawford 2000 HYPERLINK http://www.asil.org/ajil/Crawford.htm 18 Aug. 2004; Wood 2000 HYPERLINK www.ukun.org/xp/sarticleType.17/Article_ID.185/qx/articles_snow.htm 23 Oct. 2003.

preventing an injurious act, provides the necessary link for making a violation attributable to the state.[249]

There is an obvious correlation between international human rights law and international rules on state responsibility. [250] International human rights law violations become an "authentic" breach of international law [251]by invoking the principles of state responsibility.[252] Failure to legislate can give rise to state responsibility as reflected in the ILC Draft Articles.[253] The Commentary to the Draft Articles asserts that the Draft Articles do not define the contents of obligations primary rules giving rise to responsibility; rather, they constitute the general secondary rules of international law.[254] This is an important distinction as it indicates that the rules on state responsibility do not aim to substitute any other obligations already in existence through custom or convention.[255] Engstrom asserts that:

Exploring the relationship between these two sets of principles also reveals that the ILC Draft Articles apply to the whole field of international obligations of states, irrespective of whether that obligation is owed to states, to an individual, a group, or the international community as a whole. [256]

Part 1 of the Draft Articles defining the internationally wrongful act of a state is specifically intended to apply also to human rights violations. It does not only cover international obligations owed to other states, but all obligations of the state.[257] Engstrom states that:

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[249] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 15; Lawson *Out of Control* 96-97.

[250] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 15.

[251] *Ibid.*

[252] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 15 -16. Lawson *supra* note 249 at 100.

[253] Eng strom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 16; Lawson *supra* note 249 at 104-106.

[254] International Law Commission *Draft Articles* U.N. Doc. A/CN.4/I.600 (2000) at 59.

[255] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 16; Lawson *supra* note 249 at 104 and 116.

[256] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 16;

[257] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004; International Law Commission *Draft Articles* U.N. Doc. A/CN.4/I.600 (2000) at 59-62 and 214. The Commentary also states that whereas the responsibility for a human rights treaty violation may exist towards all other parties, reparation should benefit the individual (at 234).

Although the element of reciprocity is dissimilar in human rights law and the law of state responsibility (human rights conventions e.g. not containing any right to take countermeasures), the ILC Draft takes this into account by recognizing that the latter part of the Draft Articles (on legal consequences and implementation) are not entirely applicable in the case of human rights obligations. This way the ILC Draft Articles avoid a situation where human rights obligations could be suspended as a response to another state's breach of international law.[258]

Under the Draft Articles peremptory norms are treated as absolute and the rights conferred by human rights conventions cannot be waived.[259] Engstrom further argues that:

[The] very core of human rights is treated as absolute..... Whereas the international conventions allow derogation from its provisions in times of public emergency, the right to life, the prohibition against torture and cruel, inhuman or degrading treatment or punishment, against slavery and servitude, against detention for debt, the principle of legality in the field of criminal law, the right to recognition of legal personality, and freedom of thought, conscience and religion, are characterized as non-derogable.[260]

Under international Customary Law, states are responsible for the human rights violations perpetrated by private individuals when the state breaches its international obligation to prevent the violation from occurring.

3.4 International criminal law and non-state actors

3.4.1. Introduction

International human rights law obligates states in terms of custom and convention to ensure that the human rights of citizens in their territories are protected,

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[258] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 16; International Law Commission *Draft Articles* U.N. Doc. A/CN.4/l.600 (2000) at Article 50(1)(b).

[259] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 16–17; Bassiouni 1996 *Law & Contemp. Probs.* 63-74 at 66-68, although consent may be relevant to their application, see e.g. *ICCPR* at article 7. In general see Chapter V of the International Law Commission *Draft Articles* U.N. Doc. A/CN.4/l.600 (2000) at 169 *et seq.*

[260] Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17; *ICCPR* at article 4 and Human Rights Committee *General Comment 29* U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

whereas international criminal law applies to individuals who commit acts defined as international crimes.[261]

Importantly, in international criminal law, various crimes against humanity overlap with some fundamental human rights violations in the International Criminal Court Statute or the Statute of Rome.[262] Through the Statute of Rome, human rights violations became criminalized and as such, the ICC Statute that entered into force on 1 July 2002 expanded the reach of international human rights law substantially.[263] A permanent International Criminal Court is of particular importance due to the fact that:

- It serves as a permanent deterrent to people considering human rights violations and other crimes against humanity (previously international mechanisms were only set up after the violations occurred);
- It has a much wider jurisdiction than existing ad hoc tribunals;

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[261] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 54. International criminal law also identifies elements of criminal responsibility and enforcement mechanisms for these crimes.

[262] *Rome Statute of the International Criminal Court: United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court July 17 1998* 2187 U.N.T.S. 3, U.N. Doc. A/CONF.183/9 (1998), (entered into force Jul. 1, 2002), reprinted in 37 I.L.M. 999 (1998) (hereinafter referred to the "ICC Statute"); Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 5; Teitel *supra* note 5 at 363: "Currently the humanitarian regime is being entrenched through codifications chartering new international judicial institutions that make criminal justice the primary means of enforcing international (human) rights law.....The establishment of an international regime that contemplates the coersive enforcement of (human rights) law reflects a reconceptualization of the rule of law in the international (legal) order". On the merger between international humanitarian law and human rights law also see ICC statute Article 7 defining crimes against humanity and proscribing persecution against any identifiable group for widespread and systematic attack on any civilian population; Amnesty International ? HYPERLINK http://web.amnesty.org/pages/int_jus_icc 23 Oct. 2003; Human Rights Watch ? HYPERLINK http://www.hrw.org/campaigns/icc/whowhat.htm 23 Oct. 2003.

[263] Teitel *supra* note 5 at 363; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 5; Scheinin *Background Paper* 32: "What is punishable for an individual under international law is also prohibited in relation to States. And what is prohibited by international law by qualifying certain acts as international crimes, is certainly relevant for an understanding of what rights fundamental standards of humanity must be respected by States and individuals in all circumstances. Human Rights Committee *General Comment 29* U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 12 states that: "In asserting the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the covenant".

- It is an effective permanent judicial structure for the prosecution of human rights violations that will bring international criminals to justice;
- The statute contains advanced provisions for the protection of victims. The Court may also order a convicted person to pay compensation or any other reparation that the Court deems appropriate.[264]

In order to address the challenges of the modern world effectively and to promote security and respect for all human beings, the world community needs a minimum public order. Governments all over the world and their leaders must adhere to universally recognized norms and standards of peace and security. If governments fail in this duty of protection, their leaders must be held personally accountable under international criminal law. In the new legal world order the prosecution of human rights is a reality. Demagogue heads of state are no longer allowed to carry on *more solito* but are being held legally accountable for world public order and national security.

3.4.2 International crimes

International Crimes derive from both International Convention Law and International Customary Law. All international crimes are linked by the following factors:

- The criminal conduct affects legitimate international interest; (including pervasive perpetual violations of human rights);
- The criminal conduct constitutes egregious conduct deemed offensive to the commonly shared values of the world community.
- The conduct affects an internationally protected interest, which does not rise to the level required by (a) (b), but which cannot be prevented or controlled without its international criminalization.[265]

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[264] Amnesty International ? HYPERLINK http://web.amnesty.org/pages/int_jus_icc 23 Oct. 2003.

[265] Bassiouni 1996 *Law & Contemp. Probs.* 5-8; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 32.

The Nuremberg Charter just after World War Two was the first international instrument to define crimes against humanity. In Article 6 c of the Charter, crimes against humanity were defined as:

murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[266]

Crimes against humanity have also been included in the Statutes of the International Criminal Tribunal of Yugoslavia ("ICTY") [267]and Intenational Criminal Tribunal for Rwanda ("ICTR"). These codifications together with the case law resulted in and developed the concept of international criminal law. [268] The most important development in international criminal law was that the requirement of a nexus to armed conflict was dropped in the Statute of the ICTR and in *the Tadic-case,* which meant that *"a state sovereignty approach has been... supplanted by a human being oriented approach".* [269]

The most important and authoritative codification of crimes against humanity is the the International Criminal Court Statute (the Statute of Rome). In the ICC Statute crimes against humanity are defined as:[270]

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[266] *Charter of the International Military Tribunal (I.M.T.), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)* Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945) at art. 6(c); Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 34.

[267] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991* U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1163 (1993) (hereinafter referred to as the "ICTY Statute"): "Believing that the establishment of an international tribunal and the prosecution of the persons responsible for ....violations of international humanitarian law will contribute to esurin g that such violations are halted and effectively redressed".

[268] Teitel *supra* note 5 at 362 and 363; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 34.

[269] *Prosecutor v Dusko Tadic* Case No. IT-94-1-AR-72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 at para. 141.

[270] The ICC Statute became active when sixty ratifications were obtained. There are presently ninety four ratifications and one hundred and thirty nine signatures (Coalition for the International Criminal Court ? HYPERLINK http://www.iccnow.org/countryinfo/worldsigsandratifications.html 24 Jun. 2004); Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 35.

"1. ..... any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) **Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity**;
(h) **Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender** as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) **Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.**[271]

The ICC definition is not new but rather the codification of the development of international law since Nuremberg. The contemporary notion of crimes against humanity can be summarized in three elements:

- the perpetrator has committed one of the listed acts or offences;
- the offence was committed as part of a widespread or systematic attack directed against a civilian population, and
- the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[272]

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[271] *ICC Statute* at article 7 (emphasis added).

[272] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 37; International Criminal Court *Report* U.N. Doc. PCNICC/2000/1/Add.2 (2000) at p. 9; *Prosecutor v Dusko Tadic* Case No. IT-94-1-T, Trial Chamber II, Opinion and Judgement of 7 May 1997 at para. 644. In the *Tadic-case*, the ICTY held that the phrase "directed any civilian population entailed that "there must be some form of a governmental organised or group policy to commit these acts"; The International Law Commission *Draft Code of Crimes* U.N. Doc. A/CN.4/L.532 (1996) at article 18 asserts that: "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated as directed by a Government or by any organisation or group".

3.4.3 Criminal responsibility

Crimes against international law are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[273]

When heads of state directly or indirectly participate in crimes against humanity or due to gross negligence or omissions ignore the plight of those whose fundamental human rights are being perpetually violated by private individuals, then they are criminally responsible for their actions and omissions. In the new global legal order, violations of human rights are no longer viewed as domestic matters but as matters of consequence for the international community.

The establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) further reinforced the principle of individual criminal responsibility for the commission of international crimes. In the first annual report of the *ICTY* submitted to the Security Council, the Secretary-General identifies the bringing of the persons responsible for the crimes to justice and to deter further crimes as the main objectives of the tribunal.[274] The new International Human Rights regime redefines the meaning of international security by substituting the understanding of security as defined in terms of state borders with a transformed construction where Human Rights are the supreme law of the world.

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[273] International Military Tribunal *Trial Of Major War Criminals* s 223; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 26.

[274] ICTY *Annual Report, 1994* U.N. Doc. A/49/342 - S/1994/1007 (1994) at p 11-13; *ICTY Statute* at articles 7 and 23; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994* S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) (hereinafter referred to as the "ICTR Statute") at articles 6 and 22; Nowak *supra* note 10 at 6: "With the establishment of the ad hoc criminal tribunals for the former Yugoslavia in 1993 and for Rwanda in 1994, a new chapter in international criminal law began leading to the adoption of the Rome Statute for a permanent international criminal court (ICC) in 1998, which entered into force on 1 July 2002. in addition to war crimes, the ICC will have the power to try individuals, irrespective of their function and nationality, for the most serious human rights violations, in times of peace or war, including genocide and crimes against humanity"; Teitel *supra* note 5 at 363-364.

The International Law Commission Draft Code of Crimes Against the Peace and Security of mankind, 1996 in Article 2 states that individual responsibility of *inter alia* heads of state follows when that individual:

(3)

(a) **Intentionally commits such a crime**;
(b) Orders the commission of such a crime, which in fact occurs or is attempted;
(c) **Fails to prevent or repress the commission of such a crime** in the circumstances set out in article 6;
(d) **Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission**;
(e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
(f) **Directly and publicly incites another individual to commit such a crime which in fact occurs**;
(g) Attempts to commit such a crime by taking action commencing the execution of a crime, which does not in fact occur because of circumstances independent of his intentions.[275]

The Rome Statute in Article 25 confirms the individual criminal responsibility for the international crimes over which the ICC will have jurisdiction. Article 25 stipulates that:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute;
2. A person who commits crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this Statute;
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person:
   (a) **Commits such a crime, whether as an individual, jointly with another or through another person**, regardless of whether that other person is criminally responsible;
   (b) **Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted**;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

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[275] International Law Commission *Draft Code of Crimes* U.N. Doc. A/CN.4/L.532 (1996) at article 2 (emphasis added).

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such a contribution shall be intentional and shall either:
   i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
   ii. Be made in the knowledge of the intention of the group to commit crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit the crime if that person completely and voluntarily gave up the criminal purpose;

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law. [276]

The above acts establish both the principle of individual criminal responsibility under international criminal law, and the ability of international criminal law to penetrate the shield of state sovereignty and enforce this principle directly.[277]

International crimes such as hijacking, theft of nuclear materials, aggression and taking civilians hostage are committed by individuals without assistance from the state. When it comes to the crime of genocide and crimes against humanity, the state or a political group is usually involved as the individual perpetrator is usually acting as agent of the state or of an organised political grouping or pursuant to state or party policy.[278] What distinguishes these crimes from other international crimes is that they are the product of a state action or wilful inaction in pursuit of policy. In these circumstances, heads of state will be held personally responsible for the criminal actions of the non-state actors.

Prior to the Second World War, victimisation of civilians and mass scale human rights violations of human rights were perpetrated mainly by the state's public

[276] ICC Statute (emphasis added).
[277] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 29; Teitel *supra* note 5 at 381.
[278] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 30; Dugard *Criminal Responsibility* 239.

apparatus, such as the armed forces, the police, paramilitary units and the civilian bureaucracy as products of a state action or policy. Since WWII large-scale human rights violations have often been committed by non-state actors.[279] The recent attacks on the World Trade centre in New York were committed by non-state actors and in South Africa one thousand five hundred and ninety farmers have been killed by non-state actors since 1991.

3.4.4. The international crime of genocide

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. Article II of the Convention defines the crime of genocide as:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group,

if they are committed with the intent to destroy in whole or in part, a national ethnical, racial or religious group as such.

The provisions of the convention have also been incorporated as such in the Statutes of the ICTY, the ICTR and ICC.[280]

The international crime of genocide is a very specific crime. The victim of the crime is the group itself and not an individual. The prohibition on genocide protects the right to physical existence of minority groups.[281] For an act to be considered as genocide, it is necessary that:

- one of the acts listed in above has been committed;
- the act has been committed against one of the protected groups;
- the crime has been committed with the special intent to destroy in whole or

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[279] Commission of Experts *Final Report* U.N. Doc. S/1994/674 (1994) states that non-state actors committed most of the crimes falling within the definition of crimes against humanity.

[280] *Genocide Convention.*

[281] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 32.

in part, the group as such.[282]

The *genocidal intent,* joined with the *special identity of the victims* requirement is what distinguishes genocide from other crimes. [283]

In South Africa the perpetual and pervasive attacks of murder of white Afrikaner farmers has been classified as the crime of genocide by Genocide Watch International. More than one thousand five hundred and ninety of South Africa's 35000 white farmers have been murdered since 1991. Statistically, white farmers are being killed at twice the rate of US soldiers in Iraq. Genocide Watch International warned that the farmers are being killed at a rate of 335 per 100 000 population group and that the genocide threat against them has now reached a very dangerous stage five classification. Slogans such as *"Kill a Farmer Kill a Boer"* that continue to be shouted at political rallies in South Africa is great cause for concern.[284]

The Genocide Convention and the Statutes of the ad hoc tribunals and the ICC Statute stipulate, in that:

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.[285]

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[282] *Ibid.*

[283] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 32; *Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T, Chamber 1, Judgment of 2 September 1998; *Genocide Convention.*

[284] Genocide Watch 2002 HYPERLINK http://www.genocidewatch.org/BoersSlain01.htm 17 Jun. 2004: "This Genocide Watch is to raise an alert concerning the number of Boer farmers slain since the end of apartheid in South Africa. The threat of destruction of a group must not be ignored because its numbers are small... A critical factor in this analysis is the total remaining number of Boer farmers. The total number of ethno-European farmers in South Africa has been estimated at approximately 40,000. The majority of ethno-European farmers are Boers. In world context, this may seem to be a small number of people. But such absolute numbers are biased against recognition of threats to the survival of minorities. The smaller the minority the more severe this bias. The agricultural department of a bank in South Africa has calculated the per capita murder rate of ethno-European farmers to be four (4) times greater than the average murder rate for the population of South Africa. This comparative trend analysis of murder rates for specific ethnic groups is troubling. If the per capita murder rate of the population as a whole has decreased over recent years as the South African government claims, but at the same time the per capita murder rate of a specific group (in this case Boer farmers) has increased, it is reason for alarm"; also see International Campaign to Stop South African Genocide 2004 HYPERLINK http://www.icssag.com/index2.html 5 February 2005.

[285] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 32; *ICTY Statute* at article 4; *ICTR Statute* at article 2; *ICC Statute* at article 6.

In the *Jelisic-case* the trial chamber held that:

international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone.[286]

What is central is the knowledge or the intent to seek the total or at least partial destruction of a certain defined group.

United Nations Secretary General Kofi Annan observed that human rights abuses such as crimes against humanity and threats of genocide constitute legitimate justifications for Security Council military intervention under Chapter 7 of the United Nations Charter.[287]

3.4.4 Complementary between International Human Rights law and International Criminal Law

The ICC Statute International Human Rights Law and International Criminal Law *"merged"* in the sense that serious human rights violations are criminalized by The ICC Statute.[288]

The ICC Statute through the codification of crimes against humanity added significant value to the International Human Rights regime. Perpetrators of human rights violations can now be held criminally responsible for their actions. One of the major benefits of the ICC is that it is a tool against impunity. Corrupt demagogue leaders that have no regard for human dignity and life or for international norms can now be brought to justice for their crimes against the human family. Heads of state are not above the law and can no longer hide behind state sovereignty but are legally accountable for their actions and omissions.

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[286] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 32; *Prosecutor v Goran Jelisic* Case No. IT-95-10, Trial Chamber, Judgment of 14 December 1999 at paras. 80-83.

[287] *Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict* U.N.Doc.S/1999/957 (1999) at para. 67; Meron *supra* note 66 at 381-382.

The fact that the ICC Statute codifies crimes against humanity is important to the human rights regime, as human rights violations that also qualify as crimes against humanity, will be prosecuted internationally when the state is not willing or able to prosecute.[289] The ICC Statute is also well suited for addressing the challenges posed by the modern conflicts, the attack on and killing of minority groups, perpetual and pervasive violation of human rights by criminals and the threats against the public order coming from different types of non-state actors.[290]

The criminalisation of gross violations of human rights in the ICC Statute must, however, not be regarded as a substitute for international human rights law as expressed through treaty and custom and the states' responsibility for what happens in their territory. These two sets of legal regimes must be regarded as complementary to one another.[291]

3.5 Conclusion

The new global realities of international terrorism, international crime syndicates; trans-national corporations that generate more income than most small and medium sized countries and failed states that continue to allow perpetual and pervasive violations of human rights of its citizens, require a new approach to maintain minimum legal world order.

Today states are responsible and accountable for human rights violations perpetrated by non-state actors that live within their territory. The American led war on terror shows that governments that harbour terrorists or networks of organised crime might face economic sanctions and military reprisal.

Human Rights as expressed in international law by custom and convention are not

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[288] Teitel *supra* note 5 at 362; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 51; Carter *International Criminal Law* 157 regarding the fusion of international criminal law and international human rights law.

[289] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 52.

[290] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 56.

[291] Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 56.

merely seen as limitations on government action, but are deemed to impose positive legal obligations on states to prevent, investigate and punish human rights violations that occur in their jurisdiction. In determining whether states are fulfilling their international obligations, states are measured against the principle of effectiveness and the due diligence standard.

South Africa has signed and ratified all major human rights conventions currently in operation without any reservations. South Africa is, therefore, legally bound by international law to *"respect and ensure"* to all within its territory *inter alia* the right to life, the right to security and the right to be free from all forms of torture as expressed in the ICCPR.

Human beings cannot enjoy human rights unless they can enjoy all of them. Collectively human rights are codified, universally shared, measurable and enforceable. They provide the framework within which development, democracy and human security can be realised. The Universal Declaration of Human Rights calls upon every individual and all states to promote respect for these rights and freedoms and to ensure their observance. The promotion and effective practical protection of all human rights is the first and main responsibility of the state.[292] The international community is past the stage of looking at empty promises of improvement, but judges' actual performance. *Non quod dictum est sed quod factum est inspicitur (not what is said but what is done is regarded).* Only when fundamental human rights are not only rhetorically asserted but seriously pressed as legal entitlements, will human rights law become an effective system for the protection of human worth and dignity.

States are responsible for human rights violations committed by non-state actors if the state fails to prevent, respect and ensure to all within its territory the human rights expressed in international human rights law, contrary to the governments' international legal obligations.

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[292] Amnesty International 2002 HYPERLINK http://www.oecdobserver.org/news/fullstory.php/aid/716/Globalise_this:_Human_rights.html 17 Jun. 2004.

4. STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES BY NON-STATE ACTORS UNDER THE INTER-AMERICAN HUMAN RIGHTS SYSTEM IN GENERAL AND IN THE UNITED STATES OF AMERICA SPECIFICALLY.

4.1	***Introduction***
4.2	***The American convention on human rights***
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4.3.1.1	Organisation of the Commission
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4.4.1	*The duty to respect*
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4.5	***The United States of America***
4.5.1	*Background*
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4.5.2.2	The right to protection under the Fourteenth Amendment
4.5.2.3	The privileges and immunity clause
4.5.2.4	Due process clause
4.5.2.5	The equal protection clause
4.5.3	*The State's affirmative duty of protection*
4.5.3.1	Deshaney v Winnebago County department of social services
4.5.3.2	Limited recognition of an affirmative duty to protect
4.6	***Conclusion***

4.1 *Introduction*

The Inter-American system for the protection of human rights emerged with the adoption of the **American Declaration of the Rights and Duties of Man** on 30 April 1948[1] when 21 nations[2] met in Bogotá, Columbia and signed the **Charter of the Organisation of American States (OAS)**, which affirmed their commitment to common goals and respect for each nation's sovereignty. Since then, the OAS has expanded to include the nations of the Caribbean, as well as Canada.[3]

The principles of the Organisation of American States grew out of a history of regional cooperation dating back to the 19th century.

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[1] OAS 2003? HYPERLINK http://www.oas.org/documents/eng/oasinbrief.asp 9 Feb. 2004; Anon. ?(a) HYPERLINK http://www.encyclopedia4u.com/i/inter-american-commission-on-human-rights.html 9 Feb. 2004; Anon. ?(b) HYPERLINK http://www.worldhistory.com/wiki/I/Inter-American-Commission-on-Human-Rights.htm 9 Feb. 2004; Anon. ?(c) HYPERLINK http://www.worldhistory.com/wiki/O/Organisation-of-American-States.htm 9 Feb. 2004. The American Declaration of the Rights and Duties of Man was the first international human rights instrument of a general nature, predating even the Universal Declaration of Human Rights by more than six months.

[2] General Secretariat, OAS 1997 HYPERLINK http://www.oas.org/juridico/english/charter.html 9 Feb. 2004. The Charter of the Organisation of American States (1948) (hereinafter referred to as "the Charter"), chapter 3, and specifically article 4 of the Charter, provides that "all American States that ratify the present Charter are members of the Organisation". This procedure has remained unchanged since the OAS Charter was drawn up, at the Ninth International Conference of American States (Bogotá, Colombia, March 20 May 2, 1948). Twenty-one American States participated in that conference. They were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba (By resolution of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, 1962, the current Government of Cuba is excluded from participation in the OAS), Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay and Venezuela. Subsequently, 14 other American States joined the Organisation by signing and ratifying the Charter, As follows: Barbados and Trinidad and Tobago (1967), Jamaica (1969), Grenada (1975), Suriname (1977); Dominica and Saint Lucia (1979); Antigua and Barbuda and Saint Vincent and the Grenadines (1981), Bahamas (1982), St. Kitts and Nevis (1984), Canada (1990), and Belize and Guyana (1991), bringing to 35 the number of Member States. All 35 independent countries of the Americas have ratified the OAS Charter and belong to the Organisation. Cuba remains a member, but its government has been excluded from participation in the OAS since 1962.

[3] *Ibid.*; Maheu and Rossiter 2003 HYPERLINK http://www.parl.gc.ca/37/2.parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.htm 5 Mar. 2004.

- In 1826, Simon Bolivar convened the Congress of Panama with the idea of creating an association of the states in the Americas.
- In 1910, this organisation became the Pan American Union.
- In 1890, the first International Conference of American States, held in Washington D.C., established the International Union of American Republics and its secretariat, the Commercial Bureau of the American Republics.
- In 1948, at the Ninth International American Conference, participants signed the OAS Charter and the American Declaration of the Rights and Duties of Man, the first international expression of human rights principles.

The transition from the Pan American Union to the Organisation of American States was smooth. The Director-General of the former Pan American Union, Alberto Lleras Camargo, became the first Secretary-General of the OAS.[4]

The Inter-American Commission on Human Rights (IACHR) was created in 1959. It held its first meeting in 1960 and it conducted its first on-site visit to inspect the human rights situation in an OAS member state in 1961.[5]

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[4]OAS 2003? HYPERLINK http://www.oas.org/documents/eng/oasinbrief.asp 9 Feb. 2004; Anon. ?(c) HYPERLINK http://www.worldhistory.com/wiki/O/Organisation-of-American-States.htm 9 Feb. 2004. In the words of article 1 of the Charter, the goal of the member nations in creating the OAS was "to achieve an order of peace and justice; to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence". Article 2 then defines eight essential purposes; to strengthen the peace of the continent; to promote and consolidate representative democracy, with due respect for the principle of non-intervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states; to provide for common action on the part of those states in the event of aggression; to seek the solution of political, juridical, and economic problems that may arise among them; to promote, by cooperative action, their economic, social, and cultural development; to eradicate extreme poverty, which constitutes an obstacle to the full democratic development peoples of the hemisphere; and to achieve an effective limitation of conventional weapons that will make it possible to devote amounts of resources to the economic and social development of the member states. Over the course of the 1990s, with the end of the Cold War, the return to democracy in Latin American thrust toward globalization, the OAS made major efforts to reinvent itself to fit the new context. It's stated priorities now include *inter alia*: strengthening democracy; working for peace; defending human rights; fostering free trade; fighting the drug trade; and promoting sustainable development.

[5]Anon. ?(d) HYPERLINK http://www.cidh.oas.org/what.htm 9 Feb. 2004; Anon. ?(a) HYPERLINK http://www.encyclopedia4u.com/i/inter-american-commission-on-human-rights.html 9 Feb. 2004. Since then IACHR has carried out 69 visits to 23 member States. In

A major step in the development of the system was taken in 1965, when the Commission was expressly authorized to examine specific cases of human rights violations. Since then, the *IACHR* has received thousands of petitions and has processed in excess of 12,000 individual cases.[6]

In 1969, the guiding principles behind the American Declaration were reshaped, and restated in the *American Convention on Human Rights.*[7] The Convention defines the human rights that the states' parties are required to respect, ensure and guarantee. The Convention also created the establishment of the *Inter-American Court of Human Rights*[8] and defines the functions and procedures of both the Commission and the Court, that are the two monitoring bodies at the Inter-American human rights system.

4.2 The American Convention on Human Rights

The *American Convention on Human Rights*[9] (hereinafter "*the American Convention*") was signed on 22 November 1969 and entered into force on 18

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relation to its visits for the observation of the general human rights situation of a country, the IACHR has published 44 special country reports to date.

[6] Anon. ?(d) HYPERLINK http://www.cidh.oas.org/what.htm 9 Feb. 2004.

[7] *American Convention on Human Rights* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, (entered into force on July 18, 1978) (hereinafter referred to as the "American Convention").

[8] Anon. ?(d) HYPERLINK http://www.cidh.oas.org/what.htm 9 Feb. 2004. It is currently binding on 24 of the OAS's 35 member states.

[9] *The American Convention*; As stated in the preamble: "The American states signatory to the present Convention, reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man. Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality; and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states. Considering that these principles have been set forth in the Charter of the Organisation of American States in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope. Reiterating that, in accordance with the Universal Declaration of Human Rights the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby

July 1978. The American Convention places a duty on state parties to exercise due diligence to prevent, investigate, punish and remedy acts of violence perpetrated by private actors.[10]

The American Convention is the governing instrument of the Inter-American human rights protection system and as such,[11] the Convention enumerates the rights and freedoms to be protected by state parties and provides for the implementation of the Convention by the Inter-American Commission on Human Rights[12] (IACHR or the Commission or the Inter-American Commission) and the Inter-American Court of Human Rights[13].

State obligations under the Convention are enumerated in Articles 1, 2 and 26 of the American Convention:[14]

Article 1(1): Obligation to respect and ensure rights.

The states' parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons (') subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination.

Article 2: Obligation to adopt measures to give domestic legal effect to rights.

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everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights and ... resolved that an Inter-American Convention on Human Rights should determine the structure, competence and procedure of the organs responsible for these matters".

10 Anon. ?(d) HYPERLINK http://www.cidh.oas.org/what.htm 9 Feb. 2004.

11 Ewing 1995 *Colum. Hum. Rts. L. Rev.* 751-755. The Charter (art. 16) also recognizes the obligation of states "to respect the rights of the individual". The American Declaration of the Rights and Duties of Man (1948) lists those rights protected by the Charter under customary international law.

12 *American Convention*, arts. 33-51. The Inter-American Commission, seated in Washington, DC, was established by the OAS in 1960 and became a statutory organ of the OAS in 1967. The Commission is composed of seven individuals elected to four-year terms by the General Assembly of the OAS.

13 *American Convention*, arts. 33 and 52-69. The Inter-American Court, seated in San Jose, Costa Rica, is made up of seven justices elected to six-year terms by the General Assembly of the OAS.

14 Melish *Protecting Economic, Social and Cultural Rrights* 155.

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the states' parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Article 26: Obligation to adopt measures for progressive achievement of rights.

The states' parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.

Modelled on the European Convention for the Protection of Human Rights and Fundamental Rights (1950)[15] and the UN International Covenant on Civil and Political Rights (1966),[16] the American Convention lists twenty three substantive rights and freedoms. These include: the right to life (Article 4), the right to humane treatment (Article 5), freedom from slavery (Article 6), the right to personal liberty (Article 7), the right to privacy (Article 11), freedom of thought and expression (Article 13), freedom of association (Article 16), the rights of the family (Article 17), the rights of the child (Article 19), the right to equal protection (Article 24), the right to judicial protection (Article 25) and the right to progressive development of economic, social and cultural rights (Article 26).

Under the American Convention, individuals, groups and non-governmental organisations may institute legal action against member states for violations of

[15] *European Convention for the Protection of Human Rights and Fundamental Freedoms* Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

[16] *International Covenant on Civil and Political Rights* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

their legal duties with the Inter-American Commission.[17] Recourse to the Inter-American Commission is available only when all domestic remedies have been exhausted.[18] If the Inter American Commission Human Rights fails to reach a friendly settlement with the state party concerned, it may publish the case or submit it to the Inter-American Court.[19] The the Inter-American Commission may submit a case to the Court only if the state party charged with violating the Convention has recognized the competence of the Court.[20] Members of the Organisation of American States may also submit cases to the Commission and Court.[21] In addition to its contentious jurisdiction, the Inter-American Court exercises advisory jurisdiction over questions concerning the interpretation of the American Convention and other treaties affecting the protection of human rights in the Americas.[22]

For a petition to be accepted by the *IACHR,* the petition must establish a violation by a state party of a right guaranteed by *the American Convention.*[23] Because the substantive fundamental human rights enumerated in *the American Convention* are vested in individuals, both state and non-state actors may violate an individual's rights under the Convention. In the event of a non-state actor violating an individual's rights, responsibility for the violation are imputed to a state party as the state is responsible to ensure the fundamental human rights set out in the convention.[24]

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17 *American Convention*, art. 44.

18 *American Convention*, art. 46(a); Ewing *supra* note 11 at 756.

19 *American Convention*, arts. 48-51.

20 *American Convention*, arts. 45, 62; Ewing *supra* note 11 at 756: "There are currently thirty five member states of the OAS. Twenty-five have ratified the American Convention. Sixteen states have recognized the binding competence of the Inter-American Court. (Annual Report of the Inter-American Court of Human Rights 1993, O.A.S. Doc. OEA/Ser.L/V/111.29, doc. 4, app. XVI (1994). The United States of America has signed but not ratified the American Convention and does not recognize the competence of the Court".

21 *American Convention*, arts. 45, 61.

22 *American Convention*, art. 64; Ewing, *supra* note 11 at 756; for background on the procedures of the Inter-American Commission and Court, Medina Quiroga *Battle of Human Rights* 263-68; Mendez and Vivanco 1990 *Hamline L. Rev.* 507, 519-30.

23 *American Convention*, arts. 44, 47(b).

24 Ewing, *supra* note 11 at 756. The Gallardo Case involved acts of violence against women. In July 1981 Costa Rican authorities detained three women for alleged involvement in a terrorist organisation. One of the three, Viviana Gallardo was charged with the murder of the Costa

As will be clearly demonstrated in this chapter, state parties to the American Convention are under an *obligatio et iuris* to secure and ensure to all within their jurisdiction the rights set forth in the American Convention. Part 1 of the American Convention, read together with the human rights set out in Chapter 2 of the Convention, clearly means that the state must practically and factually secure to everyone in their jurisdiction the various human rights set out in the convention. If a person's human rights are violated then that person has a claim against the state for failing to organise and manage civil society in such a way that human rights are secured and ensured.

4.3 The Inter-American human rights monitoring bodies

Article 33 of the American Convention determines that the Inter-American Commission on Human Rights (hereinafter the "IACHR" or "the Commission") and the Inter-American Court of Human Rights (hereinafter the "the Court") have competence with respect to matters relating to the fulfillment of the commitments made by the state parties to the Convention.[25]

Rican Civil Guard. The three prisoners were placed in a prison cell under the control of the civil guard to await trial. A civil guard corporal Jose Bolanas Quesada gained access to the cell and fired a machine gun through the door killing Gallardo and wounding the other two women. If Corporal Bolanos had never been investigated, detained and prosecuted by Costa Rican authorities, the Inter-American Commission could have brought the case to the Court, charging the government with the violation of various provisions of the Convention. Violations could have included the right to life (art. 4), the right to humane treatment (art. 5), and the right to judicial protection (art. 25). State responsibility would have been established by the fact that Bolanos was a government agent. The government of Costa Rica itself submitted the Gallardo case to the Inter-American Court for a determination of whether it had violated the American Convention on Human Rights. The petitions subsequently presented to the Inter-American Commission of Human Rights by Gallardo's family members charged the government of Costa Rica with holding the prisoners under precarious conditions that facilitated the criminal attack by an agent of the state. The Commission deemed the case inadmissible under Art. 48(1)(c) of the Convention after Bolanos was sentenced by Costa Rican authorities for the crimes of qualified homicide, aggravated assault and simple assault.

[25] *American Convention*, art. 33.

Currently, there are three mechanisms within the OAS for the protection of human rights in the Americas. The IACHR monitors compliance with treaty obligations for the 25 states parties to the American Convention on Human Rights.[26] The IACHR also monitors compliance for the 10 member states that are not yet parties to the Convention by applying the American Declaration of the Rights and Duties of Man.[27] The Court monitors compliance under the Convention for the 17 states' parties to the Convention that have also recognized the compulsory jurisdiction of the Court pursuant to *Article 62* of the Convention.[28]

4.3.1 The Inter-American Commission on Human Rights

The IACHR is an autonomous organ of *the Organisation of American States.* Its human rights duties stem from two documents:

- the OAS Charter,[29] and
- the American Convention on Human Rights.[30]

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[26] Davidson *Inter-American Human Rights System* 381*;* Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

[27] *Ibid*; Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and US. In other words, only common law, English-speaking countries are still reluctant to become full participants in the Inter-American human rights system. The 10th country, which has not yet ratified the Convention, is Cuba. Resolution VI of the Eighth Consultative Meeting of Ministers of Foreign Affairs (1962) excluded the present government of Cuba from participation in the Inter-American system.

[28] Davidson *Inter-American Human Rights System* 381; Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. After the publication of Davidson's book, Mexico and Brazil accepted the contentious jurisdiction of the Court. The Dominican Republic announced recently its intention to accept the Court's contentious jurisdiction. That will mean that all of the Latin American countries will be under the jurisdiction of the Inter-American Court.

[29] General Secretariat, OAS 1997 HYPERLINK http://www.oas.org/juridico/english/charter.html 9 Feb. 2004.

[30] *American Convention, supra* notes 7, 9.

The *IACHR* is a permanent body, with headquarters in Washington D.C. and it meets in regular and special sessions several times a year.

The main task of *the IACHR* is to promote the observance and defense of human rights in the Americas.[31]

4.3.1.1 Organisation of the Commission

The Inter-American Commission on Human Rights is composed of seven members who must all be persons of high moral character and possess recognized competence in the field of human rights[32].

The Commission represents all the member countries of the Organisation of American States.[33]

The members of the Commission are elected in their personal capacity by the General Assembly of the Organisation from a list of candidates proposed by the governments of the member states. Each of the governments may propose up to three candidates, who may be nationals of the states proposing them or of any other member state of the Organisation of American States. At least one of the candidates must be a national of a state other than the one proposing the state.[34]

The members of the Commission are elected for a term of four years and may be re-elected only once and no two nationals of the same state may be members of the Commission.[35]

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[31] Inter-American Commission on Human Rights 2002(a) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.2a.htm 3 Mar. 2004; Anon. ?(d) HYPERLINK http://www.cidh.oas.org/what.htm 9 Feb. 2004.

[32] *American Convention*, art. 34.

[33] *American Convention*, art. 35.

[34] *American Convention*, art. 36.

[35] *American Convention,* art. 37.

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term, shall be filled by the Permanent Council of the Organisation in accordance with the provisions of the Statute of the Commission.[36]

4.3.1.2 Functions of the Commission

The main function of the Commission is to promote respect for and to defend human rights. In the exercise of its mandate, the Commission has the functions and powers:

- To develop an awareness of human rights among the peoples of America;
- To make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favour of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- To prepare such studies or reports as it considers advisable in the performance of its duties;
- To request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- To respond, through the General Secretariat of the Organisation of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- To take action on petitions and other communications pursuant to its authority under the provisions of *articles 44* to *51* of the American Convention;
- To submit an annual report to the General Assembly of the Organisation of American States;[37] and

[36] *American Convention*, art. 38.
[37] *American Convention*, art. 34.

- To monitor compliance by member states with court orders of the Inter-American Court on Human Rights.[38]

The states' parties to the American Convention must also transmit to the Commission a copy of each of the reports and studies that must be submitted annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields so that the Commission may guard over the promotion of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organisation American States. [39]

The States Parties are also under an obligation to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of the American Convention.[40]

4.3.1.3 Competence before the Commission

Any person or group or persons, or any non-governmental entity legally recognized in one or more member states of the Organisation of American States, may lodge petitions with the Commission containing denunciations or complaints of violation of the Convention by a state party.[41]

In terms of Article 45 any state party may, when it deposits its instrument of ratification of or adherence to the Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine

[38] Inter-American Commission on Human Rights 2002(a) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.2a.htm 3 Mar. 2004 at 232-250, where *inter alia* the following cases were monitored and reported on: the Blake case, the Colotenango case, the Bamaca Valsques case, the Helen Mack et al. case, the Jose Francisco Gallardo Case and the Miguel Agustin Pro Juarez case.
[39] *American Convention,* art. 42.
[40] *American Convention,* art. 43.
[41] *American Convention,* art. 44.

communications in which a State party alleges that another state party has committed a violation of a human right set forth in the Convention. Communications presented by virtue of Article 45 may be admitted and examined only if they are presented by a state party that has made a declaration recognizing the afore mentioned competence of the Commission. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.[42]

Admission by the Commission of a petition is subject to the following requirements:

a. That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
b. That the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
c. That the subject of the petition or communication is not pending in another international proceeding for settlement; and
d. That, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

The provisions of paragraphs 1a and 1b of this article shall not be applicable when:

a. The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b. The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c. There has been unwarranted delay in rendering a final judgment under the afore mentioned remedies.[43]

In terms of Article 47 the Commission shall consider inadmissible any petition or communication if:

[42] *American Convention*, art. 45.
[43] *American Convention*, art. 45.

- Any of the requirements have not been met;
- The petition does not state facts that tend to establish a violation of the rights guaranteed by the American Convention;
- The statements of the petitioner or of the state indicate that the petition is manifestly groundless or obviously out of order; or
- The petitions substantially the same as one previously studied by the Commission or by another international human rights organisation.

4.3.1.4 Procedure before the Commission

When the Commission receives a petition alleging a violation of any of the fundamental human rights protected by the American Convention, it proceeds as follows:

- If the petition or communication is admissible, it will request information from the government of the state indicated as being responsible for the alleged violations. The Commission will furnish the government *in casu* with a transcript of the relevant and pertinent portions of the petition. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
- After the information has been received, or after the period established has elapsed and the information has not been received, the Commission will ascertain whether the grounds for the petition still exist. If they do not, the Commission will order the record to be closed.
- The Commission may also declare the petition inadmissible or out of order on the basis of information or evidence subsequently received.
- If the record has not been closed, the Commission will, with the knowledge of the parties, examine the matter set forth in the petition in order to verify the facts. If necessary and advisable, the Commission will carry out an investigation, for the effective conduct of which it requires,

and the states concerned will furnish to the Commission, all necessary facilities.

- The Commission may request the states concerned to furnish any relevant information and, if so requested, will hear oral statements or receive written statements from the parties concerned.
- The Commission will place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention.[44]

In serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.[45]

If a friendly settlement has been reached in accordance with paragraph 1f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the states' parties to this Convention, and shall then be communicated to the Secretary-General of the Organisation of American States for publication. This report shall contain a brief statement of the facts and of the solution reached.[46]

If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with *paragraph 1e* of *Article 48* shall also be attached to the report.

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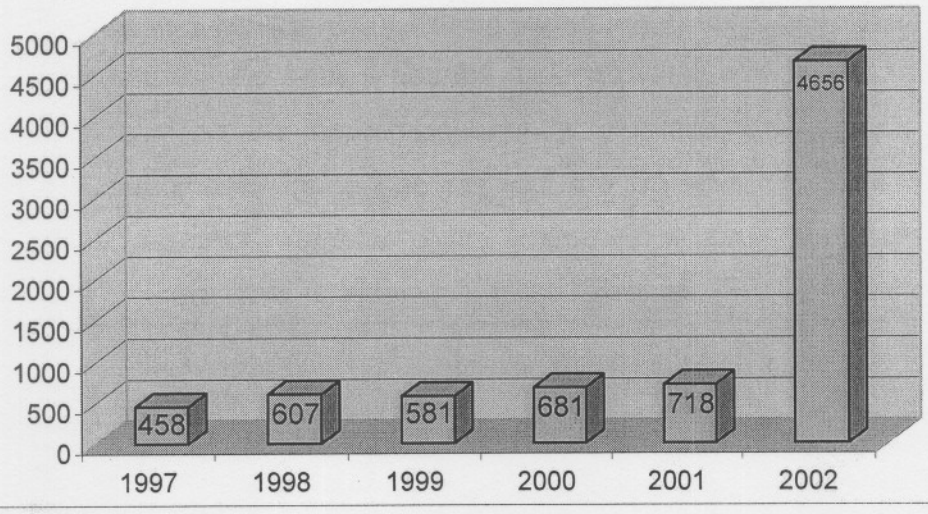
[44] *American Convention*, art. 48.
[45] *American Convention*, art. 48(2).
[46] *American Convention*, art. 49.

The Report will be sent to the states concerned.[47] In this report, the Committee will make such proposals and recommendations as it sees fit.[48]

If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration. Where appropriate, the Commission shall make recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.[49]

4.3.1.5 Statistics

Figure 6: Total number of petitions received by year.



[47] *American Convention*, art. 50.
[48] *American Convention*, art. 50(3).
[49] American Convention, art. 51.

This graph illustrates the total number of petitions received by the Commission during the last six years. "Petitions" for the purposes of these statistics include all complaints, presented in writing, concerning an alleged violation by an OAS member state of the Convention, the Declaration and/or other pertinent instrument.[50]

4.3.2 The Inter-American Court of Human Rights

The Inter-American Court of Human Rights is an autonomous judicial institution based in the city San Jose, Costa Rica.[51]

The Court was established by the American Convention on Human Rights with the purpose of enforcing and interpreting the provisions of the Convention and started operating in 1978.[52]

Its two main functions are adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it and under the latter, it issues opinions on matters of legal interpretation brought to its attention by member states or individuals.[53]

4.3.2.1 Organisation of the Court

The Court consists of seven judges, who are nationals of the member states of the Organisation. The judges are elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are

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[50] Inter-American Commission on Human Rights 2002(b) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.3.htm 9 Feb. 2004.
[51] Inter-American Court of Human Rights 1999 HYPERLINK http://www1.umn.edu/humanrts/iachr/Annuals/annual-99.html 3 Mar. 2004.
[52] OAS 2003? HYPERLINK http://www.oas.org/documents/eng/oasinbrief.asp 9 Feb. 2004.
[53] OAS 2003? HYPERLINK http://www.oas.org/documents/eng/oasinbrief.asp 9 Feb. 2004.

nationals or of the state that proposes them as candidates. No two judges may be nationals of the same state.[54]

The judges of the Court are elected by secret ballot by an absolute majority vote of the states' parties to the Convention, in the General Assembly of the Organisation, from a panel of candidates proposed by the states.

The judges of the Court are elected for a term of six years and may be re-elected only once. A judge elected to replace a judge whose term has not expired shall complete the term of the latter. Judges continue in office until the expiration of their term. They shall, however, continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges.[55] Five judges constitute a quorum for the transaction of business by the Court.[56] The Commission appears in all the cases before the court.[57]

4.3.2.2 Jurisdiction and functions of the Court

Only the states' parties to the Convention and the Commission have the right to submit a case to the Court.

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[54] American Convention, arts. 52(1), 52(2); OAS 2003? HYPERLINK http://www.oas.org/documents/eng/oasinbrief.asp 9 Feb. 2004:
The Court's membership in October 2003 stood as follows:
- Antonio A. Cancado Trindade (Brazil) President
- Alirio Abreu Burelli (Venezuela) Vice-President
- Heman Salgado Pesantes (Ecuador) Judge
- Oliver Jackman (Barbados) Judge
- Maximo Pacheco Gomez (Chile) Judge
- Sergio Garcia Ramirez (Mexico) Judge
- Carlos Vicente de Roux Rengifo (Colombia) Judge.

[55] *American Convention*, art. 54.
[56] *American Convention*, art. 56.
[57] *American Convention*, art. 57.

In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been adhered to.[58]

A state party may, upon depositing its instrument of ratification or adherence to the American Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention.[59]

Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary-General of the Organisation, who shall transmit copies thereof to the other member states of the Organisation and to the Secretary of the Court.

The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the states' parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.[60]

Article 63 of the American Convention determines that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems

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[58] *American Convention*, art. 61.
[59] *American Convention*, art. 62.
[60] *American Convention*, art. 63.

pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.[61]

The member states of the Organisation of American States may also consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.

The Court, at the request of a member state of the Organisation, may also provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.[62]

In terms of Article 65, the Court submits to each regular session of the General Assembly of the Organisation of American States for the Assembly's consideration, a report on its work during the previous year. It specifies in particular, the cases in which a state has not complied with its judgements, making any pertinent recommendations.[63]

4.3.2.3 Procedure before the Court

The procedure before the Court is the same as discussed at 4.3.1.4 above for the Commission.

Reasons are given for the judgement of the Court when the judgement does not represent in whole or in part the unanimous opinion of the judges, any judge is entitled to have his dissenting or separate opinion attached to the judgement.[64]

The judgement of the Court is final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgement, the Court shall

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[61] *American Convention*, art. 63.
[62] *American Convention*, art. 64.
[63] *American Convention*, art. 65.
[64] *American Convention*, arts. 66(1) and 66(2).

interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgement.[65]

In terms of Article 68 the states' parties to the Convention undertake to comply with the judgement of the Court in any case to which they are parties. That part of a judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgements against the state.[66]

The parties to the case shall be notified of the judgement of the Court and it shall be transmitted to the states' parties to the Convention.[67]

4.4 Interpretation and application of state responsibility for private acts of violence under the American Convention

The Inter American Court of Human Rights has affirmed on numerous occasions that acts committed by private persons can be attributed to a state when the state fails to act in accordance with its international obligations under the American Convention.[68]

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[65] *American Convention*, art. 67.

[66] *American Convention*, art. 68.

[67] *American Convention*, art. 69.

[68] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) paras. 162, 164; *Godinez Cruz Case* Judgement of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989) paras. 171, 173; *Neira Alegria et al. Case* Judgement of 19 January 1995, *Inter-Am. Ct. Hr.* (Ser. C) No. 20 (1995) para. 85 (emphasis added); Ewing *supra* note 11 at 770; Melish *supra* note 14 at 155 correctly asserts that: "The international system for the protection of human rights is based on the principle of state responsibility. By ratifying human rights treaties, States recognize that there are limits to and responsibilities in the exercise of public power. They recognize, too, that they may be held responsible under international law for any act or omission undertaken by - or with the acquiescence of - public authority that surpasses those limits and results in injury to protected persons' right. Accordingly, human rights instruments generally include a set of protected rights and a set of state obligations. Where a State violates the obligations it has assumed under international law for guaranteeing protected rights, it may be held accountable in international proceedings for any resulting injury. Every petition challenging state conduct under a human rights treaty must, therefore, demonstrate impairment of a specific individual's protected right and breach of a state obligation with respect to that right. This chapter describes state obligations".

As stated above[69], State obligations under *the American Convention* are described in Articles 1, [70] 2,[71] and 26[72]. Under *Article 1*, States Parties commit to *respect* and to *ensure* the free and full exercise of each right set forth in Articles 3-26 to all who live within their jurisdictions. Under Article 2, States Parties commit to adopt legislative and other measures to ensure that all protected rights have domestic legal effect. Article 26 imposes an obligation on States to adopt legislative and other measures for the progressive achievement of rights that are not "immediately requirable in themselves" e.g., through the adoption, and good faith implementation, of a plan of action.

In the *Velasquez Rodriques*[73] and *Godinez Cruz*[74] cases, *the* Inter-American Court elaborated on state obligations with respect to the rights contained in the Convention and established a basis for imputing responsibility for human rights abuses committed by non-state actors to state parties. State responsibility for acts of violence committed by non-state actors can be established based on the

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69 *Supra* at 4.2.

70 *American Convention,* Art. 1(1): Obligation to Respect and Ensure Rights. "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination...".

71 *American Convention*, Art. 2: Obligation to Adopt Measures to Give Domestic Legal Effect to Rights: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms".

72 *American Convention*, Art. 26: Obligation to Adopt Measures for Progressive Achievement of Rights: "The States Parties undertake to adopt measures both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires".

73 *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988). Angel Manfredo Velasquez Rodriguez, a Honduran university student, disappeared in Tegucigalpa, the capital on September 12, 1981. Velasquez was allegedly detained without a warrant for his arrest by members of the Honduran police and armed forces and tortured in custody. Honduran authorities subsequently denied that Velasquez had been detained.

74 *Godinez Cruz Case* Judgement of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989). Sail Godinez Cruz, a schoolteacher, disappeared on July 22, 1982. Godinez was allegedly arrested by members of the Honduran military.

state's duties and international obligatio et iuris under the American Convention detailed in the *Velasquez Rodriquez case* and subsequent opinions.

In the *Velasquez Rodriques case*, the Inter-American Court found that the disappearance of Manfredo Velasquez was carried out by agents acting "*under the cover of public authority*".[75] The Court, however, found that even had that fact not been proven, the failure of the state to act, is a failure on the part of the Honduras government to fulfill the duties it assumed under Article 1(1) of the American Convention, which obligated the government of Honduras to ensure Manfredo Velasquez the free and full exercise of his fundamental human rights.[76] Article 1(1)'s positive legal duty to ensure rights obligate state parties to take specific steps to guarantee the "*free and full exercise*" of the rights contained in the Convention.[77] The Inter-American Court interpreted Article 1(1) as placing a duty on states to exercise "due diligence" to prevent, investigate and punish violations of fundamental human rights contained in the American Convention and to ensure victims adequate compensation. The failure of a state party to the Convention to fulfill its positive legal duty to act under Article 1 (1) may establish state responsibility for private acts of violence.[78]

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[75] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 182.

[76] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 182..

[77] Ewing *supra* note 11 at 771 and accompanying footnote 85 asserts that: "The language of Article 1(1) is the same as that in Article 2(1) of the International Covenant on Civil and Political Rights. Interpreting the International Covenant, former President of the Inter-American Court, Thomas Buergenthal has written: "The obligation "to ensure" these rights encompasses the duty "to respect" them, but it is substantially broader . . . (The provision implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed . . . including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights). The obligation to "ensure" rights creates affirmative obligations on the state - for example, to discipline its officials and to improve administration of criminal justice ...; as regards some rights in some circumstances, it may perhaps require the state to adopt laws and other measures against private interference with the enjoyment of the rights ...". taken from Buergenthal *To Respect and to Ensure* 72, 77-78.

[78] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 172. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because, it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as

The scope of the positive legal state duties under the American Convention includes legislative, executive, and judicial responses to human rights abuses committed by non-state actors. The measures that may be required of states to satisfy their obligations under the Convention are discussed hereinafter in relation to each state duty.

4.4.1 The duty to respect

The main obligation assumed by states' parties under article 1(1) is "*to respect the rights and freedoms*" of all persons who reside in their respective jurisdictions.[79] This legal duty is principally negative in nature and constitutes an absolute injunction upon abusive state power. Under international human rights law, a state is responsible and liable for the acts and omissions of its representatives. The duty to respect is, therefore, violated whenever a state organ, official or public entity participates in, authorizes or is complicit in acts or omissions that impair the exercise of protected fundamental human rights under the American Convention.[80]

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required by the Convention. Ewing *supra* note 11 asserts at footnote 86 that due diligence requires "reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances...", taken from Shelton 1989 *Fordham Intl. L. J.* 23.

[79] *El Amparo Case* Reparations (art. 63(1) American Convention on Human Rights), Judgement of 14 September 1996, *Inter-Am. Ct. Hr.* (Ser. C) No. 28 (1996); *Castillo Paez Case* Reparations (art. 63(1) American Convention on Human Rights), Judgement of 27 November 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 43 (1998); *Paniagua Morales Case* Judgement of 8 March 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 37 (1998); *Loyasa Tamayo Case* Preliminary objections, Judgement of 31 January 1996, *Inter-Am. Ct. Hr.* (Ser. C) No.25, (1996); *Blake Case* Preliminary objections, Judgement of 24 January 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 36 (1998).

[80] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at paras.169-172. ("According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention .... [U]nder international law a state, is responsible for the acts of its agents... and for their omissions, even when those agents act outside the sphere of their authority or violate internal law... . Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority-or by persons who use their position of authority is imputable to the State".); Melish *supra* note 14 at 159.

Importantly a state is responsible for its acts as well as its omissions. An omission to protect a citizen's right to life or right to security may lead to state responsibility for human rights violations by non-state actors.

4.4.2 The duty to ensure

The positive legal "*duty to ensure*" is the second general obligation imposed by Article 1(1) of the American Convention. States must take the necessary affirmative measures, of a judicial, legislative, and executive nature,

to organise the governmental apparatus and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.[81]

In terms of this obligation, the state parties to the convention must **prevent, investigate and punish** any violation of the fundamental human rights recognized and protected by the Convention whether committed by state or non-state actors.[82]

Significantly, the duty to ensure protected human rights and freedoms places a positive legal duty on states' parties to the Convention to protect individuals from the harmful acts and omissions of not only the state or its representatives but also from violent acts of private persons. It is obvious that one cannot speak of "rights" unless there is somebody against which or in relation to whom these rights can be exercised. International human rights provisions are minimum rules for treating fellow human beings on the basis that all human beings are equal.

The general obligation to ensure protected human rights consists of four principle

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[81] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at para. 166.

[82] *Ibid.*; Melish *supra* note 14 at 159. If possible the state must attempt to *restore* the right violated and *provide compensation* for damages resulting from the violation.

state obligations:

- A duty to prevent;
- A duty to investigate;
- A duty to punish;
- A duty to remedy. [83]

Illustrative of the above is the recent much publicized case of *Myrna Mack,*[84] 2003. Myrna Mack was stabbed to death by members of a military death squad while on her way home from work on 11 September 1990. Her assassination was in response to her anthropological research into the destruction of indigenous communities by the Guatemalan military during the country's armed conflict. For over 13 years, her sister Helen Mack has sought to bring to justice to those responsible for Myrna's murder. The majority of the *Inter-American Court* ordered that the government of Guatemala *inter alia*:

1. Must effectively investigate the facts of the case in order to identify and prosecute all those responsible for the killing, as well as those who covered up the crime;
2. Must remove all obstacles to justice in the case and guarantee adequate security for the judicial authorities, prosecutors, witnesses, and relatives of Myrna Mack;
3. Must pay US $ 266 000 for material damages to members of the Mack family and US$ 350 000 for pain and suffering to members of the Mack family.[85]

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[83] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 169-172.

[84] Lawyers Committee for Human Rights 2003 HYPERLINK http://www.lchr.org/media/_alerts/1219b.htm 5 Mar. 2004; *Myrna Mack Chang Case* Judgement of 25 November 2003, *Inter-Am. Ct. H.R.* (Ser. C) No. 101 (2003).

[85] Lawyers Committee for Human Rights 2003 HYPERLINK http://www.lchr.org/media/_alerts/1219b.htm 5 Mar. 2004; *Myrna Mack Chang Case* Judgement of 25 November 2003, *Inter-Am. Ct. H.R.* (Ser. C) No. 101 (2003).

4.4.2.1 The duty to prevent

The State has an international obligatio et iuris under Article 1(1) *"to take reasonable steps to prevent human rights violations"* by public and private actors.[86] The duty to prevent

includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. [87]

Such measures may be broken down into a number of sub-categories of preventative obligations: to (1) regulate an effective criminal justice system; (2) monitor; (3) conduct impact studies; (4) remove structural obstacles and (5) cultural measures.[88] The failure of a state to undertake any one of the above-mentioned measures is not final proof of its responsibility for a violation of a protected human right. It may, however, be a indication of a state's "lack of diligence to prevent the violation".[89] In determining responsibility for human rights abuses committed by non-state actors, what a state does *not* do is often just as important as what it does do.[90]

Strong effective criminal justice measures are necessary to ensure the rights guaranteed by the American Convention. While not the sole defense against acts of violence committed by non-state actors, the criminal justice system is a state's

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[86] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 173. "State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention ... the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction". Acts of private persons "lead to international responsibility of the State, 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 Convention. "What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible"; Melish *supra* note 14 at 161.

[87] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 175; Melish *supra* note 14 at 161; Ewing *supra* note 11 at 773.

[88] Melish *supra* note 14 at 162-166 for detailed discussion on regulating, monitoring, conducting of impact studies and the removal of structural obstacles.

[89] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 172-173; Melish *supra* note 14 at 161.

[90] Melish *supra* note 14 at 161.

most immediate mechanism to ensure the rights to life, to security, to human dignity, to personal liberty and to freedom of association. Effective criminal justice responses to private acts of violence should constitute the first test of a state's due diligence to promote the fundamental human right to security and to be free from violence and to ensure that acts of violence are treated as illegal acts leading to the punishment of those responsible.[91]

The Inter-American Court has acknowledged that cultural measures may be required of states to promote the protection of human rights. Public information and education programmes to counter racial gender and minority bias may be required to satisfy the duty of states to exercise due diligence to ensure rights.[92]

4.4.2.2 The duty to investigate

In the event that an injury of a protected right occurs, despite the state's *bona fide* good faith efforts of prevention, state parties are under an obligation to undertake a serious investigation into the human rights violation that occurred.

In the case of *Castillo Paez,*[93] the Commission requested the Court to order the government of Peru to:

to conduct the necessary investigations to identify, try and punish those responsible for the forced disappearance of Ernesto Castillo-Paez, ...and to pay full reparation, both material and moral, to the victim's family for the serious damages suffered as a result of the violation of the said rights under the convention.[94]

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[91] Ewing *supra* note 11 at 773.

[92] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 175.

[93] *Castillo Paez Case* Reparations (art. 63(1) American Convention on Human Rights), Judgement of 27 November 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 43 (1998).

[94] Inter-American Court of Human Rights 1996 HYPERLINK http://wwwserver.law.wits.ac.za/humanrts/iachr/96-2eng.htm 5 Mar. 2004.

Similarly in the *Blake Case*,[95] the Court unanimously ruled:

that the state of Guatamala is obliged to use all the means at its disposal to investigate the acts denounced and punish those responsible for the disappearance and death of Mr. Nicholas Chapman Black.

The duty to investigate requires that state parties to the Convention investigate every situation involving a violation of rights protected by the Convention.[96] Investigations must be serious, [97] and

be assumed by the state as its own legal duty, not as a step taken by private interests that depend upon the initiative of the victim or (their) family or upon their offer of proof, without an effective search for the truth by the government. [98]

States are, therefore, required to investigate human rights abuses committed by non-state actors seriously and adequately.

This obligation may entail training judges, police, doctors, social workers and

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[95] *Blake Case* Preliminary objections, Judgement of 24 January 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 36 (1998).

[96] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) 176-177: The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. ... In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the state as its own legal duty, not as a step taken by private interests that depend upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the state responsible on the international plane; Melish *supra* note 14 at footnote 34 citing the Neira Alegria Case (disappearance of prisoners following suppression of prison riot by Peruvian military). In the Neira Alegria case against Peru, the Court found that Peru had violated its duty to investigate by failing to identify the remains of prisoners killed during the suppression of a prison riot not by armed forces; *Neira Alegria et al. Case* Judgement of 19 January 1995, *Inter-Am. Ct. Hr.* (Ser. C) No. 20 (1995) (the government waited nine months to recover the majority of the remains and then failed to employ the forensic techniques necessary to identify the bodies).

[97] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 177; Ewing *supra* note 11 at footnote 97: "not undertaken as 'a mere formality preordained to be ineffective'".

[98] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 176-177.

others in the appropriate techniques for gathering and processing information.[99]

4.4.2.3 The duty to punish

Closely related to the duties to *"prevent"* and to *"investigate"*, Article I(I) also incorporates the duty to punish those responsible for the violation of human rights. In the Velasquez Rodriquez Case the Court held:

if the state apparatus acts in such a way that the violator, goes unpunished ... the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdictions. [100]

Punishing human rights violations is essential to the government's obligation to *"ensure"* protected fundamental human rights. Sanctioning violations aids in deterring future human rights violations by sending a clear message to potential abusers that violations will not be tolerated. Both the Court and the Commission have consistently emphasized the duty to sanction in individual cases. [101] In the

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[99] Ewing *supra* note 11 at footnotes 96-99.

[100] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988)at 176; Ewing *supra* note 11 at 776.

[101] *El Amparo Case* Reparations (art. 63(1) American Convention on Human Rights), Judgement of 14 September 1996, *Inter-Am. Ct. Hr.* (Ser. C) No. 28 (1996); *Castillo Paez Case* Reparations (art. 63(1) American Convention on Human Rights), Judgement of 27 November 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 43 (1998); *Paniagua Morales Case* Judgement of 8 March 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 37 (1998); *Loyasa Tamayo Case* Preliminary objections, Judgement of 31 January 1996, *Inter-Am. Ct. Hr.* (Ser. C) No.25, (1996); *Blake Case* Preliminary objections, Judgement of 24 January 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 36 (1998); Melish *supra* note 14 at footnote 36 points out that Commission and Court merits decisions generally conclude with a unanimous finding that the State must investigate "... identify and *sanction* those responsible and adopt internal measures necessary to guarantee fulfillment of this obligation". The Commission has been particularly critical of amnesty laws that foreclose entirely the possibility of sanctioning human rights violators, finding such laws to conflict directly with Article (1) 1. See the case of *Rodolfo Robles Espinoza and Sons v Peru* Case 11.317, Report No. 20/99, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.95 Doc. 7 rev. at 787 (1998) (stating that, through such laws and decrees, "a State precludes 'any judicial possibility of continuing the criminal trials intended to establish the crimes denounced; to identify their authors, accomplices and accessories after the fact, and to impose the corresponding punishments.' . . . Consequently, amnesty laws directly prevent exercise of the right to prompt an effective recourse to Judicial guarantees and they violate the State's obligation of ensuring free and full exercise of the rights recognized in the Convention [art. 1(1)]".) (internal citations omitted); see also the cases of *Garay Hermosilla et al. v Chile* Case 10.843, Report No. 36/96, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997); *Meneses Reyes, Lagos Salinas, Alsina Hurtos and Vegara Inostroza v Chile* Cases 11.228,

Luis Uscategui Case[102] that dealt with death squads in Venezuela, the Commission found:

...the failure to act on the part of the appropriate authorities responsible for investigating, judging and punishing the members of the so called death squads is a fundamental factor that allows them to continue to operate.[103]

Subsequently the Court on 27 November 2002, responding to an urgent request of the Commission resolved:

To require the state to investigate the acts in question ....for the purpose of discovering those responsible and (to) *punish them.* [104]

In its prior investigation into the matter the Commission found:

...the failure to act on the part of the appropriate authorities responsible for investigating, judging and punishing the members of the so called death squads is a fundamental factor that allows them to continue to operate.[105]

Similarly In the *Paniagua Morales et al. Case*[106] the Court was requested to:

order Guatamala to identify, judge *and punish* those responsible for the (se) violations and to pay fair compensation to the victims according to Article 63 (1) of the American Convention. [107]

11.229, 11.231 and 11.182, Report No. 34/96, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.95 Doc. 7 rev. at 196 (1997); *Consuelo et al. v Argentina* Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993); *Masacre Las Hojas v El Salvador* Case 10.287, Report No. 26/92, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993); *Mendoza et al. v Uruguay* Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993).

[102] Inter-American Commission on Human Rights 2002(b) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.3.htm 9 Feb. 2004 at 256.

[103] *Ibid.*

[104] Inter-American Commission on Human Rights 2002(b) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.3.htm 9 Feb. 2004 at 256.

[105] Inter-American Commission on Human Rights 2002(b) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.3.htm 9 Feb. 2004 at 252.

[106] *Paniagua Morales Case* Judgement of 8 March 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 37 (1998); Inter-American Commission on Human Rights 2002(b) HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.3.htm 9 Feb. 2004 at 345-346.

[107] *Paniagua Morales Case* Judgement of 8 March 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 37 (1998); Inter-American Commission on Human Rights 2002(b)

A state which has appropriate laws criminalizing assault or domestic violence, for example, will violate the American Convention if the conviction rates for these crimes evidence a failure to exercise due diligence to prosecute these crimes. [108]

4.4.2.4 The duty to remedy

The Article 1(1) duty to "*ensure*" also obligates States to make *reparation* for harm brought about by the violation of an international obligation. In the *Velasquez Rodriques case* the Court affirmed:

It is a principle of international law which jurisprudence, has considered 'even a general concept of law', that every violation of an international obligation which results in harm creates a duty to make adequate reparation. [Adequate reparation] "consists in full restitution ....., which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages".[109]

State parties must, *"if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation".*[110] Reparation is "*obligatory following a State's failure to enforce an international convention or commitment".* Consequently, a State's failure to make reparation

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HYPERLINK http://www.cidh.oas.org/annualrep/2002eng/chap.3.htm 9 Feb. 2004 at 345-346.

[108] In other words when conviction rates are low and out of proportion in relation to the number of complaints lodged (Ewing *supra* note 11 at footnote 102). In Peru, convictions were obtained in only 14% of the rape cases in which formal charges were filed 1988. (compared with a rate of 23% in the U.S. in the same year). Chile, 4000 rapes were reported in 1989, of which 493 (2.47%) resulted in convictions (Culliton 1993 *H. Int'l L. J.* 517-18). Chilean legal system systematically fails to prosecute violence against women. Also see Ewing *supra* note 11 at 776 and accompanying footnote 31, asserting that Article 25 guarantees the right to judicial protection against "all acts that violate fundamental rights recognized by the constitution or laws of the state concerned or by (the) Convention". This provision explicitly calls on state parties to "ensure" that persons have recourse to the judicial system to protect rights. Any situation in which victims of violence against women are denied effective legal recourse due to the failure of the state to adequately investigate or punish acts of gender based violence will also constitute a state violation of the substantive rights to judicial protection under Article 25 of the American Convention.

[109] Melish *supra* note 14 at footnote 42 citing *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at par 26. Also see *Godinez Cruz Case* Judgement of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989) at para 24.

[110] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 166; Ewing *supra* note 11 at footnote 100.

for harm brought about by a human rights violation in its jurisdiction triggers its international responsibility under the American Convention.[111]

The duty to remedy human rights abuse is so important in the Inter-American human rights system that the American Convention includes a separate provision requiring the Court to order reparation upon finding a human rights violation.

Article 63(1) provides:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of this right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[112] According to the Court, "This article codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law, as has been recognized by this Court and the case law of other tribunals".[113]

In the Blake Case,[114] the Court unanimously declared and ruled :

...that the state of Guatamala is obliged to pay fair compensation to the relatives of Mr. Blake.... and to reimburse them for the expenses incurred ....[115]

As the above dimensions of the state's duty "*to ensure*" fundamental human

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111 *Rodolfo Robles Espinoza and Sons v Peru* Case 11.317, Report No. 20/99, *Inter-Am. Ct. Hr.*, OEA/Ser.L/V/II.95 Doc. 7 rev. at 787 (1998) at para. 161: "It is a generally accepted principle of international law that a State's failure to comply with a commitment causes it to incur in the obligation of making reparation. Liability is the necessary corollary of a right. All rights at the international level impose a liability on the State. If the obligation in question is not satisfied, the liability requires adequate redress to be made. Reparation is therefore obligatory following a State's failure to enforce an international convention or commitment" (internal citations omitted).

112 *American Convention*, art. 63(1); Melish *supra* note 14 at footnote 44.

113 Melish *supra* note 14 at footnote 45; *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at para. 25; *Godinez Cruz Case* Judgement of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989) at para. 23.

114 *Blake Case* Preliminary objections, Judgement of 24 January 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 36 (1998).

115 *Blake Case* Preliminary objections, Judgement of 24 January 1998, *Inter-Am. Ct. Hr.* (Ser. C) No. 36 (1998) at 124.

rights to those who live within their jurisdiction demonstrate, the American Convention obligates states to take specific steps in response to private acts that violate fundamental human rights. A former president of the Inter-American Court, Rafael Nieto Navia, has identified three basic state obligations under the American Convention: "to *respect rights and liberties, to ensure their free and full exercise and to adopt measures that make them effective*". [116]

4.5 The United States of America

4.5.1 Background

The United States of America is a country with a very rich human rights tradition. The United States of America is also the country with the oldest active constitution that encompasses a supreme bill of human rights and fundamental freedoms. From this rich human rights tradition there is much to be learned by other countries, including South Africa. The system in the United States of America works. The United States of America today is the most powerful nation on earth and the undisputed leader of the democratic free world. All this was built on a solid foundation of valuing human rights and freedoms.

Although the American Constitution (unlike the constitutions of most other liberal democracies) contains no language containing or establishing affirmative governmental duties,[117] the law that was developed over the past two hundred years shows clearly that the state has an affirmative obligation to protect those who live within their borders and to ensure that their citizens actually enjoy the rights set out in the Bill of Rights.

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[116] Ewing *supra* note 11 at 777 and accompanying footnote 108.

[117] Glendon 1992 *U. Chi. L. Rev.* 521: "A second distinguishing feature is that the American Constitution, unlike the constitutions of most other liberal democracies contains no language establishing affirmative welfare rights or obligations".

Although the United States Supreme Court in recent years denied[118] a broad interpretation of an affirmative duty in favour of a narrow understanding[119] and despite the fact that the USA stubbornly refuses to accept international jurisdiction,[120] there is a great deal to learn and appreciate from America's constitutional human rights processes, case law and history.[121] Because the overwhelming majority of the world's constitutions have been adopted within the past thirty years, there are few other countries with such a rich human rights and human rights debate heritage. The United States of America is a member of the Organisation of American States and a signatory to the American Declaration on the rights and Duties of Man. It is, however, not a signatory to the American Convention and as such does not accept the jurisdiction of the Inter-American Court of Human Rights or the Inter- American Commission on Human Rights.

4.5.2 The Fourteenth Amendment

4.5.2.1 The Adoption of the Fourteenth Amendment

Initially the Federal Constitution of the United States of America left the protection of the basic human rights of individuals to the states. The main aim of

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[118] Wrongly so according to most scholars and academics.

[119] Fisher 1999 *Wash. & Lee L. Rev.* 509: "This view has led to the Supreme Court's refusal to recognize constitutional duties to rescue or to protect in all but extremely narrow circumstances".

[120] Stephens 2000 *ILSA J. Int'l & Comp. L.* 278 and 279: "While actively engaged in international efforts to force governments and officials of other countries to obey international law, the United States Government has sharply restricted the domestic application of those same rules"; Glendon *supra* note 117 at 525: "In view of the long-standing American rights tradition, and the recent history of expansive judicial protection of a broad spectrum of individual and minority rights, the third aspect of American distinctiveness may at first glance seem puzzling. I refer to the dubious distinction of the United States as the only liberal democracy that has not ratified a number of important human rights instruments, notably the two United Nations Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. This reticence, no doubt, is due in large part to our prudent unwillingness to submit to the jurisdiction of international organisations dominated by critics of the United States. But particularly where economic and social rights are concerned our reluctance is also attributable to our prevailing ideas about which sorts of needs, goods, interests, and values should be characterized as fundamental rights. Another likely reason is that the American civil litigation system is not well equipped to handle the potential consequences of characterizing a new set of interests as fundamental rights".

[121] *Ibid.*

the Fourteenth Amendment was to establish the right to protection as part of the Federal Constitution in order to obligate states to protect the fundamental rights of all the persons that lived within the territory and jurisdiction of that state[122].

Most Republicans at the time believed that the states failed in their duty to provide protection to their citizens, especially with regards to black slaves that were declared free men. Positive action on the part of the Federation was needed in order for them to comply with the original contract theory. With the abolishment of slavery through the Thirteenth Amendment during the national controversy regarding slaves between 1830 to 1870, black people in the South's fundamental human rights to life, liberty and freedom were consistently being violated by a society that had deep seated prejudices against colour. In one instance, two policemen repeatedly struck a petite black woman with baseball bats. The police claimed self-defence. In another incident, a black man was beaten by police based on a false weapons charge, and the policeman's word was enough to exonerate him.

At the time it was testified that:

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[122] Heyman 1991 *Duke L. J.* 546 asserts that slavery meant that most blacks were denied the protection of their civil liberties; see Dred Scott v Sandford, 60 U.S. (19 How.) 393 (1857) where the Supreme Court asserted that blacks had no rights that whites were bound to respect; Bigelow 1993 *Notre Dame J.L. Ethics & Pub. Pol'y* 555-556 and accompanying footnotes 105-113: "The Fourteenth Amendment was enacted to provide individuals with the fundamental rights, including the right to protection, which the citizens already possessed under general constitutional theory, but that the states were not enforcing adequately. The concept of protection was woven inextricably with the status of the individual as a citizen. It was not until the passage of the Thirteenth Amendment in 1865, however, that the status of "citizen" was extended to blacks. In the South, following the Emancipation Proclamation and the congressional ratification of the Thirteenth Amendment, resistance abounded against extending any sort of protections to the new citizens, who were previous slaves. Violence was commonplace. Against this background, the federal government determined that it could no longer idly sit by. Reports of the conditions in the South were printed and distributed to the congressional Joint Committee on Reconstruction. The Committee concluded that in order to protect the freed blacks from discrimination and violence, it was "necessary to implement federal guarantees of protection, either through legislation or through constitutional amendment. Consequently, the meaning of this "protection" which the federal government intended to provide, through the Fourteenth Amendment and the subsequent Civil Rights Act, must be understood in the context of the common law tradition and the social contract theory, upon which our Constitution originated".

Some of the local police have been guilty of great abuses by pretending to have authority to disarm the coloured people. They go in squads and search houses and seize arms. . . . Houses of coloured men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken. A great variety of such offences have been committed by the local police. [123]

Unrestrained violence against blacks as well as the enactment of black codes by states which restricted blacks in several of their fundamental rights, including freedom of movement, to testify in court, to own property and to dispose of their own labour, confirmed the belief that the states were unable and unwilling to protect the rights of all its citizens.[124] It was necessary to provide federal guarantees of protection through legislation and constitutional amendment.

During the Thirty-ninth Congress the Civil Rights Act of 1866 [125] was enacted in response to the black codes and to protect freed men from violations of their basic human rights. The principal aim was reflected in the title of the Act which read:

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[123] Heyman *supra* note 122 at 546; Report of C. Schurz, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. (1865); James *Framing of the Fourth Amendment* 51-52.

[124] Heyman *supra* note 122 at footnote 274 quoting Report of C. Schurz, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. (1865) wrote: "In many districts robbing and plundering was going on with perfect impunity, the roads were infested by bands of highwaymen, numerous assaults occurred, and several stage lines were considered unsafe. The (accompanying statements of several military officers) give a terrible picture of the state of things in the localities they refer to. It is stated that civil officers are either unwilling or unable to enforce the laws; that one man does not dare to testify against another for fear of being murdered, and that the better elements of society are kept down by lawless". Also see Heyman *supra* note 122 at footnote 272 again quoting Report of C. Schurz, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. (1865): The agent, Captain J.H. Weber, wrote to the assistant commissioner of the Bureau as follows: "In the immediate vicinity of our military posts, and in locations that can readily be reached by the officers of this bureau, the citizens are wary of abusing the blacks; they are so because this bureau has arrested and punished people committing such offences.... But in remote localities... the blacks are as badly treated as ever; coloured people often report themselves to the sub-commissioners with bruised heads and lacerated backs, and ask for redress, protection, to be permitted to live at their former homes, and some assurance that they will not be treated in a like manner again if they return. But nothing can be done if their homes happen to be twenty or thirty miles from any office that will protect them..... As to protection from the civil authorities, there is no such thing outside of this city. There is not a justice of the peace or any other civil officer in the district, eight (8) counties, of which I have charge, that will listen to a complaint from a Negro; and in the city, since the adjudication of these cases has been turned over to the mayor, the abuse of and impositions upon Negroes are increasing very visibly, for the reason that very little, if any, attention is paid to any complaint of a Negro against a white person".

[125] *Civil Rights Act* of 1866, 42 U.S.C.A. § 1981 (1988).

An act to protect all persons in the United States in their Civil Rights, and furnish the Means of their Vindication.[126]

Section 1 declared that:

all persons born in the United States were citizens of the United States, and provided: such citizens, of every race and colour... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[127]

Republicans explained the Civil Rights Act in terms of the natural right and social contract theory in the classical legal tradition.[128] Conservatives attacked the Civil Rights Act on the basis that the Bill invaded the exclusive authority of the states to regulate the rights of their citizens.[129] In response, the supporters of the Bill argued that Congress had authority under the Thirteenth Amendment, which

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[126] *Civil Rights Act* of 1866, 42 U.S.C.A. § 1981 (1988).

[127] *Civil Rights Act* of 1866, 42 U.S.C.A. § 1981 (1988), ss 1 and 14; Heyman *supra* note 122 at 552 and accompanying footnote 293.

[128] Heyman *supra* note 122 at 552 and accompanying footnote 294; CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866); Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004:
"Republicans explained the Civil Rights Act in terms of natural rights theory and the classical legal tradition. A significant debate in the House on S. 61, the civil rights bill, took place on March 1. Representative Wilson, chairman of the Judiciary Committee, explained the background to the bill's phraseology "civil rights and immunities" and "full and equal benefit of all laws and proceedings for the security of person and property". Quoting Kent's commentaries, Wilson explained: "I understand civil rights to be simply the absolute rights of individuals, such as – "The right of personal security, the right of personal liberty, and the right to acquire and enjoy property". Wilson added that "we are reducing to statute from the spirit of the Constitution," a clear reference to the Bill of Rights. Referring to "the great fundamental civil rights", Wilson pointed out: "[Sir William] Blackstone classifies them under three articles, as follows: 1. The right of personal security; which, he says, "Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation". 2. The right of personal liberty; and this, he says, "Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. "3. The right of personal property; which he defines to be, "The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land". Other Republicans explained the Act in the same terms".

[129] Heyman *supra* note 122 at 552 and accompanying footnote 290.

abolished slavery and in essence declared that all persons in the United States should be free and protected. Under *Section 1* of the Thirteenth Amendment. Congress had power to *"give effect to that declaration and secure to all persons within the United States practical freedom"* by ensuring that the former slaves possessed all of the *"privileges which are essential to freemen".*[130] More broadly, proponents argued that the national government had inherent authority to protect its citizens.

Allegiance and protection are reciprocal rights...."How is it that every person born in the United States owes allegiance to the Government? Everything that he is or has, his property and his life, may be taken by the Government of the United States in its defense or to maintain the honour of the nation; and can it be that.... the people of our day have struggled through a civil war, with all its sacrifices and all its desolation, to maintain it, and at last... we have got a Government that is all powerful to command the obedience of the citizen, but has not power to afford him protection?" *131*

American citizenship, it was said "*would be worth very little if it did not carry protection with it*". [132] The nation must have authority to protect fundamental rights *"or our Constitution fails in the first and most important office of government". 133*

The first duty of government is to protect its citizens from human rights abuses by both state and non-state actors.[134] Republicans desired to enshrine the protections that the Civil Rights Act afforded to citizens in the constitution and proceeded with the drafting of the Fourteenth Amendment.

There can be absolutely no doubt as to what the framers of the Fourteenth Amendment meant by their words, as the debates in Congress during the drafting and ratification of the amendment clearly reveal: on 12 Jan 1866, Rep.

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130 Heyman *supra* note 122 at 553; CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).
131 Heyman *supra* note 122 at 553; CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).
132 Heyman *supra* note 122 at 553; CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) quoting remarks of Senator Trumbull.
133 *Id.* quoting remarks of Representative Wilson.
134 Heyman *supra* note 122 at 554 and accompanying footnotes 310-313.

John Bingham of Ohio began the drafting of the Fourteenth Amendment by a proposed amendment to the Joint Senate-House Committee of 15.

The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property. [135]

Rep. Thaddeus Stevens of Pennsylvania proposed a similar guarantee:

All laws, state or national, shall operate impartially and equally on all persons without regard to race or colour.[136]

On 19 Jan. 1866 Connecticut Representative Henry Deming introduced a constitutional amendment similar to Bingham's that declared:

That Congress shall have power to make all laws necessary and proper to secure to all persons in every State equal protection in their rights of life, liberty, and property".[137]

On January 20 the Joint Committee's subcommittee considering drafts of constitutional amendments reported to the full Joint Committee an expanded form of the Bingham proposal that read as follows:

Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property".[138]

On January 27 the Joint Committee considered a draft of the constitutional amendment reported by the subcommittee of Bingham, Boutwell, and Rogers. It now read:

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[135] Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul 2004 at 2 and footnote 2.

[136] Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul 2004 at 2 and footnote 2.

[137] Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004 at 2 and footnote 3.

[138] Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004 at 2 and footnote 3.

Congress shall have power to make laws, which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in every State the same immunities and also equal political rights and privileges.[139]

Consequently the Fourteenth Amendment was adopted and *section one* provided:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[140]

4.5.2.2. The right to protection under the Fourteenth Amendment

The records of the debates in the Thirty-Ninth Congress regarding the Fourteenth Amendment, and the Civil Rights Act of 1866 clearly confirm that the constitutional right to protection and security was understood by the framers to include protection against private acts of violence committed by non-state actors.[141]

Relying on the Declaration of Independence, Blackstone and Kent the framers contended that the rights to life, liberty, security and property were "natural" and

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[139] Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004 at 2 and footnote 4.

[140] *U.S. CONST.* amend. XIV, § 1.

[141] Heyman *supra* note 122 at 554; CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) where Samuel Shellabarger of Ohio declared "that protection by his Government is the right of every citizen" and Senator Alvin Stewart of Nevada asserted that: "It is the duty of the Government to protect; of the subject to obey". "These are the essential elements of citizenship," agreed Senator Justin Morrill of Vermont, "allegiance on one side and protection on the other". And "these great fundamental rights," declared Representative James Wilson of Iowa, are "the first and most important office of government".; Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004.

"inalienable".[142] Following the classical view, the framers viewed liberty and protection as going hand in hand. They defined constitutional liberty in terms of Blackstone's conception of civil liberty in which the individual's natural liberty was subject to limitation in return for the protection which civil government affords him.[143] The individual had a duty to obey and respect the laws of society and in turn the society had a duty to respect and protect his natural rights from violation by others in the society.

The right to protection was secured in different ways by the Fourteenth Amendment. Under the privileges or immunities clause of the Fourteenth Amendment protection was a substantive right of American citizenship and under the due process clause it was implicit in the injunction that no person should be deprived of life, liberty or property and finally, the equal protection clause obligates states that protection afforded to a state's citizen must be afforded equally to all the citizens.[144]

4 5 2.3 The privileges and immunity clause

Section One of the Fourteenth Amendment forbids states to *"abridge the privileges or immunities of citizens of the United States".*[145]

In the leading decision of *Corfield v. Coryell* Justice Washington defined "*privileges and immunities*" as: [146]

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[142] Kent *Commentaries* bladsy?; CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866): Trumbull quoted from Kent's *Commentaries* as follows: "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country to be natural, inherent, and inalienable".; Heyman *supra* note I22 at 547.

[143] Heyman *supra* note 122 at 557.

[144] Heyman *supra* note 122 at 217; Farber and Sherry *History of the American Constitution* 253-319.

[145] U.S. CONST. amend. XIV, § 1.

[146] Corfield v Coryell 6. F. Cas. 546 (1823). In Corfield, Justice Washington was called upon to interpret Article IV, Section 2 of the Constitution, which provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"; Heyman *supra* note 122 at 555; Kent *supra* note 142 at 71-72: Corfield was discussed as the

those privileges and immunities which are, in their nature, fundamental: which belong, of right, to the citizens of all free governments and which have, at all times, been enjoyed by the citizens of the several state's which compose this Union.... These fundamental principles ... may ... be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole".

Justice Washington proceeded to mention some of the particular privileges and immunities that were regarded as fundamental, including:

The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of habeas corpus, to institute and maintain actions of any kind in the courts of the state, to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state ... to which may be added the elective franchise, as regulated and established by the laws or constitution of the sate in which it is to be exercised. [147]

The *Corfield v Coryell* case recognized *"protection by the government"* as a fundamental right of citizenship on a equal footing to the rights to life, liberty and property. It is clear that protection was understood to be one of the main rights of citizenship guaranteed by the Privileges or Immunities Clause. This reflected the classical view of the legal relationship between citizenship and protection. Citizenship implies that certain basic human rights must be protected by the

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leading authority on the meaning of privileges and immunities by Chancellor Kent; Roland 2000 HYPERLINK http://www.constitution.org/col/intent_14th.htm 14 Jul. 2004 at 4: "On February 13, 1866, it was reported in both houses of Congress that the Joint Committee had recommended adoption of a constitutional amendment to read as follows:
The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property. This appears to be the first reported draft of what would become § 1 of the Fourteenth Amendment. Note that it substituted the legal term of art "immunities" for "rights", in a context that makes it clear the meaning is equivalent, but chosen to emphasize that it is rights against the actions of government that is intended, and that it included all such rights, not only those mentioned in Amendments 1-8, but those in the original Constitution, the un-enumerated rights of the Ninth Amendment, and the right recognized in the Tenth Amendment not to have government exercise un-delegated powers.

[147] *Corfield v Coryell* 6. F. Cas. 546 (1823) at 551-552; Heyman *supra* note 122 at 555.

government in return for the duty by the citizen of allegiance and obedience to the laws of the land. [148]

4.5.2.4 Due Process Clause

For the meaning of the Due Process Clause it is again helpful to look at the history of the clause and the various congressional debates leading up to the acceptance of the Fourteenth Amendment.[149]

Representative Bingham referring to the Due Process Clause of the Fifth Amendment, which was to be incorporated in the language of the [150] Fourteenth Amendment, stated that the clause ensured *"the protection"* and it guaranteed the right "*of all persons to be protected in life, liberty and property*".[151] It was, therefore, a violation of the Due Process Clause for any state government to deny protection to any free citizen of the United States of America within their limits in the fundamental rights of life, liberty and property.[152] This understanding was also supported by other representatives like Representative Thayer who stated that "*the Fifth Amendment guarantees to all the citizens of the United States their right to life, liberty and property*". Representative Wilson also stated that under the Fifth Amendment "*the citizen is entitled to life, liberty and the right to property*"; and also Rep. De Frees contended that Section 1 of the Fourteenth Amendment "secures to all life, liberty and property".[153]

The Due Process Clause right to protection of the law was not, as is often thought, peculiar and specific to antislavery ideology, instead it was central to the

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[148] CONG. GLOBE, 39th Cong., 1st Sess. at 1832 (1866); Heyman *supra* note 122 at 555.
[149] Heyman *supra* note 122 at 557.
[150] CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866); Heyman *supra* note 122 at 557 and footnote 335.
[151] CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) at 1089; Heyman *supra* note 122 at 557 and footnote 335.
[152] CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) at 1090; Heyman *supra* note 122 at 557 and footnote 335.
[153] CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866); Heyman *supra* note 122 at 558 and footnote 338.

classical understanding of "*due process of law*" in both England and America.[154] The various Due Process Clauses of the Federal American Constitution can be traced back to the *Magna Carta* of the 12th century, which declared in chapter 39: [155]

No free man shall be taken or imprisoned, or be deprived of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will the sovereign pass upon him, nor condemn him, but by lawful judgement of his peers, or by law of the land.

Most of the first American state constitutions contained "*law of the land*" provisions based on the aforementioned clause contained in the Magna Carta. In drafting the Fifth Amendment, the medieval language of the Magna Carta was translated into the modern human rights terminology of rights to life, liberty and property.[156] By the time of the American Civil War, the "*law of the land*" provision appeared in some or other form in almost every American state constitution.[157]

Blackstone treated Chapter 29 of Magna Carta as having positive legal content. The law of the land provision *"protected every individual of the nation in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgement of his peers or the law of the land".* [158]

This view was echoed by Daniel Webster in his argument in the case of *Trustees of Dartmouth College v Woodward:*

By the law of the land.....is most clearly intended, the general law..... which hears before it condemns which proceeds upon inquiry, and renders judgement only after trial. The meaning is, that every citizen shall hold his life, liberty,

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[154] CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866); Heyman *supra* note 122 at 558 and footnote 338; Crosskey 1954 *U. Chi. L. Rev.* 16-17.

[155] *Supra* at 2.2.3; Magna Carta ch. 39; Heyman *supra* note 122 at 559.

[156] Heyman *supra* note 122 at 559 and accompanying footnote 343; Crosskey *supra* note 154 at 16-17; *Murray's Lessee v Hoboken Land & Improvement Co.* 59 U.S. (19 How.) 272 (1855) at 276; Cooley *Treatise on the Constitutional Limitations* 351-353; Riggs 1990 *Wis. L. Rev.* 991-995.

[157] Cooley *supra* note 156 at 351-353; Heyman *supra* note 122 at 559.

[158] Heyman supra note 122 at 559; Blackstone *Commentaries* 424.

property and immunities, under the protection of the general rules which govern society.[159]

Webster and Blackstone both interpreted the law-of-the-land clause as placing a positive legal duty on the state to respect and protect an individual's fundamental human right to life, liberty and property.

Heyman asserts that:

Read narrowly, these statements might be mistakenly taken to refer only to protection against intrusions by the government itself. Understood in the context of classical thought however, the principle that they articulated had a broader meaning. A citizen holds his life, liberty and property under the protection of the law. The law secures these rights on the one hand, and specifies the conditions under which those rights are forfeited on the other. The due process provisions forbid the government from depriving a citizen of his fundamental rights. In the absence of a judicially determined forfeiture, the citizen is entitled to the protection of the law, including the right to appeal to the law for redress of any injuries that he might suffer, whether the injury arose from private parties or from the government itself.[160]

Reflecting this view, some antebellum judicial opinions held that the government might violate these provisions not only by directly infringing the fundamental human right to life, liberty or property of a citizen, but also by omitting to protect these rights. As one antebellum judge expressed it:

To hold that the (due process) clause can apply only to cases where there is to be some manual interference by the state with the rights of persons or of property ... would virtually nullify the provision, as the most oppressive and tyrannical ends may be accomplished by simply withdrawing from individual rights the protection of the law.[161]

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[159] *Trustees of Dartmouth College v Woodward* 17 U.S. (4 Wheat.) 518 (1819) at 551-599 (argument of Daniel Webster for plaintiffs in error).

[160] *Trustees of Dartmouth College v Woodward* 17 U.S. (4 Wheat.) 518 (1819) at 581; Cooley *supra* note 156 at 353; Heyman *supra* note 122 at 560.

[161] *Wynehamer v People* 13 N.Y. 378 (1856) at 434 (opinion of Selden. J.); Heyman *supra* note 122 at 559.

The Due Process Clause, therefore, clearly also applies to cases where there is a violation of a fundamental right and the violator is a non-state actor.

The Due Process Clause forbids the government to deprive any person of his rights to life, liberty and property. The government violates this provision by executing and imprisoning a person, or by taking his property, without due process. But it also does so by refusing or omitting to protect a person's fundamental human right to life, liberty and property when these rights are being threatened by non-state actors.[162]

4.5.2.5 The Equal Protection Clause

The right to the equal protection of the law is expressly recognized by the Fourteenth Amendment's Equal Protection clause.

The foundations of equal protection are to be found in John Locke's theories of natural rights and social contract.[163] Locke starts with the concept of natural liberty.[164] In a state of nature, which is "*a state of perfect freedom*", each individual human being is free to do as he sees fit, without being subject to or depending on the will of others. The natural state of humankind is a state of equality in which free men and women live out their lives without any subordination or subjection to a ruler. Every man is free to direct his own actions, without depending on the will of any other man. Men who are free in this state are also equal due to the fact that each is independent of the others. Locke defined natural equality in two ways. In negative terms, which meant the absence of "*subordination or subjection*" whereby an individual is deprived of his natural

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[162] Heyman *supra* note 122 at 562 and accompanying footnote 360: CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).
[163] Locke *Two Treatises* at section 4; Heyman *supra* note 122 at 563.
[164] Locke *supra* note 163 at s 4; Heyman *supra* note 122 at 564.

freedom and subjected to the will of another. In positive terms, natural equality means the equal right to one's natural liberty.[165] As Locke explains:

Though I have said above..... that all men by nature are equal, I cannot be supposed to understand all sorts of equality: age or virtue may give men a just presidency: excellence of parts and merit may place others above the common level: birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude, or other respects, may have made it due: and yet all this consists with the equality, which all men are in, in respect of jurisdiction or dominion one over another; which was the equality I there spoke of, as proper to the business in hand, being that equal right, that every man hath, to his natural freedom, without being subjected to the will or authority of any other man.[166]

When individuals enter civil society and, therefore, sacrifice their natural liberties, their main aim is the protection of their fundamental human rights by the society in order for them to enjoy the fundamental human rights to life, liberty and property.[167] Just as natural equality was the equal right of man to natural liberty, civil equality is the equal right of man to protection under the law. The members of society are, therefore, "*equally subjects of the same law together,*" a law that is *"common to every one of that society,"* and that secures the natural rights of all its members.[168]

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[165] Locke *supra* note 163 at s 4.

[166] Locke *supra* note 163 at s 54; Heyman *supra* note 122 at 564.

[167] Locke *supra* note 163 at s 54.

[168] Locke *supra* note 163 at s 131: "But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good; but is obliged to secure everyone's property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any common-wealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end, but the peace, safety, and public good of the people", and at 134: *"Sec. 134.* the great end of men's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as

According to Locke, the principle of equality has important substantive implications. It gives rise to one of the most basic principles of the law of nature:

[T]hat being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.[169]

As Locke writes in *Two Treatises of Government:*

But though this be a state of liberty, yet it is not a state of license: though man in that state has an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order, and about His business; they are His property, whose workmanship they are, made to last during His, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one, as he is bound to preserve himself,

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the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it".

[169] Locke *supra* note 163 at ss 131 and 136: "Sec. *136.* The legislative, or supreme authority, cannot assume to its self a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges: for the law of nature being unwritten, and so no where to be found but in the minds of men, they who through passion or interest shall misquote, or misapply it, cannot so easily be convinced of their mistake where there is no established judge: and so it serves not, as it ought, to determine the rights, and fence the properties of those that live under it, especially where every one is judge, interpreter, and executioner of it too, and that in his own case: and he that has right on his side, having ordinarily but his own single strength, hath not force enough to defend himself from injuries, or to punish delinquents. To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which everyone may know what is his. To this end it is that men give up all their natural power to the society which they enter into, and the community puts the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature"; Heyman *supra* note 122 at 564.

and not to quit his station willfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.[170]

To violate another persons fundamental human rights denies equality because it treats the victim as subordinate to the violator's will and infringes his equal right to liberty.[171] For the law to treat persons as equals, it must protect each individual against the invasion of his fundamental human rights by both state and non-state actors. According to Locke every individual has an equal right to protection under the law. This right has a substantive as well as a formal dimension: it requires not only that the law applies equally to all, but also that the law protects individuals against the violation of their fundamental human rights by others. [172]

This understanding of equality was shared by the framers of the Fourteenth Amendment. In an exchange of words between Senators Henry Wilson of Massachusetts and Edgar Cowan of Pennsylvania during the Senate's debate of the Feedmen's Bureau Bill responding to a challenge by Senator Cowan, Senator Wilson replied:[173]

Sir, the Senator from Pennsylvania asks me what I mean by the equality of men ... He asks whether I mean that one man shall weigh as much as another, or have as much money. Why are these questions put? Does he not know precisely and exactly what we do mean? Does he not know that we mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and the proudest man in the land?[174]

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170 Locke *supra* note 163 at chapter 2, s 6; Locke 1690 HYPERLINK http://www.pearsoncustom.com/link/humanities/phil/ethics/lockejohn.html 15 Jul. 2004.

171 Heyman *supra* note 122 at 564; Wilson *Lectures* 241.

172 Locke *supra* note 163 at ss 22, 59, 31; Heyman *supra* note 122 at 564.

173 Heyman *supra* note 122 at 565.

174 CONG. GLOBE, 39th Cong., 1st Sess. 342-343 (1866); Locke *supra* note 163 at s. 6; Heyman *supra* note 122 at 565.

Senator Cowan himself had defined equality earlier in the debate in almost identical terms.

> What is meant by equality, as I understand it, in the language of the Declaration of Independence is that each man shall have the right to pursue in his own way life, liberty and happiness. That is the whole of it. It is not that he shall be an elector, it is not that he shall receive the especial favours of the community in any way, but it means that that if he is assailed by one stronger than himself the government shall protect him to punish the assailant. It means ... that if an intruder and trespasser gets upon his land he shall have a remedy to recover it. That is what I understand by equality before the law.[175]

Equality was not merely a formal or empty concept with no obligations on the part of government.[176] By equality, the framers meant the equal right of every individual to protection of his natural and fundamental human rights to life, liberty and the pursuit of happiness by the state. Security and protection was a fundamental human right, not a broad meaningless cliché that the government could arbitrarily bestow or withhold as it saw fit. Instead "Equal Protection" meant the equal and inalienable right of every person to the full protection that states and governments owe to their citizens including the right to be safeguarded against violations by murderers, rapists, crime syndicates and other non-state actors. [177]

4.5.3 The state's affirmative duty of protection

4.5.3.1 Deshaney v Winnebago County department of social services

In 1867, a congressional representative stated that: "*The first duty of the Government is to afford protection to its citizens*".[178] Since this statement, many

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[175] Heyman *supra* note 122 at 565.
[176] *Id.* at 566; Westen 1982 *Harv. L. Rev.* 537-596.
[177] Heyman *supra* note 122 at 566.
[178] CONG. GLOBE, 39th Cong., 2nd Sess. 101 (1866-1867) (remarks of Rep. Farnsworth, debating Reconstruction Act of 1867), quoted in Heyman *supra* note 122 at 507; Bigelow *supra* note 122 at footnote 77.

doubts have surfaced regarding whether or not the USA government actually has a duty to protect individuals from the acts of violence perpetrated by non-state actors. The controversial *DeShaney v Winnebago County Department of Social Services* decision is illustrative:[179]

Joshua DeShaney was born in 1979.[180] A year later, Joshua's parents divorced and a Wyoming court awarded custody of Joshua to his father, Randy. Randy and Joshua then moved to Winnebago County, Wisconsin. Randy remarried. His second marriage also was short lived and in January 1982 (at the time of their divorce), Randy's second wife informed the county authorities that Joshua might be a victim of child abuse at the hands of his father. When interviewed by Department of Social Services (DSS) officials Randy denied the allegations and no action was taken by DSS. A year later, Joshua was hospitalized with multiple cuts and bruises. The examining physician notified DSS of his suspicions of child abuse. DSS obtained a court order placing Joshua in the temporary custody of the hospital. A "child protection team"[181] met to consider Joshua's situation. They determined that there was insufficient evidence to remove Joshua from the custody of his father. The child protection team recommended that Randy must secure counseling services, that Joshua be enrolled in a preschool programmeme, and that Randy's current girlfriend be encouraged to move out of the house. Randy signed an agreement undertaking to accomplish these goals. Based on the recommendation of the child protective team, the

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179 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1005-1006. The distinctive aspect of DeShaney is its focus on affirmative duties. The distinguishing characteristic of affirmative duty cases is that the plaintiff seeks damages not from the actor who commits the harm but from a governmental official who somehow made the plaintiff more vulnerable to, or failed to prevent the harm.

180 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1005-1006; Eaton and Wells 1991 *Wash. L. Rev.*.112-113 and accompanying footnote 14. The account of the facts in DeShaney is taken from the Supreme Court's opinion (*DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1001-1002) and the Seventh Circuit's opinion (*DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987)).

181 The team consisted of a pediatrician, a psychologist, a police detective, the county attorney, several DSS caseworkers, and various hospital personnel. Eaton and Wells supra note 180 at footnote 15.

juvenile court dismissed the child protection case and returned Joshua to the custody of his abusive father.

Over the next fourteen months, Joshua's situation did not improve. On the contrary, in February 1983, emergency room personnel notified DSS that Joshua had again suffered injuries that pointed towards physical abuse. During the next six months, the social services representative handling Joshua's case observed various suspicious injuries on Joshua's body. She was also aware that Joshua's father did not comply with the agreement as Joshua was not enrolled in a preschool programme and his girlfriend was still living with them in the house. In November, the hospital again notified DSS that Joshua had been treated for injuries that they believed to be caused by child abuse. On the next two visits to Joshua's home, the social services representative was told that Joshua was to sick to see her.[182] Despite this chronology of events clearly indicating child abuse, the social services representative did not take any action to remove Joshua from his abusive father's custody. In March 1984, Joshua lapsed into a life-threatening coma following a severe beating from his father. [183] Surgery revealed a series of hemorrhages caused by blows to the head inflicted over a long period of time. Joshua had bruises and marks of various sizes covering his body and half of his brain was destroyed.[184] Although Joshua survived, he will reside in an institution for the severely and profoundly retarded for the rest of his life.[185]

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[182] Eaton and Wells *supra* note 180 at 113.

[183] *DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 300; *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1002. The day before Joshua was admitted the caseworker was at the DeShaney home (*DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 300). She was told Joshua fainted for no reason, but did not request to see him.

[184] *DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 300.

[185] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1002; *DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 300. His father was found guilty of child abuse. He was sentenced to two to four years in prison.

Joshua and his mother sued the state for the abuse that Joshua suffered at the hands of his father. The claim was brought under Section 1983[186] against

[186] *Civil Rights Act* of 1866, 42 U.S.C.A. § 1981 (1988) at § 1983 provides: "Every person who, under colour of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress". To establish a cause of action under § 1983 the plaintiff must show the following: 1) plaintiff must have a constitutionally protected liberty interest; 2) the state must owe a duty to the plaintiff; 3) the state must breach that duty; 4) the state must act with the requisite degree of culpability; 5) the state must cause plaintiffs injury; and 6) plaintiff must suffer actual damages.; Bjorklund 1990 Iowa L. Rev. 791-802. at footnote 224 asserts: "Establishing a liberty interest is the first of six elements in a § 1983 cause of action. The second element is demonstrating the state owes a duty to the plaintiff under colour of state law. See Adickes v. S. H. Kress & Co.. 398 U.S. 144. 152 (1970) (colour of state law met when private persons act jointly with state officials); Brooks v. Richardson. 478 F.Supp. 793. 795 (S.D.N.Y. 1979) (colour of state law found when statute empowered agency to care for and take custody of children); see also 42 U.S.C. § 1983 (1979). Third, state breach of duty must be under colour of state law. See Monell v. Department of Social Servs.. 436 U.S. 658. 690 (1978) (official policy sufficient to hold municipality liable under § 1983); Estate of Bailey. 768 F.2d at 506 (official policy sufficient to hold governmental entity liable under § 1983); Turpin. 619 F.2d at 200 (municipality liable under § 1983 when city acts or fails to act pursuant to official policy); Byrd v. Brishke. 466 F.2d 6. 11 (7th Cir. 1972) (§ 1983 liability for failure of police "to enforce the laws and preserve the peace"). A well-established policy may not be inferred through evidence of only one incident of unconstitutional conduct by the state. See City of Oklahoma City v. Tuttle. 471 U.S. 808, 815-16 (1985) (suggesting "single incident" rule may be insufficient to hold state liable); see also Randle v. Gokev. 469 F.Supp. 452. 454-55 (N.D. Ohio 1979) (one incident of excessive force insufficient to establish official policy); Smith v. Ambrogio. 456 F.Supp. 1130. 1136-37 (D. Conn. 1978) (first arrest without probable cause insufficient to establish policy); but cf. Turpin. 619 F.2d at 202 (two arrests sufficient to entitle plaintiff to jury trial). State inaction is also sufficient to establish a policy. Estate of Bailey. 768 F.2d at 506 (state inaction sufficient to establish liability under §1983): Turpin v. Mailet. 619 F.2d 196. 200 (2d Cir. 1980) (same), cert. denied, 449 U.S. 1016 (1980); see also Whirl v. Kern. 407 F.2d 781. 795 (5th Cir. 1969) (liability when state unjustifiably continues incarceration of person after charges dropped), cert. denied, 396 U.S. 901 (1969); but see Rizzo v. Goode. 423 U.S. 362. 378 (1976) (state inaction insufficient to establish liability under § 1983). Fourth, plaintiff must establish that the state acted with the requisite degree of Culpability. Courts are confused over the degree of culpability necessary for § 1983 liability. The "state of mind" requirements include (1) deliberate indifference, see, e.g., Estelle v. Gamble. 429 U.S. 97. 104-05 (1976); Balistreri v. Pacifica Police Dep't. 855 F.2d 1421. 1424-25 (9th Cir. 1988); Estate of Bailey. 768 F.2d at 508: Rock v. McCov. 763 F.2d 394. 397 (10th Cir. 1985); (2) reckless disregard of plaintiffs rights, see Balistreri. 855 F.2d at 1424-25: Martin v. White. 742 F.2d 469. 474 (8th Cir. 1984); (3) gross negligence see Ellsworth v. City of Racine. 774 F.2d 182. 187 (7th Cir. 1985); Benson v. Cadv. 761 F.2d 335. 339-40 (7th Cir. 1985); Doe v. New York City Dept. of Social Servs.. 6490F.2d 134. 145-46 (2d Cir. 1981); and (4) the professional judgement standard, see Youngberg. 457 U.S. at 321. Courts agree negligence is insufficient and intentional acts are sufficient for § 1983 liability. See Balistreri. 855 F.2d at 1424 (negligence insufficient); Benson. 761 F.2d at 339 (intentional act or reckless disregard sufficient); but see Wright v. City of Ozark. 715 F.2d 1513. 1516 (llth Cir. 1983) (no constitutional duty breached when police suppressed information without regard for the plaintiffs welfare). Fifth, state deprivation must cause plaintiffs injury. See Benson. 761 F.2d at 339 (§ 1983 is a tort damage action, even if duty violated is based on text of Constitution); Lossman v. Pekarske. 707 F.2d 288. 290 (7th Cir. 1983) (same). Last,

Winnebago County, DSS, the caseworker, and her supervisor for deprivation of Joshua's liberty without due process of law under the Fourteenth Amendment.[187] The District Court found in favour of the state by granting a summary judgement against Joshua and his mother.[188] The Seventh Circuit Court of Appeals affirmed the district courts ruling by stating that the Due Process Clause does not require the state to protect its citizens from private acts of violence committed by non-state actors or actions not attributable to state employees.[189] The court also held that there was no special relationship between the DSS and Joshua as there is no legal basis in the language of the Due Process Clauses or the principles of constitutional law for a general doctrine of special relationship in the USA.[190]

On appeal the Supreme Court also rejected Joshua's claim. The majority opinion, written by Chief Justice Rehnquist framed the first issue as to whether the state deprived Joshua's liberty by failing to protect him from his father's violence.[191] Or put differently was the state responsible for and liable for the human rights abuses that Joshua suffered at the hands of a non-state actor. The majority of the court relied on its view of the Constitution as a charter of negative liberties stating:

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security. It forbids the State

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plaintiff must prove actual damages as a result of the deprivation. See Benson. 761 F.2d at 339; Lossman. 707 F.2d at 290-91".; Dine 2002 *Cal. W. L. Rev.*at 516 – 519.

187 DeShaney v Winnebago County Department of Social Services 109 S. Ct. 998 (1989) at 1002; Bjorklund supra note 186 at 791-802.

188 *DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 299.

189 *DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 301-302. The court held that the causal connection between the state's failure to remove Joshua and the harm was too attenuated. The court stated that because Joshua would have been injured had the DSS never existed, the caseworker's intervention most likely did not do him any harm.

190 *DeShaney v Winnebago County Department of Social Services* 812 F. 2d 298 (7th Cir. 1987) at 303.

191 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1002-1003.

itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. [192]

Applying the aforementioned test, the court held that due to the fact that the due process clause does not create a positive legal duty for the state to protect abused children, the state is not liable for its failure to protect Joshua.[193] The Court went further and stated that the fact that the state provides child abuse services does not obligate it constitutionally to protect children against private acts of violence.[194]

Joshua's second argument was that the state had a positive constitutional legal duty to protect him because he was in a special relationship with the state. The majority conceded that due process protection *"imposes upon the State affirmative duties of care and protection with respect to particular individuals"*,[195] but held that such protection is "*triggered*" only when an individual cannot act freely and is restrained by the State [196] *"through incarceration, institutionalization, or other similar restraint on personal liberty"*.[197]

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[192] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989)at 1003.

[193] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1004.

[194] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1004. The Court stated that this view is well rooted in the history of the Due Process Clause in protecting citizens from the abusive power of the state. The Court viewed the purpose of the due process clause as protecting citizens from "oppressive," "arbitrary," and "abusive" powers of the government. It believed the case at bar did not invoke this purpose of the clause. It can be argued, however, that the withdrawal of aid was the kind of arbitrary, oppressive, and abusive power that led to Joshua's deprivation of liberty.

[195] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1004-1005.

[196] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1006.

[197] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1006. The Court did not address the issue as to whether a "similar restraint on personal liberty" would include children in foster homes. It appears from the footnote (footnote 9), however, that liability may be found based on the foster parent being a state actor.

The Court held that a special relationship exists only in limited circumstances and referred to two cases as justification of this view.[198] In *Estelle v. Gamble,*[199] it was held that the state has a positive constitutional legal duty to provide inmates with the necessary medical treatment because confinement prevented them from seeking the necessary private assistance[200] and in *Youngberg v. Romeo,*[201] the Court held that the state has a positive constitutional legal duty to provide certain services to persons involuntarily institutionalized and dependent upon the state for the basic necessities of life.[202] In the DeShaney case the Court held that Due Process protection only applies when state action confines an individual's liberty, renders the person incapable to care for herself, and fails to provide the basic necessities of life.[203] The Court, therefore, refused to extend a positive legal duty to act and to protect non-institutionalized persons.

Importantly Justice Brennan, in dissent disagreed with the majority's opinion application to the facts of the case. Conceding that the Due Process Clause does not create a "*general right to basic governmental services*" [204] he concluded that the extent of state involvement in Joshua's life warranted imposing a positive

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198 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1005-1006. In addition to the two precedents, the Court cited Revere v Massachusetts General Hospital 463 U.S. 239 (1983) at 244 to stand for the proposition that the state must supply medical treatment to individuals in police custody who are injured during apprehension (*DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1005). The Court did not address whether the due process protection may apply when the State takes possession of a child and places the child under care of state agents in a foster home.

199 *Estelle v Gamble* 429 U.S. 97 (1976).

200 *Estelle v Gamble* 429 U.S. 97 (1976)at 103.

201 *Youngberg v Romeo* 457 U.S. 307 (1982).

202 *Youngberg v Romeo* 457 U.S. 307 (1982) at 317; *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1005-1006.

203 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1005-1006. In my view for a court to find that a state can only be held accountable for its own action inside institutions controlled by the state is absurd. In the 21st century the state is all powerful and controls and regulates all aspects of life. The state is 100% responsible and liable for what takes place within its borders. To find that a government must protect an inmate in prison but not a civilian in his house makes no sense. Just as the state is in control of what happens within its prisons walls so to it is in control of what happens inside borders. Like prisoners civilians are also stripped of their own defenses. No person is allowed a private army to protect him from all possible breaches of security. That is the state's role and that is why citizens pay taxes to the government.

204 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1007-1008 (Brennan J dissenting).

legal duty to protect. Specifically, Justice Brennan found that the state worsened Joshua's position by cutting off potential rescuers.

Through its child welfare programme ... the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS.[205] Inaction in this context "can be every bit as abusive of power as action".[206]

Justice Brennan also noted that the state acted positively by establishing a child welfare system[207] and stated that *"children like Joshua are made worse off by the existence of this programme".*[208] Justice Brennan asserted that *"the monopolization of a particular path of relief imposes positive duties on the state".*[209] The emergency personnel and doctors who reported the beatings trusted the DSS to come to Joshua's aid.[210] According to *Justice Brennan*, since the state had cut off all private sources of help by establishing social services, and then refused to help Joshua, it could not now claim immunity from the abuse that occurred. [211]

In a separate dissent, Justice Blackmun held that the question of whether to impose a positive legal duty on the state to protect citizens against abuses committed by non-state actors was open since Fourteenth Amendment precedents can be read narrowly or broadly.[212] Justice Blackmun accused the

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[205] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1011 (Brennan J dissenting).

[206] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1012.

[207] *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 204-205; Schriwer 2000 *U.S.F. L. Rev.* at 381- 390; Dine supra note 186 at 390.

[208] *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 210; Schriwer supra note 207 at 390.

[209] *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 207; Schriwer supra note 207 at 390.

[210] *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 209; Schriwer supra note 207 at 390.

[211] *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 210; Schriwer *supra* note 207 at 390.

[212] *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 212-213 (Blackmun dissenting).

majority of the court of "*sterile formalism*" in its interpretation of the Fourteenth Amendment.[213] He agreed with Justice Brennan's analysis in finding not "mere passivity" but active state intervention, which *"triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed".*[214] Justice Blackmun also stated that a narrow reading contravened the true purpose of *"the broad and stirring Clauses of the Fourteenth Amendment,"* which were intended to "undo the formalistic legal reasoning that infected antebellum jurisprudence".[215] Given this choice, he would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[216]

Joshua deserved to have his case heard in light of the constitutional protections that *14 U.S.C. § 1983* was designed to provide.[217]

According to Professors Eaton and Wells, although:

our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid"[218] and in support of this proposition, the Court cited opinions proclaiming that there is no fundamental right to adequate housing,[219] and that the government has no constitutional obligation to fund abortions or other medical services.[220] These cases do indeed support the thesis that the Constitution is primarily a "charter of negative liberties".[221]

Other cases, however, find positive governmental obligations in various constitutional provisions, including the due process clause. Scholars have documented many instances in which the *Supreme Court* has found in negatively phrased provisions constitutional duties that can be described as positive in

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213 *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 212.
214 *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 212.
215 *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 212.
216 *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 213.
217 *DeShaney v Winnebago County Department of Social Service* 489 U.S. 189 (1989) at 242-244.
218 Eaton and Wells supra note 180at 122 quoting *Malinski v New York* 324 U.S. 401 (1945) at 416-417.
219 Eaton and Wells supra note 180 at 122 referring to *Youngberg v Romeo* 457 U.S. 307 (1982).
220 *Youngberg v Romeo* 457 U.S. 307 (1982) at 324; Eaton and Wells supra note 180 at 122.
221 *City of Revere v Massachusetts General Hospital* 463 U.S. 239 (1983).

some sense.[222] Besides the line of cases from *Estelle* to *Youngberg* on duties owed to involuntarily confined persons, note the obligation to provide counsel to indigent criminal defendants, the obligation to provide access to information,[223] the obligation to provide access to government facilities to engage in communicative activity,[224] and other arguably affirmative duties constitutionally imposed on government. To the extent these rulings require the state to act affirmatively they do so by reason of the same due process the Court describes in restrictive terms in DeShaney.[225]

One case that suggests that the Due Process Clause involves state protection is *Truax v Corrigan.*[226] This case involved an employer's request for a judicial order against picketing by striking workers. The Court ruled that, by withdrawing the injunctive remedy, the state had deprived the employer of property without due process of law. The Court, in effect, read the Due Process Clause to require the state to protect the employer from abusive acts committed by non-state actors. This parallels the theory rejected by the majority in DeShaney.[227]

Professors Eaton and Wells propose *Boddie v. Connecticut*[228] as the progenitor of the state's positive legal duty to protect citizens from human rights abuses

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[222] *Daniels v Williams* 474 U.S. 327 (1986) at 331 (quoting *Hurtado v California* 110 U.S. 516 (1884) at 527, quoting *Bank of Columbia v Okely* 17 U.S. (4 Wheat.) 235 (1819) at 244.

[223] *Hall v Tawney* 621 F. 2d 607 (4th Cir. 1980) at 613; Eaton and Wells supra note 180 at 254-255.

[224] Eaton and Wells *supra* note 180, citing *Daniels v Williams* 474 U.S. 327 (1986) at 331-333.

[225] *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1011 (Brennan J dissenting) (under the majority's reasoning, officials presumably would not be liable if they "decided not to help Joshua because his name began with a 'j', or because he was born in the spring").

Sometimes state officers really do stand by and do nothing to help persons in distress. See *Tucker v Callahan* 867 F. 2d 909 (6th Cir. 1989) (policeman allegedly watched from his parked patrol car as plaintiff was assaulted thirty yards away; qualified immunity defense upheld); *Escamilla v City of Santa Ana* 796 F. 2d 266 (9th Cir. 1986) (plaintiff injured in baroom brawl; undercover policemen stood by and did nothing to help; relief denied for failure to state a constitutional claim); *Beard v O'Neal* 728 F. 2d 894 (7th Cir. 1984) at 899 (FBI informant watched as aggressor murdered plaintiff; no constitutional duty to help), *cert.* denied, *Beard v O'Neal* 469 U.S. 825 (1984).

[226] *Truax v Corrigan* 257 U.S. 312 (1921) ; Eaton and Wells supra note 180 at 122. The dissenters do not contest this point, but they do not altogether concede it either. Justice Brennan begins by accepting it for purposes of argument. (*DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1008-09, Brennan J dissenting). He and Justice Blackmun insist that the state did contribute to Joshua's vulnerability.

[227] Eaton and Wells supra note 180 at 122.

[228] *Boddie v Connecticut* 401 U.S. 371 (1971).

committed by non-state actors.[229] The *Boddie* case was a challenge by a poor and needy couple to the state's sixty dollar divorce fee. The Court invalidated the fee on the ground that due process *"does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages".*[230] Essentially the *Boddie v Connecticut* case requires the state to subsidize divorces of poor persons because of the state's control over the mechanisms for obtaining a divorce. Professors Eaton and Wells argue that if the Court in the DeShaney case focused on the parallel between Connecticut's monopoly on the means for obtaining divorce and Wisconsin's decision to channel complaints about child abuse to social services agencies, the outcome might have been different. The Winnebago County Department of Social Services exercised as much control over Joshua's exposure to a violent parent as the Connecticut Courts had over divorce.[231]

Professors Eaton and Wells conclude that:

Prior case law may not compel a different result in DeShaney, but neither does it preclude it, there are too many counter examples in which the Court presented by Joshua's claims was "an open one".[232]

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229 Eaton and Wells supra note 180 at 123.

230 *Boddie v Connecticut* 401 U.S. 371 (1971) at 374

231 *DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989) at 1011 (Brennan J dissenting).

232 Eaton and Wells supra note 180 at 122-123; Bjorklund *supra* note 174 at 805 also asserts that there are four fundamental flaws in the Deshaney decision:1) The too formalistic interpretation of the Constitution where certainty and predictability is favoured at the expense of individual justice and societal change; 2) The second flaw in the majority opinion is the utilization of the physical custody requirement to establish a constitutional duty to protect; 3) The third flaw in the majority opinion is the improper characterization of the duty requirement of *section 1983* cause of action; 4) The final flaw in the majorities opinion is its distinction between state action and inaction. The court noted that state inaction is actionable in a non-custodial relationship only when the state places a person in a position of danger...The seventh Court of Appeals stated that: "If the state puts a man in position of danger from private persons it will not be hard to say that its role was merely passive; its as much an active tortfeasor as if it had thrown him into a snake pit", from *Bowers v Devito* 686 F. 2d 616 (7th Cir. 1982) at 618.

Despite it's rich history in holding the state responsible for human rights violations committed by non-state actors, the United States Supreme Court has taken a narrow view of the states' positive legal duty to protect fundamental human rights from abuses at the hands of non-state actors. In *DeShaney,* according to the USA Supreme Court, the state merely has a duty to refrain from interfering with the fundamental human rights of the individual.[233] In rejecting Joshua's claim, the Court asserted that the purpose of the Due Process Clause was to protect the people from the State, not to ensure that the State protected them from each other. The Court recognized that appositive legal duty may arise when the state has contributed to the individuals's need for assistance. In *DeShaney,* even though

the State may have been aware of the dangers that Joshua faced in his father's home, it "played no part in their creation, nor did it... render him any more vulnerable to them".[234]

Many commentators have strongly condemned the *DeShaney* case[235] for not accurately reflecting the law in the United States and cites many precedents and historical debates as proof to hold the state responsible for human rights violations committed by non-state actors. Hopefully, the USA Supreme Court will someday reconsider this narrowly construed rule in light of considerations of justice, the original purpose and intent, legal precedent and the pervasive role of government in modern life.

4.5.3.2 Limited recognition of an affirmative duty to protect

The Due Process Clause of the Fourteenth Amendment to the USA Constitution asserts that no state shall.... *"Deprive any person of life, liberty or property,*

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[233] Schriwer supra note 207 at footnote 224.
[234] Eaton and Wells supra note 180 at 108.
[235] Bjorkland supra note 186; Bigelow *supra* note 122; Eaton and Wells supra note 180; Schriwer supra note 207; Dine supra note 186; Heyman *supra* note 122; Gotham 1992 *Wash. L. Rev.* 655.

without due process of law...". The Due Process Clause protects an individual's right to be free from unjustified intrusions on personal security.

Although the Due Process Clause prohibits state action infringing upon fundamental human rights rights, the USA Supreme Court has held that in some circumstances it imposes a positive legal duty on the state to protect fundamental human rights, also from private parties or non-state actors.[236]

In the case of *Estelle v Gamble,*[237] a state inmate (Mr. Gamble) brought a civil rights action against the state, claiming that he was subjected to cruel and unusual punishment in violation of his Eighth Amendment rights for inadequate medical treatment. Gamble was injured on 9 November 1973 when a bale of cotton fell on him while he was unloading a truck. Between the date of injury and 9 February 1974 Mr. Gamble on several occasions (despite complaints of severe pain) was denied medical treatment and medicines by the guards and medical personnel on duty. The Supreme Court held that

> deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain....This is true whether the indifference is manifested by prison doctors in their response to the prisoners needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. ..... deliberate indifference to a prisoners serious illness or injury states a cause of action under section 1983.

In the case of *Revere v Massachusetts General Hospital*[238] the Court held that the state owes an affirmative duty of care and protection to pretrial detainees. On September 20 1978, members of the police force of the City of Revere responded to a report of breaking and entering in progress. At the scene of the crime they sought to detain a man named Patrick M Kivlin, who attempted to flee. When

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[236] Dine supra note 186 at 510; *Estelle v Gamble* 429 U.S. 97 (1976); *Youngberg v Romeo* 457 U.S. 307 (1982); *Doe v New York City Department of Social Services* 649 F. 2d 134 (2nd Cir. 1981) at 145 (holding that a foster child may have a section 1983 cause of action against the state for a violation of the right to safety when the states conduct amounted to deliberate indifference to abuse by the foster parent); Fisher *supra* note 119 at 510; Eaton and Wells *supra* note 168 at 114.

[237] *Estelle v Gamble* 429 U.S. 97 (1976) at 105-106.

[238] *City of Revere v Massachusetts General Hospital* 463 U.S. 239 (1983).

repeated commands to stop and a warning shot failed to halt Kivlin's flight, an officer fired at Kivlin and wounded him. The officers summoned a private ambulance that took Kivlin (accompanied by one of the officers) to the emergency room of the Massachusetts General Hospital (MGH). Kivlin was hospitalized for ten days and upon his release the Revere police served him with a warrant of arrest that had been issued while Kivlin was in hospital. MGH sent the Revere police department a bill for its services to Kivlin. The chief of the police responded by denying responsibility for the bill. In January 1979, MGH sued the Revere police to recover its costs for services rendered to Kivlin. The Supreme Court *inter alia* held:

> The Due Process Clause ....does require the responsible government or governmental agency to provide medical care to persons like Kivlin who have been injured while being apprehended by the police.... If ...the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay.[239]

The case of *Youngberg v Romeo*[240] that dealt with involuntarily committed mental patients is another good example of the state's affirmative duty to protect individuals from human rights abuses by private actors. Youngberg (who was a 33 year old man that was mentally retarded with the capacity of an 18-month-old child) was involuntarily committed to a Pennsylvania state institution. After becoming concerned with injuries which Youngberg suffered at the institution, both self inflicted and by the reaction of other residents towards him (private non-state actors), his mother sued the state under *42 U.S.C 1983.*[241] She claimed that her son had constitutionally protected rights to safe conditions of confinement, freedom from bodily restrain and that the state knew, or should have known about his injuries, but failed to take the appropriate preventative measures thereby violating Younberg's fundamental human rights under the US Constitution. The

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239 *City of Revere v Massachusetts General Hospital* 463 U.S. 239 (1983).

240 *Youngberg v Romeo* 457 U.S. 307 (1982).

241 *Civil Rights Act* of 1866, 42 U.S.C.A. § 1981 (1988) at § 1983 provides that "every person who, under colour of any statute, ordinance, regulation, custom or usage, of any state territory, subjects or causes to be subjected any citizen of the United States .....to the deprivation of any rights, privileges, or immunities, secured by the constitution ....shall be liable to the party injured ....".; Dine supra note 186.

Court held that Youngberg had a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement and to freedom from unreasonable bodily restraints .

The Supreme Court of the United States has, therefore, recognized an affirmative state duty to protect individuals from human rights abuses by non-state actors in cases where the state assumes custody over an individual.[242]

Michael R Gotham[243] asserts:

When the state restricts the freedom of individuals to act on their own behalf and thereby worsens their position, courts impose an affirmative duty on the state to provide care and protection to those individuals (also from private actors) ... the state must provide the individual with reasonable safety and protection from himself and third parties including other inmates.[244]

Although the USA Supreme Court recognized a positive legal duty to protect, only in the context of prisons and mental institutions, lower courts in the USA have extended the principle to a number of other circumstances. In the case of *White v Rochford,*[245] three young children were in a car driven by an uncle of two of the children when the police stopped the car and arrested the uncle. Disregarding the uncle's pleas that the children be taken to the safety of a police station or a phone booth, the police left the children alone in the car on the side of a busy highway. The children were forced to cross eight lanes of heavy traffic and walk along the freeway at night to call their mother. The mother had no vehicle to pick up the children and again called the police who refused to help. The court found that leaving the children in such a life threatening position of danger was a violation of the children's right to safety and security.[246]

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242 Gotham supra note 235 at 655; Dine supra note 186 at 511.

243 Gotham supra note 235 at 655.

244 *Estelle v Gamble* 429 U.S. 97 (1976) at 103-104; *City of Revere v Massachusetts General Hospital* 463 U.S. 239 (1983) (holding that the Fourteenth Ammendment requires that states ensure that persons injured while being apprehended by police officers must receive medical attention); *Youngberg v Romeo* 457 U.S. 307 (1982) (holding that substantive due process requires that states provide mental patients with services necessary to ensure safety).

245 *White v Rochford* 592 F. 2d 381 (7th Cir. 1979); Dine supra note 186 at 511 and 512.

246 *White v Rochford* 592 F. 2d 381 (7th Cir. 1979); Dine supra note 186 at 511 and 512.

In the case of *Doe v New York City Department of Social Services* the court held that a foster child may have a *section 1983* cause of action against the state for a violation of the right to safety when the state's conduct amounted to deliberate indifference to abuse by the foster parent.[247]

In determining state responsibility for human rights abuses in the afore mentioned limited circumstances, the courts used three different standards to determine liability on the part of the state:

- deliberate indifference;
- professional judgement; and
- special relationship.

To find deliberate indifference the action that is being challenged should *"offend evolving standards of decency"* and should be *"repugnant to the conscience of mankind".*[248] The professional judgement standard inquires as to *"whether the state's conduct was such a substantial departure from accepted professional judgement, practice or standards in the care and treatment of the plaintiff as to demonstrate that the state did not base their actions on a professional judgement".*[249] Special relationship can be established in three ways:

1. by way of a positive act that inhibits self help or private rescue;
2. by way of the state's positive acts that expose the plaintiff to danger; or
3. by way of an undertaking that worsens the plaintiffs position.

Lower federal courts have recognized a positive state act that inhibits self help or private rescue and is not limited to instances of involuntary confinement. The case of *Ross v United States*[250] is a good example. A twelve year old boy fell off a breakwater into Lake Michigan. Although two nearby scuba diving citizens offered

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[247] *Doe v New York City Department of Social Services* 649 F. 2d 134 (2nd Cir. 1981) at 145.
[248] *Doe v New York City Department of Social Services* 649 F. 2d 134 (2nd Cir. 1981) at 145; *Estelle v Gamble* 429 U.S. 97 (1976); Dine supra note 186 at 514.
[249] *Youngberg v Romeo* 457 U.S. 307 (1982); Dine supra note 186 at 515.
[250] *Ross v United States* 910 F. 2d 1422 (7th Cir. 1990); Eaton and Wells supra note 180 at 148.

to help save him, a deputy sheriff, acting pursuant to state policy, ordered them to stop their rescue efforts and threatened to arrest them if they persisted. The deputy sheriff even positioned his boat to prevent their rescue efforts. Twenty minutes after the initial rescuers arrived on the scene, the officially authorized divers recovered the boy's body. The Court found in favour of the complainant because the state had a policy of cutting off private sources of rescue without providing a meaningful alternative. If the state by its positive acts isolates someone and restricts private aid, the state is liable.[251]

Special relationship is also established when the state by way of a positive act exposes an individual to danger. The case of *Stoneking v Bradford Area School District*[252] is illustrative. Kathleen Stoneking was a student subjected to sexual abuse and harassment by the band director of Bradford High School. She alleged that the school director and school board officials were aware of the band director's illegal conduct, but took no action to protect her. She sued both the officials and the school district. The Court found in favour of Miss Stoneking and held the state liable due to the fact that Ms. Stoneking's constitutional injury resulted from the state's

> own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers.[253]

The case confirms that there is a positive legal duty on the state to supervise their agents or employees adequately. Inadequate supervision amounts to deliberate indifference that will render the state legally liable.[254] The case of *Nishiyama v Dickson County*[255] illustrates the operation of the same principle in a different context. The county sheriff regularly allowed a trusty inmate to have unsupervised

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251 Eaton and Wells supra note 180 at 149.
252 *Stoneking v Bradford Area School District* 882 F. 2d 720 (3rd Cir. 1989), *cert.* denied , *Stoneking v Bradford Area School District* 110 S. Ct. 840 (1990).
253 *Stoneking v Bradford Area School District* 882 F. 2d 720 (3rd Cir. 1989) at 724-725.
254 Eaton and Wells supra note 180 at 150.
255 *Nishiyama v Dickson County* 814 F. 2d 277 (6th Cir. 1987); Eaton and Wells supra note 180 at 153.

use of a marked and equipped police patrol car. On the day in question, the sheriff left the car in the inmate's control, and took no action after receiving reports that the inmate was using the car to stop and harass unsuspected motorists. During this time the inmate murdered a young girl. The Court ruled that the failure of the sheriff to respond to reports that the inmate was endangering motorists constituted an *"arbitrary use of governmental power"*[256]. The Court found that the state

by their acts facilitated the crime by providing the criminal with the necessary means and the ...opportunity to commit his crime.[257]

In the case *Gibson v The City of Chigago*[258] the state was found liable because it created the dangerous situation by allowing a police officer to retain a weapon after being declared unfit for duty.

Special relationship is also established when the state undertakes to help and to provide security and then fails to follow through on the promise. An illustrative case is *Balistreri v. Pacifica Police Department.*[259] The plaintiff was repeatedly beaten by her husband. She eventually secured a restraining order forbidding her husband from having any contact with her. Despite the restraining order and the police department's knowledge that the husband was continuing to commit acts of violence against Mrs. Balistreri, the police refused to arrest Mr. Balistreri before he severely injured his wife. The Court found that a special relationship arose

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256 *Nishiyama v Dickson County* 814 F. 2d 277 (6th Cir. 1987) at 282; Eaton and Wells supra note 180 at 153.

257 *Nishiyama v Dickson County* 814 F. 2d 277 (6th Cir. 1987) at 280-281; Eaton and Wells supra note 180 at 153 and footnote 232: "Nishiyama's reasoning survives Deshaney. In the recent case of Cornelius v Town of Highland Lake 880 F. 2d 348 (11th Cir. 1989), *cert.* denied 110 S. Ct. 1784 (1990) a town clerk was abducted and terrorized by prison inmates assigned to a community work programme. The inmates were assigned to work near the town hall under direct supervision of state agents. Government officials dictated which inmates were to be released under the programme and the degree of supervision that they were to receive. As town clerk the plaintiff was forced to work alongside the inmates (that led to the injury). The court found that the (state) "did indeed create the situation".

258 *Gibson v the City of Chicago* 910 F. 2d 1510 (7th Cir. 1990).

259 *Balistreri v Pacifica Police Department* 855 F. 2d 1421 (9th Cir. 1988) superseded *Balistreri v Pacifica Police Department* 901 F. 2d 696 (9th Cir. 1990); Eaton and Wells *supra* note 180 at 155.

between Mrs. Balistreri and the police based on the state's undertaking to protect her by issuing the restraining order. The Court held that:

the restraining order together with the defendant's repeated notice ...are sufficient to state a claim that the defendant's (state) owed a duty to take reasonable measures to protect Balistreri from her estranged husband. [260]

As is clear from the above in certain limited cases the state is responsible for human rights abuses committed by non-state actors in the USA.[261]

4.6 Conclusion

In stark contrast to the USA Supreme Court, the Inter-American Human Rights System has consistently recognized a government's affirmative obligation to protect its citizens' rights, even from invasion by private actors.

Member states are expected to protect their citizens not only from government action but also from private acts of violence. The Inter-American Court of Human Rights has affirmed on numerous occasions that acts committed by private persons can be attributed to a state when the state fails to act in accordance with its international obligations under the American Convention.

The general obligation to ensure protected human rights consists of four principle state obligations:

- A duty to prevent;
- A duty to investigate;
- A duty to punish;

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[260] *Balistreri v Pacifica Police Department* 855 F. 2d 1421 (9th Cir. 1988) at 1426; Eaton and Wells supra note 180 at 156 and footnote 239.

[261] Wiegleb 1995 *Wash. U. J. Urb. & Contemp. L.* 393 asserts that: "In requiring states to carry out federal regulatory programmes the constituents may legitimately hold the state accountable for how the federal programme is implemented in the state".

- A duty to remedy.

In the leading decision of *Velasquez Rodriquez,* the Inter-American Court of Human Rights set the worldwide standard for state responsibility for human rights abuses committed by non-state actors and elaborated on state obligations with respect to the rights contained in the Convention. Under the American Convention, states have an international legal obligation to ensure to all who live within their jurisdiction the actual enjoyment of the human rights as set out in the American Convention.

There can be no doubt that under the Inter-American human rights system the state is responsible and liable for human rights abuses committed by non-state actors!

5. STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES COMMITTED BY NON-STATE ACTORS IN EUROPE IN GENERAL AND IN THE UNITED KINGDOM SPECIFICALLY

5.1 ***Introduction***

5.2 ***The European Convention***

5.3 ***The European Court of Human Rights***
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5.5.4 *Limitation of state responsibility*

5.6 ***Conclusion***

5.1 Introduction

It has been stated that the European Human Rights System is the best observed and most developed regional system for the protection of human rights in the world.[1] The European Human Rights system was born in the aftermath of World War Two. In a desire to shield itself from the horrors that occurred during World War Two and in an attempt to stop such atrocities from recurring, various European countries *prudens futuri* agreed to establish the Council of Europe whose main aim was to protect and promote fundamental human rights and freedoms. On 5 May 1949, Belgium, Denmark, France, Ireland, Italy, Luxembourg, The Netherlands, Norway, Sweden and the United Kingdom signed "*The Treaty of London*" that established the Council of Europe. [2] In order to achieve its stated goal, the Council created a normative and institutional system for the guarantee of human rights in Europe. The Council proposed the Convention for the Protection of Human Rights and Fundamental Freedom [3] that obliged all state parties to the Convention to *secure* to all within their jurisdiction the rights set out in the convention.[4]

Today the convention's reach stretches right across the European continent, from the Atlantic to the Pacific, and covers an area with a population of more than eight

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[1] Alter *Establishing the Supremacy of European Law* 1: "The European legal system has become the most effective international legal system in existence..."; Schriwer 2000 *U.S.F. L. Rev.* 382: "The European Union's legal system has become the most effective international legal system in existence. Unlike most international legal systems where international tribunals hear few cases, where most state violation of international rules are not pursued through legal means, and where most legal disputes are resolved out of court, in Europe the legal process is a key element inducing compliance with European law. There is an international rule of law that works in Europe. It works much like a domestic rule of law, where violations of the law are brought to court, legal decisions are respected, and the autonomous influence of law and legal rulings extends to the political process itself"; Merrills and Robertson *Human Rights in Europe* 1: "The (European) Convention ... is certainly the most fully developed and best observed ... and provid(es) an inspiring model for other human rights systems".

[2] **Article 3** of the Statute of the Council of Europe (*Statute of the Council of Europe* May 5, 1949, ETS No. 1 (entered into force Aug. 3, 1949)) reads as follows: "Every Member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms ..."

[3] Neacsu 2003
HYPERLINK http://www.law.columbia.edu/library/Research_Guides/internat_law/eur_hr
11 Sep. 2003.

[4] Anon. 2000(a) HYPERLINK

hundred and twenty million people. Forty four states are Contracting Parties to the Convention, which has become an integral part of the great majority of the various states national legal systems. The European Convention is deeply entrenched in the legal and moral fabric of many European societies, human rights are protected as a matter of fact and perpetrators are held accountable.[5] Today, any European state that wishes to become a member of the Council of Europe must first accept the principle of the *Rule of the Law* and the responsibility to guarantee and secure human rights and fundamental freedoms to everyone under its jurisdiction as set out in the European Convention.

Over the past half century the European Human Rights System has consistently held states responsible and accountable for human rights abuses perpetrated by non-state actors and recognized an affirmative governmental duty to protect and ensure the rights of all the people living within its jurisdiction.

5.2 The European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "The European Convention" or "The Convention") was drawn up by the Council of Europe and entered into force in September 1953. The framers took the 1948 Universal Declaration of Human Rights as the basis and starting point of the European Convention. The Convention was to represent the first steps for the collective enforcement of certain of the fundamental human rights set out in the Universal Declaration.[6]

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http://www.woe.edu.pl/2000/6_00/human_rights.html 9 Nov. 2003.

[5] Wildhaber 2003
HYPERLINK
http://www.echr.coe.int/Eng/Press/2003/sept/StatemenbythePresident50thanniversayofECHR.htm
10 Nov. 2003.

[6] The *European Convention for the Protection of Human Rights and Fundamental Freedoms* Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (hereinafter referred to as the *European Convention*). The text of the Convention has been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55) which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118),

In addition to laying down a number of civil and political rights and freedoms, the European Convention also provided a mechanism to enforce the various obligations set out in the Convention and agreed to by the contracting state parties. The European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe were the institutions that were entrusted with this responsibility.

In terms of the Convention, complaints could be brought against contracting states either by other contracting states or by individual applicants. Recognition to the right of individual complaints was, however initially optional and it could, therefore, be exercised only against those states which had accepted it. Protocol 11 to the Convention (which came into effect on 1 November 1998) was introduced to make its acceptance compulsory for all contracting states.[7] This gave individuals the right to petition for redress of human rights violations.

The main aim of the Council of Europe in adopting the European Convention on Human Rights was to legally and practically secure and ensure the universal and effective recognition and observance of basic human rights throughout Europe to all people living within the contracting state parties' jurisdiction.[8] The European

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which entered into force on 1 January 1990, and comprised also the test of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provision which had been amended or added by these Protocols is replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS no. 146) has lost its purpose (HR-Net 1995 HYPERLINK http://www.hri.org/docs/ECHR50.html 19 Aug. 2004).

[7] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004. Since the Convention's entry into force twelve Protocols have been adopted. Protocols Nos. 1, 4, 6, 7 and 12 added further rights and liberties to those guaranteed by the Convention, while Protocol No. 2 conferred on the Court the power to give advisory opinions. Protocol No. 9 enabled individual applicants to bring their cases before the Court subject to ratification by the respondent State and acceptance by a screening panel. Protocol No. 11 restructured the enforcement machinery. The remaining Protocols addressed the organisation of and procedure before the Convention institution.

[8] Preamble of the *European Convention*: "Considering that this Declaration aims at securing the universal and effective recognition and observance of the rights therein declared;...Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on

Convention on Human Rights established a supra-national institutional system for the protection and promotion of fundamental human rights and freedoms.[9]

The European Convention in Article 1, which had significance with regards to both the scope and effectiveness of the Convention, states that:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

This Article raises three important questions of principle.[10] The first to be noted is that Article 1 contains an immediate obligation to *"secure"* and ensure the rights and freedoms guaranteed by the Convention. By signing the Convention, states, therefore, committed themselves to immediately practically and effectively[11] secure human rights to their citizens as opposed to protection after some internal laws and systems are put in place. A second important principle expressed in Article 1 is that of universality in the application of human rights protection of the Convention. International human rights treaties usually[12] oblige contracting state parties to guarantee the rights set out in the convention only to their own citizens and the citizens of the other contracting state parties. The European Convention, however, *secures* fundamental human rights to *"everyone"* within the jurisdiction irrespective of citizenship. Human rights pertain to all by virtue of their very nature as human beings. It follows that international measures to protect and ensure human rights cannot be limited in their effect by extending them only to the citizens of one country or group of countries. Human rights belong to all human beings. The third important principle to be found in Article 1 is that contracting state parties are obliged to secure to everyone in their jurisdiction *"the rights and freedoms defined in section 1"*. The

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the other by a common understanding **and observance of the human rights** on which they depend".

[9] Neacsu 2003 HYPERLINK http://www.law.columbia.edu/library/Research_Guides/internat_law/eur_hr 11 Sep. 2003 at 3.

[10] Merrills and Robertson *supra* note 1 at 2.

[11] *Marckx v Belgium* 2 E.H.R.R. 330 (1979-80) at 31 where it was held that respect for human rights on the part of the state must be effective.

[12] In line with the principle of reciprocity, on which many international treaties are based.

undertaking is limited to those rights and freedoms. The European Convention guarantees twenty-five rights and freedoms and no more.[13]

The European Convention on Human Rights *inter alia* guarantees:

- The right to life.[14]
- The right to be free from torture and inhuman or degrading treatment or punishment.[15]
- The right to be free from slavery or servitude.[16]
- The right to liberty and security.[17]
- The right to a fair trial.[18]
- The right to respect for family and private life.[19]
- Freedom of thought, conscience and religion.[20]
- Freedom of expression.[21]
- Freedom of assembly and association.[22]
- The right to and effective remedy.[23]
- The right to education for every person.[24]
- Freedom from imprisonment for debt.[25]
- The abolition of capital punishment in times of peace.[26]

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[13] Section 1 of the *European Convention* in article 2-13 sets out twelve particular human rights. Protocol No. 1 contains three more; Protocol 4 four further rights; one in Protocol No. 6 and five additional rights in Protocol No. 7.

[14] *European Convention*, art. 2.

[15] *European Convention*, art. 3.

[16] *European Convention*, art. 4.

[17] *European Convention*, art. 5.

[18] *European Convention,* art. 6.

[19] *European Convention*, art. 8.

[20] *European Convention*, art. 9.

[21] *European Convention*, art. 10.

[22] *European Convention*, art. 11.

[23] *European Convention,*art. 13.

[24] *Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* Mar. 20, 1952, ETS No. 9 (entered into force May 18, 1954).

[25] *Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* Sep. 16, 1963, ETS No. 46 (entered into force May 2, 1968).

[26] *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* Apr. 28, 1983, ETS No. 114 (entered into force Mar. 1, 1985).

- Due process rights for aliens being expelled. [27]
- The equality of the rights and responsibilities of spouses.[28]

The above protection espoused by the European Convention extends not only to state action but also to state in-action and private acts of violence. In terms of the Convention, state parties are expected to take positive steps to prevent violations from occurring.[29] State parties to the European Convention are under an international *obligatio et iurus* to secure to all within its jurisdiction the rights set out in the European Convention. In the event of private acts of violence that are pervasive and persistent in character, that a state should have prevented if it acted in accordance with its international treaty obligations, the state will not be liable for the private act *per se* but for its breach of international law.[30]

Steven Kay, who is presently *Amicus Curriae* in the Milosovic Trial, has recently observed that:

No state should call itself civilized unless it is willing to expose and take steps to prevent inhuman and degrading treatment to its citizens.

The mark of a civilized society is its willingness to prevent and expose acts of inhuman and degrading treatment perpetrated upon its citizens.

An act of inhuman and degrading treatment by a person upon a fellow human being arises from the lack of respect the one human is prepared to give the other. Once such decency is missing between people, the rights to peace and security that should be enjoyed by all, are violated.

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[27] *Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* Nov. 22, 1984, ETS No. 117 (entered into force Nov. 1, 1988).
[28] *Ibid.*
[29] Schriwer *supra* note 1 at 386.
[30] Cook 1994 *Harv. Hum. Rts. J.* 151.

Civilized societies should not be measured by their artistic achievements but by their treatment of people who live in their streets.[31]

Article 1 of the European Convention read together with the human rights set out in Section 1 of the Convention, clearly mean that the state must practically and factually secure to everyone in their jurisdiction the various human rights set out in the convention. If a person's human rights are violated, then that person has a claim against the state for failing to organise and manage civil society in such a way that human rights are secured and ensured.

5.3 The European Court of Human Rights

The European Court of Human Rights is and has been very successful in the protection and promotion of fundamental human rights and freedoms as is clearly reflected in the number of cases brought before it and the effective implementation of its decisions by member states.

The number of applications registered annually with the Commission increased from 404 in 1981 to 4750 in 1997. By that year, the number of unregistered or provisional files opened each year in the Commission had risen to over 12,000. The Court's statistics reflected a similar tendency with the number of cases referred annually rising from 7 in 1981 to 119 in 1997.[32] The increasing caseload led to the adoption of Protocol No. 11 to the Convention. The main aim of Protocol 11 was to simplify the structure of the proceedings, while strengthening the judicial character of the system by making it fully compulsory.[33] Protocol No. 11 replaced the part-time Court and Commission by a single, full-time Court.[34]

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[31] Cooper *Cruelty* 5.
[32] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 4.
[33] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 4.
[34] *Ibid.*

During the three years that followed the entry into force of Protocol No. 11, the Court's caseload grew at an unprecedented rate. The number of applications registered rose from 5979 in 1998 to 13858 in 2001, an increase of approximately 130%.[35]

5.3.1 Organszation of the Court

The European Court of Human Rights set up under The European Convention as amended by Protocol No. 11 is composed of a number of judges equal to that of the contracting states (currently forty-four).[36] Judges are elected by the Parliamentary Assembly of the Council of Europe for a fixed term of six years. [37]To ensure that the terms of office of one half of the judges are renewed every three years, the terms of office of one half of the judges elected at the first election expired after three years.[38]

Judges sit on the European Court of Human Rights in their individual capacity and do not represent any state. Judges cannot engage in any activity that is incompatible with their independence or impartiality or with the demands of full-time office, and must be of high moral character and possess the appropriate qualifications and relevant experience.[39]

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[35] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 4.

[36] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 4; *European Convention* at article 20.

[37] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 4; *European Convention* at article 23 as amended by Protocol No. 11.

[38] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 5; *European Convention* at article 23 as amended by Protocol No. 11.

[39] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 5; *European Convention* at article 21 as amended by Protocol No. 11.

The Court elects its President, two Vice-Presidents and two Section Presidents for a period of three years.[40]

The Court is divided into four Sections, whose composition, fixed for three years, is geographically and gender balanced and takes account of the different legal systems of the contracting states. Two of the Sections are presided over by the Vice-Presidents of the Court, the other two Sections are presided over by the Section Presidents. Committees of three judges are set up within each Section for twelve-month periods. [41] Chambers of seven members are constituted within each Section on the basis of rotation, with the Section President and the judge elected in respect of the state concerned sitting in each case. Where the latter is not a member of the Section, he or she sits as an *ex officio* member of the Chamber. The Grand Chamber of the Court is composed of seventeen judges, that include, as *ex officio* members, the President, Vice-Presidents and Section Presidents.

5.3.2 Procedure before the Court

5.3.2.1 General

Any contracting state or private individual that have exhausted all domestic remedies[42] within a contracting state's jurisdiction claiming to be a victim of a

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[40] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 5; *European Convention* at article 23 as amended by Protocol No. 11.

[41] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 5; *European Convention* at article 26 as amended by Protocol No. 11

[42] *European Convention* at article 35 as amended by Protocol 11 (Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004) that deals with Admissibility criteria determines:

1. The Court may deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
    a. Is anonymous; or
    b. Is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

violation of the Convention may lodge an application alleging a breach by a contracting state of one of the Convention rights directly with the Human Rights Court in Strasbourg. [43]

The procedure before the European court of Human Rights is adversarial and public. Hearings are also public, unless the Chamber or Grand Chamber decides otherwise on account of exceptional circumstances involved in the specific case.[44]

Although individual applicants may submit applications themselves, legal representation is recommended and even required for hearings or once an application has been declared admissible by the European Court of Human Rights.[45]

5.3.2.2 Admissibility procedure

On receipt of an application, individual applications are assigned to a Section, whose President designates a rapporteur. After a preliminary examination of the relevant facts involved in the case at hand, the rapporteur decides whether it should be dealt with by a three-member committee or by a Chamber.

Under Article 28, a committee may, by unanimous vote, declare inadmissible or reject from its list of cases an application submitted under Article 34 (where such a decision can be taken without further examination). The decision of the Committee shall be final.

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3. The Court shall declare inadmissible any individual application submitted under Article 34, which it considers incompatible with the provisions of the Convention, or the protocols thereto, manifestly ill founded, or an abuse of the right of application.
4. The Court shall reject any application, which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

43 European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 5.

44 *Ibid.* All documents pertaining to the cases are filed with the Court's registry and accessible to the public.

45 European Court of Human Rights 2002(b)

Individual applications, which are not declared inadmissible or rejected by the committees, and state applications are examined by a Chamber[46] that determines both admissibility and merits.[47]

Chambers may at any time relinquish jurisdiction in favour of the Grand Chamber where a case raises a serious question of interpretation of the Convention or where there is a risk of departing from existing case-law, unless one of the parties objects to such relinquishment within one month of notification of the intention to relinquish. In the event of relinquishment, the procedure followed is the same as that set out below for Chambers.[48]

The first stage of the procedure is usually written, although the Chamber may decide to hold a public hearing, in which case matters arising in relation to the merits will normally also be addressed.

Decisions on admissibility, which are taken by majority vote, contain reasons and are made public.[49]

5.3.2.3 Procedure on the merits

Once the Chamber has decided to admit the application, it will invite the parties to submit further evidence and written observations. If no hearing has taken place at the admissibility stage, the Court will hold a hearing on the merits of the case.[50]

HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 5; Applicant can apply for legal aid if they do not have sufficient means.

46 Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004 at article 28.

47 *Ibid.*

48 Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004 at article 30; European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 6.

49 European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 6.

50 Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004 at article 38.

The President of the Chamber may, in the interest of justice, grant leave to any contracting state which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing.[51]

During the procedure on the merits, negotiations aimed at securing a friendly settlement are conducted through the registrar.[52] Article 39 determines that "if a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision, which shall be confined to a brief statement of the facts and of the solution reached".

5.3.2.4 Judgements

Chamber's decisions are made by a majority vote. Any judge who has taken part in the judgement of the case is entitled to append to the judgement a separate opinion, either concurring or dissenting with the majority decision.

Within three months of delivery of the judgement of a Chamber, any party may request that the case be referred to the Grand Chamber if it raises a serious question of interpretation or application or a serious issue of general importance. Such requests are examined by a Grand Chamber panel of five judges.[53] A Chamber's judgement becomes final on expiry of a three-month period or earlier if the parties announce that they have no intention of requesting a referral or after a decision of the panel rejecting a request for referral.

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[51] Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004 at article 38.

[52] *Ibid.*

[53] Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004 at article 38. Composed of the President of the Court, the Section Presidents, with the exception of the Section President who presides over the Section to which the Chamber that gave judgement belongs, and another judge selected by rotation from judges who were not members of the original Chamber.

If the panel accepts the request, the Grand Chamber renders its decision on the case in the form of a judgement. The Grand Chamber decides by a majority vote and its judgements are final. [54] All final judgements of the Court are binding on the respondent States concerned.[55]

Article 54 of the Convention determines that: *"The judgement of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution".* To ensure actual implementation the Committee of Ministers verifies whether States in respect of which a violation of the Convention is found have taken adequate measures to comply with the specific obligations arising from the Court's judgements.

5.3.2.5 Advisory Opinions

The Court, at the request of the Committee of Ministers, may give advisory opinions on legal questions concerning the interpretation of the Convention and Protocols. In terms of Article 47(2), such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and the protocols thereto, or with any other question which the Court or the

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[54] Council of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004.
Article 44 – Final Judgements.
(1) The judgement of the Grand Chamber shall be final.
(2) The judgement of a Chamber shall become final.
   a. When the parties declare that they will not request that the case be referred to the Grand Chamber; or
   b. Three months after the date of the judgement, if reference of the case to the Grand Chamber has not been requested; or
   c. When the panel of the Grand Chamber rejects the request to refer under Article 43.
(3) The final judgement shall be published.

[55] Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004.
Article 46 – Binding Force and execution of judgements
(1) The High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties.
(2) The final judgement of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.[56]

Decisions of the Committee of Ministers to request an advisory opinion are taken by a majority vote. Advisory opinions are given by the Grand Chamber and adopted by a majority vote. Any judge may attach to the advisory opinion, a separate opinion or a bare statement of dissent. [57] Reasons are also furnished for the opinion.

5.3.2.5.6 Statistics [58]

FIGURE 7: NUMBER OF INDIVIDUAL APPLICATIONS LODGED WITH THE COURT (FORMERLY THE COMMISSION)

1995-1997	Applications lodged	Applications allocated to a decision body	Applications terminated by decision	Applications declared inadmissible or struck off the list	Applications declared admissible	Applications terminated	Judgements delivered by the court
1988	4246	1009	654	602	52	0	26
1989	4923	1445	1338	1243	95	0	25
1990	5279	1657	1216	1065	151	0	30
1991	6104	1648	1659	1441	217	1	72
1992	6456	1861	1704	1515	189	0	81
1993	9759	2037	1765	1547	218	1	60
1994	10335	2944	2372	1789	582	1	50
1995	11236	3481	2990	2182	807	0	56
1996	12704	4758	3400	2776	624	0	72
1997	14166	4750	3777	3073	703	1	106
1998	18164	5981	4420	3658	762	0	105
1999	22617	8400	4251	3520	731	0	177
2000	30069	10482	7862	6776	1086	0	695
2001	33052	13858	9728	8989	739	0	889
2002	30828	28255	18497	17915	577	5	844

[56] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 7.

[57] Council Of Europe 2002 HYPERLINK http://www.echr.coe.int/Convention/webConvenENG.pdf 20 Aug. 2004 at article 47–49.

[58] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 31.

5.4 *Interpretation and application of state responsibility for private acts of violence under the European Convention*

The transformation of the European legal system into an effective international legal system where violations of the law are brought to court, legal decisions are respected, and the autonomous influence of law and legal rulings extends to the political process itself[59] was orchestrated by the European Court of Human Rights through bold legal interpretations that held states accountable for what happens within that state's jurisdiction.

In studying the European Court of Human Rights case law, two principles can be seen clearly:

- International protection is subsidiary to national protection of human rights, and
- States are increasingly subject to positive obligations, to ensure that human rights violations do not occur within their jurisdiction.[60]

5.4.1 The Subsidiarity principle

The subsidiarity principle is the keystone of the collective human rights judicial protection system in Europe. The principle which was formulated in *the Handyside Case* [61] over 25 years ago underlies the division of responsibility for human rights

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[59] Alter *supra* note 1 at 1.

[60] European Court of Human Rights 2002(c) HYPERLINK http://www.echr.coe.int/Eng/Edocs/JURISPRUDENCE%202001Annual%20reportE.pdf 20 Aug. 2004 at 5-18.

[61] *Ibid.*; *Handyside v United Kingdom* 1 E.H.R.R. 737 (1979-80); Hoffman and Rowe *Human Rights in the UK* 46: "In the case of Handyside v UK, the European Court was asked to consider the bringing of a prosecution in England for obscenity arising out of the publication of *The Little Red Schoolbook*, a book which was aimed at children and was prosecuted for its frank discussions of sexual matters. The publisher complained that his rights to freedom of expression under Article 10 had been infringed. The United Kingdom argued that any infringement was justified in the interest of the protection of morals. The European Court decided, that although the book had not been prosecuted in some other European countries where it had been published, it was within the margin of appreciation allowed to the United Kingdom authorities to consider that this book was unlawful in Britain. In particular, there was no uniform European conception of morals and on this ground of jurisdiction, state authorities were better placed than the European Court to give an

protection between the national and the regional international levels. The European Court of human rights has reaffirmed that the state is primarily responsible for guaranteeing to all within their jurisdiction the full and unhindered enjoyment of all the fundamental human rights and freedoms set out in the European Convention. The European Court of Human Rights in the case of *Z. and others v the United Kingdom* held that:

> It is fundamental to the machinery of protection established by the convention that the national systems themselves provide redress for breaches of its provision, the Court exerting its supervisory role subject to the principle of subsidiarity.[62]

The national framework of the law must, in line with its international *obligatio et iuris* under the European Convention, provide effective protection from human rights abuses and in the event of an abuse occurring, the state must effectively investigate the abuse, punish the perpetrator and provide an effective remedy to the victim or the victim's family.

5.4.1.1 Secure and ensure

Article 1 of the Convention states that:

> The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

In 2003, the Council of Europe's Assembly again confirmed that there is a duty on states to secure to all within their jurisdiction, the rights set out in the Convention by stating:

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opinion. The Court stated that the protection established by the Convention is in that sense subsidiary to the national systems safeguarding human rights. The Court stressed, however, that allowing a margin of appreciation goes hand in hand with European overall supervision, in particular the limiting requirement of propentionality between the infringement of the right and its jurisdiction".

[62] *Z and Others v United Kingdom* 34 E.H.R.R. 3 (2002) at para. 103.

The Assembly agrees with the opinion expressed by the European Court of Human Rights in its judgement of 10 May 2001, in the case of Cyprus v. Turkey, Turkey's responsibility under the Convention also extends to actions of the Turkish Cypriot administration: Turkey, therefore, has a general obligation to secure respect for the human rights safeguarded by the Convention for all persons in the territory controlled by the Turkish Cypriot.[63]

In the case of *A. v. United Kingdom* the European Court of Human Rights considered a complaint concerning a nine-year-old boy whose stepfather had repeatedly beaten him with a garden cane as punishment. The stepfather had been brought to trial but was acquitted under the defence of *"moderate and reasonable chastisement"* as provided under English law. The Court, referring to the beatings, found that *"treatment of this kind reaches the level of severity prohibited by Article 3 of the European Convention on Human Rights".* [64] It considered that the obligation on the high contracting parties under Article I of the Convention to secure to everyone within their jurisdiction, the rights and freedoms defined in the Convention, taken together with Article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.[65] The Court found that in the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.[66]

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[63] Parliamentary Assembly, Council of Europe 2003 HYPERLINK http://assembly.coe.int/Documents/AdoptedText/TA03/ERES1333.htm 1 Jun. 2004.

[64] *A v United Kingdom* 27 E.H.R.R. 611 (1999) at para 21; Cook *supra* note 30 at 147: "When states assume membership in international human rights conventions, they agree to give effect to treaty obligations in their municipal legal system. Treaty responsibilities arise for all state parties, whether their law is contained in comprehensive or exclusive codes or is customary or religious in origin. States' parties that do not distinguish secular from religious laws and derive significant portions of their law from interpretations of sacred texts nevertheless obligate themselves in principle to implement human rights norms. When compliance demands the application of internal laws, the status that international treaties have before domestic courts is inherently a matter of domestic law. From the perspective of international law, however, a treaty member "may not invoke the provisions of its internal law as justification of its failure to perform a treaty".

[65] *A v United Kingdom* 27 E.H.R.R. 611 (1999) at para. 22.

In subsequent decisions, the European Court of Human Rights has distinguished two types of measures to be taken to protect people against human rights violations by other private individuals. Protection through: A) the national "*framework of the law*", which the Court had found lacking in the case of *A. v. United Kingdom*[67] and B) practical measure of protection to be taken in the face of a risk of ill treatment. As stated by the Court:

State responsibility may ... be engaged where the framework of the law fails to provide adequate protection... or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment which they knew or ought to have known.[68]

The subsidiary principle also applies to the scope of obligations in terms of the European Convention. The obligation in terms of the European Convention is geared to achieve certain results, in other words the aim of the Convention, which is the effective protection of human rights, must be practically achieved.[69] States, therefore, have a certain freedom of action or margin of appreciation, which the Court must respect. [70] In the *Tierfabriken Case*, the European Court of Human Rights declared:

The Court recalls that its judgement is essentially declaratory. Its task is to determine whether the contracting states have achieved the result called for by the Convention. Various possibilities are conceivable ... it is not the Court's task to indicate which means a state should utilize in order to perform its obligations under the Convention. [71]

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66 *A v United Kingdom* 27 E.H.R.R. 611 (1999) at para. 24.

67 The Court referred to protection through "deterrence". Children and other vulnerable individual's in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (*A v United Kingdom* 27 E.H.R.R. 611 (1999) at para. 22):

68 *Kaya v Turkey* 28 E.H.R.R. 1 (1999) at para. 115; in a subsequent case, the Court held that the state had violated Article 3 of the European Convention on Human Rights through the failure of the social services to protect four children from serious long-term neglect and abuse at the hands of their parents which "reached the threshold of inhuman and degrading treatment" (*Z and Others v United Kingdom* 34 E.H.R.R. 3 (2002) at paras. 74-75). "The authorities had been aware of the ill treatment and neglect over a period of years but "failed, despite the means reasonably available to them to take any effective steps to bring it to an end".

69 This can be done in various ways in line with states margin of appreciation.

70 European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 8; Hoffman and Rowe *supra* note 61 at 45-47.

71 *VgT Verein gegen Tierfabriken v Switzerland* 34 E.H.R.R. 4 (2002) at para. 78.

5.4.1.2 Effective remedy

The subsidiarity principle is further closely connected with the requirement that domestic remedies must first be exhausted [72] and with the requirement that states must provide an effective remedy in the case of a violation.[73]

In *The Kudla Case* of October 2000, the European Court Of Human Rights reaffirmed that the national authorities were in the first instance primarily responsible for implementing the rights and freedoms guaranteed in the European Convention and to punish those responsible for the violation of fundamental human rights. Appeals to the European Human Rights Court is, therefore, necessarily subsidiary to national human rights protection systems as expressed in Articles 13 and 35 (1) of the European Convention. In the *Kudla judgement*, the Court held that:

The Court would observe that even though at present there is no prevailing pattern in the legal orders of the contracting states in respect of remedies for excessive length of proceedings, there are examples emerging from the Court's own case-law on the rule on exhaustion of domestic remedies which demonstrate that it is not impossible to create such remedies and operate them effectively.[74]

The Court applied the rule on exhaustion of domestic remedies in a special way in the *Cyprus v. Turkey* case. The question *in casu* was whether individuals were obliged to exhaust remedies offered to them by courts subject to a contracting state's authority, but recognised by neither the Council of Europe nor the international community. Citing the relevant international case-law, the Court concluded that the remedies available in that entity might count as "*domestic remedies*" in the respondent state, unless they were shown to be non-existent or ineffective. The European Court of Human Rights noted that: [75]

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[72] *European Convention* at article 35 para. 1.

[73] *European Convention* at article 13: " Everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in a official capacity".

[74] *Kudla v Poland* 35 E.H.R.R. 11 (2002) at para. 154.

[75] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 10.

Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled... [76]

The Court was also careful to point out that:

To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimization of a regime which is unlawful under international law. [77]

International European law demands that European states offer effective remedies for the victims of human rights violations. The state is responsible for an effective national human rights protection system, first to prevent and then to remedy in the event of an infringement.

5.4.2 Positive state obligations

The European Court of Human Rights has ruled consistently that states are obliged to take positive action to prevent human rights abuses from occurring in order to comply with their commitments and *obligatio et iuris* under the European Convention and that states are responsible for human rights abuses committed by private actors.[78]

In *X and Y v the Netherlands,*[79] the European Court of Human Rights found Netherlands law ineffective protection of the private and family life secured under Article 8 of the European Convention. The Netherlands violated its obligation "*to*

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[76] *Cyprus v Turkey* 35 E.H.R.R. 30 (2002) at para. 96.
[77] *Cyprus v Turkey* 35 E.H.R.R. 30 (2002) at para. 101.
[78] European Court of Human Rights 2002(b) HYPERLINK http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf 1 Jun. 2004 at 13.
[79] *X and Y v the Netherlands* 8 E.H.R.R. 235 (1986) at 11 para. 23.

respect" private life by its lack of criminal evidence provisions, enabling the prosecution of an alleged rapist when testimony of the mentally handicapped victim was the sole evidence. The Court noted that although Article 8 is primarily concerned with protecting *"individuals"* from aggressive state interference, *"there may"* be positive obligations inherent in the effective respecting and ensuring of private or family life. The Court also held that these obligations may further involve the adoption of measures designed to secure respect for private life in the sphere of the relations of individuals between themselves.[80] Effective deterrence was of crucial importance due to the fact that the offence involved fundamental human rights and essential aspects of private life and physical integrity. In the Court's view, the state could achieve deterrence only through the introduction of criminal law provisions.[81] The Court concluded unanimously that, since the Netherlands Criminal Code did not provide Miss Y with practical or effective protection from this degree of assault, the state violated Article 8 of the European Convention.[82]

In *Rees v. The United Kingdom* the European Court of Human Rights recalled and endorsed its finding as to the meaning of "respect" in relation to positive obligations namely, that: [83]

.... although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life .....as far as those positive obligations are concerned, the notion of "respect" is not clear cut; having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance

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[80] *X and Y v the Netherlands* 8 E.H.R.R. 235 (1986) at para. 27.
[81] *X and Y v the Netherlands* 8 E.H.R.R. 235 (1986) at para. 27.
[82] *X and Y v the Netherlands* 8 E.H.R.R. 235 (1986) at para. 40; also see Catholic Church in England and Wales 2002 HYPERLINK http://www.catholic-ew.org.uk/CN/02/020429-1.htm 28 Oct. 2003: "Positive obligations may indeed be inherent in the concept of the right to 'respect' for private life under Article 8...However, such obligations arise either directly in relation to a public body or where there is (or ought to be) a duty on a public body to prevent one individual or private entity from violating the rights of another individual...".
[83] *Rees v United Kingdom* 9 E.H.R.R. 56 (1987) at para. 37 (in the context of Article 8).

with the Convention with due regard to the needs and resources of the community and individuals.

In the case of *Johnston and Others v. Ireland,*[84] the European Court of Human Rights held that :

Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.

Another good example is the well known case of *Platform Artze für das Leben v Austria,*[85] where an Austrian anti-abortion group complained about the disruption of its protests by counter-demonstrators. This interference with their right of assembly under Article 11 was not perpetrated by the forces of the state but by individuals (private actors) opposed to the views of the anti-abortion group. The Austrian government sought to escape liability on the basis that the human rights violation was not perpetrated by the state but by private actors. The European Court of Human Rights accepted the anti-abortion group's argument that the state authorities could, in principle, be held responsible on the basis that they had failed to take adequate security measures to secure the right of assembly. Although the European Court of Human Rights consistently refused to espouse a general theory of positive obligations, the principle that there are positive duties on the state to ensure actual enjoyment of human rights has been confirmed over and over. [86]

In the case of *Osman v. United Kingdom*, the European Court of Human Rights took a similar view regarding the standard, to which governments must adhere: The

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[84] *Johnston and Others v Ireland* 9 E.H.R.R. 203 (1987) at 54(c), as earlier set out in *Abdulaziz, Cabales and Balkandali v United Kingdom* 7 E.H.R.R. 471 (1985) at para. 67.
[85] *Platform "Artze Fur Das Leben" v Austria* 13 E.H.R.R. 204 (1991) at para 5.
[86] Cooper *supra* note 31 at 2-20; Coppel *Human Rights Act* para. 144.

Court established a standard for positive obligation for states with regard to the right to life by holding that :

The Court notes that the first sentence of Article 2..., enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction. Its is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. [87]

The issue in the *Calvelli and Ciglio Case*, was whether the case-law principles applying to protection of the life of individuals extended to the public health sphere and specifically to privately owned hospitals. The Court found that they did and that the state's positive obligation to take measures needed to protect life, required them:

To make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private section, can be determined and those responsible made accountable.[88]

The case yet again confirmed state affirmative obligations with respect to the protection of life and also that these obligations are not limited to violations resulting from actions or omissions imputable to state officials or occurring in public institutions. They also apply to violations committed by private individuals operating within structures which are not managed by the state or public authorities.

In *Z v. United Kingdom,* [89] the Court emphasized that:

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[87] *Osman v United Kingdom* 29 E.H.R.R. 245 (2000) at para. 115. Precisely the same formulation was adopted earlier in *LCB v United Kingdom* 27 E.H.R.R. 212 (1999) at para 36.

[88] *Calvelli and Ciglio v Italy* (32967/96) [2002] ECHR 3 (17 Jan. 2002) at para. 49.

[89] *Z and Others v United Kingdom* 34 E.H.R.R. 3 (2002) at 34 .

Article 3 enshrined one of the most fundamental values of a democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment. States that had ratified the Convention were bound to ensure that individuals within their jurisdiction were not subject to inhuman or degrading treatment, including such ill treatment administered by private individuals. Those measures had to provide effective protection, in particular, of children and other vulnerable people and included reasonable steps to prevent ill treatment of which the authorities had or ought to have had knowledge.

As is evident from the above case law, the *European Court of Human Rights* has reaffirmed the principle that states are responsible for human rights abuses by non-state actors under the European Convention and international law.

5.4.3 Interpretation

5.4.3.1 Broad standard of interpretation

Although the European Court of Human Rights often relies on the ordinary meaning of the wording of the Convention, it has consistently adopted a broad standard of interpretation of Convention rights. The European Court of Human Rights interprets the Convention by considering the context of the Convention's entire text, as well as its object and purpose. By adopting this dynamic system of interpretation, the European Court of Human Rights has expanded on the broad language of Convention rights and ensured effective human rights protection to individuals in the European contracting states jurisdictions.[90]

The European Court of Human Rights also held that:

the provisions of the Convention should not be interpreted restrictively so as to prevent its aims and objects being achieved. [91]

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[90] Schriwer *supra* note 1 at 399.

[91] *Ibid.*; Strossen 1990 *Hastings L.J.* 807, quoting the Golder Case (*Golder v United Kingdom* 1 E.H.R.R. 524 (1974)).

5.4.3.2 Express language of the Convention

The European Convention's ultimate goal is to protect the fundamental human rights of everyone practically within contracting state parties jurisdiction.

Interestingly the express provisions of the European Convention do not require the European Court of Human Rights to impose affirmative duties on contracting state parties; on the contrary, most articles are framed in negative terms. Article 5 for example provides that *"(e)veryone has the right to liberty and security of person"* and that *"(n)o one shall be deprived of his liberty"* except in limited circumstances. The language defining the rights under the European Convention is usually broad and unspecific. [92]

Notwithstanding the broad language of the convention the European Court has innovatively exploited the breadth of the language of the Convention to create results for the effective protection of fundamental human rights.[93] Article 3 for instance, states that: *"No one shall be subjected to torture or to inhumane and degrading treatment or punishment"*. Although Article 3 does not expressly determine that the state has an affirmative duty to protect citizens from torture, inhuman or degrading treatment, the European Court in the case of *A. v. the United Kingdom* afforded such an interpretation to Article 3.[94] The European Court has embraced creative interpretation as part of its judicial duty.

The European Court of Human Rights has noted that its role is to develop the rules of the Convention *"which must be regarded as a living instrument"* for the effective protection of human rights. [95]

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[92] Schriwer *supra* note 1 at 399.
[93] *Id.* at 400, quoting Janis, Kay and Bradley *European Human Rights Law* 68-69.
[94] *A v United Kingdom* 27 E.H.R.R. 611 (1999).
[95] Schriwer *supra* note 1 at 401.

5.4.3.3 Contemporary standards of morality

In interpreting the European Convention, the European Court of Human Rights further also looks at modern and contemporary attitudes of morality. This approach to interpretation takes into account evolving political, social and economic circumstances. The European Court interprets particular member state's concerns in the *"broader context of evolving, European-wide standards and practices"*, and is less willing to defer to the concerns of a particular country.

In the case of *Tyrer v United Kingdom,*[96] the Court noted that there:

had developed a European standard excluding corporal punishment .... from which only the [United Kingdom] and the Republic of Ireland continued to deviate. Despite the strong sentiment by the inhabitants of the Isle of Man in favour of corporal punishment, the European Court declared that "Article 3 established absolute obligations from which there could be no retreat even to take ... account [of] local circumstances.

On this issue Shriver argues that :

The European Court's broad interpretation of the Convention - in terms of looking beyond the text toward evolving trends across Europe – effectively moves all the Member States toward human rights reforms. The contracting states did not intend to protect those human rights threats solely that were prevalent at the time of drafting the Convention. Rather, "[t]heir intention was to protect the individual against the threats of the future, as well as the threats of the past". A dynamic interpretation of the European Convention is consistent with the Convention's general "purpose of promoting human rights, rather than merely maintaining (it).[97]

In employing the principles of Articles 1 and 3 of the European Convention, the European Court of Human Rights found an affirmative duty to protect citizens of the member states against human rights violations committed by non-state actors.

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[96] *Tyrer v United Kingdom* 2 E.H.R.R. 1 (1979-80); Schriwer *supra* note 1 at 402.
[97] Schriwer *supra* note 1 at 402.

5.5 State responsibility for human rights abuses committed by non-state actors in the United Kingdom

5.5.1 Background

In order to understand human rights protection in the United Kingdom fully, it is necessary to understand the structure of the United Kingdom's constitution and legal system.

The United Kingdom has a constitutional structure which is conventionally catagorised as a system of parliamentary sovereignty. The United Kingdom government consists of three branches, namely the legislature (parliament), the executive (administration and civil service) and the judicial (the Courts). Under English constitutional law, parliament is sovereign to the other branches of the state, which means that legislation passed by it takes precedence over what is decided by the courts or by the executive. [98]

The United Kingdom signed the European Convention on 8 March 1951 and the First Protocol to the Convention on 3 November 1951.[99] In terms of Section 1 of the European Convention, the United Kingdom, therefore, legally bound itself to *"secure to everyone within their jurisdiction, the rights and freedoms defined"* in the European Convention.

The Convention was the first international human rights instrument to provide means for its own interpretation and enforcement: it established a Commission to receive and examine complaints about infringement of rights by the states' parties, and a Court to adjudicate finally on complaints in light of its authoritative interpretation of the convention, and it also gave the Committee of Ministers of the Council of Europe both an adjudicative role and a monitoring role in relation to compliance by states.

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[98] Hoffman and Rowe *supra* note 61 at 33-34.

Article 25 of the Convention further enabled any state party to recognize the jurisdiction of the Commission to examine petitions from victims (including private individuals) of breaches of the Convention by that state. [100]

In 1966, the UK made a declaration under Article 25 recognizing the right of individual petition. This brought about a heightening of awareness of rights and freedoms within the United Kingdom. On the one hand there were those who called on the government for greater protection of fundamental human rights, such as anti-discrimination legislation. On the other hand, such demands were matched by politicians who believed the common law system offered the ultimate protection of human rights through tradition and legal precedent.[101]

During the 1970's and 1980's there were many articles and commentaries on human rights in general but also on the cases taken to the European Court of Human Rights in Strasbourg under the European Convention on Human Rights. Academics, lawyers and lobbyists also pushed their agendas via litigation. The literature reflects this historic change, which in many respects, marked the beginnings of a paradigm shift in the manner in which British citizens perceived rights in relation to state power and potential abuses. Newspapers reported rulings of the European Court and public interest and lobby group's numbers continued to grow, placing pressure on the government to reform practices and introduce human rights legislation.

In October 1997 Tony Blair, the new Labour Prime Minister announced his intention to adopt the European Convention as a bill of rights. Following its passage in the Houses of Parliament, the Human Rights Act [102] subsequently came into force throughout the United Kingdom, incorporating the European Convention on Human *Rights* into British law. As domestic law, individuals could now seek redress for

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99 Council of Europe 2003 HYPERLINK http://echr.coe.int/Eng/Edocs/DatesOfRatifications.html 9 Nov. 2003.

100 Feldman *Civil Liberties* 47; Hoffman and Rowe supra note 61 at 45.

101 Shorts and De Than *Human Rights Law* 11-12.

102 The *Human Rights Act* 1998 entered into force 2 October 2000.

human rights violations in national courts, without having to rely solely on the European Court of Human Rights in Strasbourg as in the past. [103]

5.5.2 *The Human Rights Act of 1998*[104]

The Human Rights Act marked a monumental constitutional change in the recognition and status of human rights in English law. The Human Rights Act of 1998, which came into force on October 2 2000, incorporated the European Convention on Human Rights into English law so that the rights which it contains were directly enforceable in English courts.[105]

As Lord Hope of Craigheid states:

It is now plain that the incorporation of the European convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.[106]

The Human Rights Act had the following important legal implications:

- The decisions of the European Court and Commission were made relevant to all decisions regarding Convention rights. [107]

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[103] Shorts and de Than *supra* note 101 at 11-12.

[104] This is not intended to be an exhaustive examination of the Human Rights Act. It will not provide detailed commentary on the application and extent of the Human Rights Act. Only these sections that relate to state responsibility for human rights abuses by non-state actors will be addressed.

[105] As Shorts and De Than *supra* note 101 at 13 assert: "The Human Rights Act changes forever the nature of British society, marking a major turning point in British constitutional history. This author would argue it is one of the most important legislative changes since the introduction of the 1689 Bill of Rights following the Glorious Revolution. Moreover, it is as important as the *Magna Carta* 1215 and the recognition of the writ of *habeas corpus*. Sedley I.J. said that whereas Lord Denning: "... likened the Treaty of Rome...to an incoming tide, flowing into the estuaries and up the rivers of our geographical and political island. The Human Rights Act deserves a different metaphor – perhaps that of a dye that will colour the fabric of our law except in those places where the fabric is impervious to it".; Cooper *supra* note 31 at 225, A1-06: "The then Home Secretary, Jack Straw, observed that the Parliamentary Bill, bringing into effect the incorporation of the European Convention on Human Rights into the law of the United Kingdom, will "strengthen representative and democratic government. It does so by enabling citizens to challenge more easily actions of the state if they fail to match the standards set by the European Convention".

[106] *R v Director of Public Prosecutions ex parte Kebilene* [2002] 2 A.C. 326 at 375.

- All United Kingdom legislation must be interpreted so as to be compatible with the Convention.[108]
- It is unlawful for a public authority to act in a way which is incompatible with a Convention right. [109]
- The courts were given the power to award remedies for breaches of Convention rights. [110]

5.5.2.1 Section 2 – International law

Section 2 of the Human Rights Act determines that:

2. –(1) A court or tribunal determining a question which has arisen in connection with a Convention rights must take into account any:

a. judgement, decision, declaration or advisory opinion of the European Court of Human Rights.
b. opinion of the Commission given in a report adopted under Article 31 of the Convention.
c. decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
d. decision of the Committee of Ministers taken under article 46 of the Convention.

whenever made or given, in so far as, in the opinion of the court or tribunal, it is relevant to the proceeding in which that question has arisen.[111]

This imposes an interpretive obligation on the courts in the United Kingdom. The Court's of the United Kingdom must "take into account" the law and interpretation of the European Convention that has been built up by the European Court of Human Rights over many years.

This ensures that the United Kingdom's courts develop the Human Rights Act in line with the way that the European Convention is applied throughout the rest of Europe

[107] S 2 of the *Human Rights Act* 1998.
[108] S 3 of the *Human Rights Act* 1998.
[109] S 6 of the *Human Rights Act* 1998.
[110] S 8 of the *Human Rights Act* 1998.

and by the European Court of Human Rights. This is important for two reasons. The first is that having cases decided consistently is an important principle of justice " *that like cases are treated alike, that rights of people in equivalent circumstances are given the same degree of respect*". The second is that it will limit the number of cases having to go to Strasbourg; due to the fact that the European Court of Human Rights legal precedent will be applied in full.[112]

5.5.2.2 Section 3 - Legislation

Section 3 of the Human Rights Act determines that:

1. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
2. This section:
    a. applies to primary legislation and subordinate legislation whenever enacted;
    b. does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
    c. does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.[113]

In the case of *R (Simms) Home Secretary, ex parte Simms* [114] Lord Hoffman asserted:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principle of human rights. The Human Rights Act 1998, will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too

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[111] S 2 of the *Human Rights Act* 1998; Shorts and De Than *supra* note 101 at 43-44.
[112] Shorts and De Than *supra* note 101 at 40-42.
[113] S 3 of the *Human Rights Act* 1998; Cooper *supra* note 31 at 1-44 asserts: It has been suggested that "a Court should take into account any Strasbourg decision, but there seems no reason why it should not develop those decisions and fill in gaps where they exist, taking a principle rather than a predictive approach".
[114] *R v Home Secretary ex parte Simms* [2002] 2 A.C. 115 at 131, Hoffman and Rowe *supra* note 61 at 54.

great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implications to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Section 3, therefore,[115] preserves the United Kingdom's constitutional position discussed above, that Parliament is superior to the Courts and that the Courts cannot declare an act of Parliament to be of no effect. The Courts in the United Kingdom are, however, not completely without power. Although the courts cannot refuse to enforce legislation contravening the European Convention, they can make a declaration of incompatibility provided for by Section 4 of the Human Rights Act.[116] Section 4 states:

"1. Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
2. If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
3. Subsection (4) applied in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
4. If the court is satisfied:
    a. that the provision is incompatible with a Convention right, and
    b. that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

    it may make a declaration of that incompatibility.
5. ....
6. A declaration under this section ("a declaration of incompatibility")-
    a. does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
    b. is not binding on the parties to the proceedings in which it is made".

By declaring legislation incompatible, the Court ruled that the legislation being considered does not comply with the European Convention. Such a declaration indicates to the United Kingdom Parliament that it has acted in breach of international *obligatio et iuris*.[117]

[115] S 3 of the Human Rights Act 1998.
[116] S 4 of the Human Rights Act 1998.
[117] Hoffman and Rowe *supra* note 61 103.

A declaration of incompatibility does not invalidate the offending legislation any more than the fact of incompatibility does; it is not even binding on the parties who are before the court (section 4(6)). The remedy for such a breach is, therefore, purely political, not legal. It can, therefore, only be remedied by persuading Parliament to change the law, not by bringing an action before the courts. The Act clearly envisages that such breaches will be remedied by Parliament for obvious reasons of parliament not wanting to be in breach of international *obligatio et iuris* and human rights laws.[118]

5.5.2.3 Section 6 - Public authorities

Section 6, which makes it unlawful for a public authority to act contrary to the provisions of the European Convention, states that:

6. (1) It is unlawful for a public authority to act in a way, which is incompatible with a Convention right.
(2) Subsection (1) does not apply to an act if :
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions.
(3) In this section "public authority" includes:
(a) a court or tribunal, and
(b) any person certain of whose functions are function of a public nature,
but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[118] *Wilson v First Country Trust Ltd. (No. 2)* (2001) 3 W.L.R. 42. The case concerned section 127(3) of the Consumer Credit Act 1974. This provides that if certain formalities are not complied with in an agreement covered by this Act, then the agreement is not enforceable. The Court of Appeal held that this blanket ban on enforcement was incompatible with Article 6, the right to a fair trial, since there was no scope for the exercise of judicial discretion; and Article 1 of the First Protocol, the right to security of property, since the effect was that the person making the loan was unable to recover even the main amount loaned. The Court of Appeal also considered that a declaration of incompatibility would be appropriate, since it was not possible to read the section in a way, which gave effect to those rights.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.
(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3) (b) if the nature of the act is private.
(6) "An act" includes a failure to act but does not include a failure to:
    (a) introduce in, or lay before Parliament a proposal for legislation; or
    (b) make any primary legislation or remedial order.[119]

This section is of extreme importance as it lays down positive obligations on all public authorities to protect the human rights set out in the European Convention of Human Rights proactively.

UK Courts can require an investigation into the adequacy of the level of protection for Convention rights which is in place in any given policy or administrative area. In terms of Section 6, the court will not only examine the conduct of any particular authority which is named as respondent, it will also assess the adequacy of the standard of protection provided by the relevant legal framework as a whole in combination with the practice of the responsibilities of the authorities.[120]

According to Section 6, the state can be held accountable not only for their actions but also for their omissions. For the state not to *"act in a way which is incompatible"* with fundamental human rights, the state is required not only to refrain from acting but also to take measures designed to secure and ensure that fundamental human rights of individuals within their jurisdictions, are not violated also at the hand of private non-state actors.

There is, therefore, a positive obligation on the United Kingdom to take those steps that could be reasonably expected of them to avoid a risk of human rights violations contrary to the European Convention of which they knew or ought to have known.[121] Public authorities must act in such a way as to ensure actual full enjoyment of fundamental human rights by the people within the jurisdiction of the United

[119] S 6 of the *Human Rights Act* 1998.
[120] Cooper *supra* note 31 at 2-13.
[121] *Id.* at 2-15.

Kingdom. This also entails that the state must protect citizens from the abusive and violating behaviour of other private individuals.[122]

5.5.2.4 Section 8 - Appropriate remedy

Section 8 of the Human Rights Act states that:

8.- (1) In relation to any act (or proposed act) of a public authority, which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.[123]

In line with Article 13 [124] of the European Convention, Section 8 provides for a remedy in the event that a human rights violation occurred. It is important to note that a state's obligation to secure and ensure human rights is not fulfilled by the payment of damages *ex post facto.* [125] The primary duty of the state remains to prevent violation from occurring in the first place or at all.

In *Donnelly v. United Kingdom,* the Court observed:

[C]ompensation could not ... be deemed to have rectified a violation in a situation where the state had not taken responsible measures to comply with its obligations (to prevent violations from occurring).

The obligations to provide a remedy do not constitute a substitute for or alternative to those obligations, but rather an obligation to provide redress within the domestic system for violations which may inevitably occur, despite measures taken to ensure compliance with the substantive provisions of ... [I]f the higher authorities of the State pursued a policy or administrative practice whereby they authorized or tolerated conduct in violation of .... Compensation would not of itself constitute an adequate remedy ...

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[122] Cooper *supra* note 31 at 2-20.
[123] S 8 of the *Human Rights Act* 1998.
[124] *European Convention* at article 13 establishes the right to an effective remedy before a national body and is often argued in tandem with Article 3 violation, Article 13 reads : "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".
[125] Cooper *supra* note 31 at 2-18.

[C]ompensation can only be seen as an adequate remedy in a situation where the higher authorities have taken reasonable steps to comply with their obligations under the Convention by preventing as far as possible, the occurrence of repetition of the acts in question.[126]

5.5.3 State responsibility for human rights abuses by non-state actors

The European Convention, which became part of the law of the United Kingdom through the Human Rights Act of 1998, is an agreement by states to secure and ensure certain fundamental human rights to individuals who live within their jurisdiction.

The European Convention imposes legal obligations on sovereign states to respect and secure human rights and not upon private individuals or non-state actors. An individual who is assaulted by the police may have a claim against the state, under Article 3 of the Convention, but not if she was assaulted by a rapist. In the last mentioned case, the victim may, however, have a claim against the state for the private act of violence due to the fact that the state failed in its duty to protect the victim, especially if it can be shown that abuse in a certain area is of a persistent and pervasive nature and that the state should have known about the potential risk of violation.

The European Court of Human Rights; who's decisions the courts in the United Kingdom must take into account in terms of Section 2, have consistently held states responsible for human rights abuses by non-state actors. Under the European Convention, the European Court of Human Rights and English Courts held states responsible for the violation of fundamental human rights where private actors were primarily to blame in the following circumstances:

- Where the state contributed indirectly to the violation;

[126] Cooper *supra* note 31 at 2-18.

- Where the state delegated its task of upholding human rights;
- Where the state failed to prevent or protect individuals from human rights violation by other individuals.[127]

The UK Courts have emphasized that it is of great importance to note that in the first instance it is the duty of states including the United Kingdom to prevent human rights violations from occurring in the first place. The primary responsibility of the United Kingdom is to secure to all within its jurisdiction all fundamental human rights as expressed in the European Convention.

In the case of *Mills v. HM Advocate,*[128] the Court held that:

It was important to start with the position in domestic law because .....the Convention left to each contracting state, in the first place, the task of securing the enjoyment of the rights and freedoms which it enshrined.

5.5.3.1 Indirect responsibility

Under British law the state can be held responsible for a human rights violation where its actions have only indirectly contributed to the violation.[129]

In the case of *Arrondelle v UK,* in which the applicant complained of noise nuisance emanating from traffic on the M23 motorway, the United Kingdom claimed that it could not be held responsible for the noise of private vehicles on the motorway, but

[127] Coppel *supra* note 86 at 145, 147; Cooper *supra* note 31 at A1-12: "The (European) Court of Human Rights has indicated that it considers that so-called "horizontal" violations can occur. In a case concerning corporal punishment in private schools, the European Court held that although the defendant before the court was a state, the primary harm was caused by the actions of non-state persons or bodies. In each such case, the Court has found the State guilty of a violation because it failed to provide protection for one individual from another. For example, although it was a private group that intimidated a group of pro-life doctors in Austria to the point where they could not speak freely, the Austrian government was guilty of a violation of that right because of that failure to protect the doctor's freedom of speech".

[128] *Mills v HM Advocate (No 2)* [2002] UKPC D2; Cooper *supra* note 31 at 216, 10-04, as was emphasized in *Eckle v Federal Republic of Germany* 5 E.H.R.R. 1 (1982) at 24, para. 66.

[129] Coppel *supra* note 86 at 147.

the Commission found responsibility on the basis that the motorway had been built by, and is operated by public authorities. [130]

In the case of *Hatton and Other v. The United Kingdom,*[131] the European Court of Human Rights found that the UK violated Section 1 of the European Convention because the United Kingdom failed to take reasonable and appropriate measures to secure the applicants rights under Section 8 of the European Convention. The facts of the case were that:

Prior to October 1993, the noise caused by night flying at Heathrow had been controlled through restrictions on the total number of take-offs and landings. After that date, noise was regulated through a system of noise quotas, which assigned each aircraft type a "Quota Count" (QC); the noisier the aircraft the higher the QC. This allowed aircraft operators to select a greater number of quieter airplanes or fewer noisier airplanes, provided the noise quota was not exceeded. The new scheme imposed these controls strictly between 11.30 p.m. to 6 a.m. with more a lenient "shoulder period" allowed from 11-11.30 p.m. and 6-7 a.m. Previously, there had been a limit on the number of take-offs and landing between 11.30 p.m. and, on weekdays, 6 a.m. during the summer and 6.30 a.m. during the winter, and 8 a.m. on Sunday mornings, but no quota system. Following an application for judicial review brought by a number of local authorities affected, the scheme was found to be contrary to Section 78 (3) of the Civil Aviation Act 1982, which required that a precise number of aircraft be specified, as opposed to a noise quota. The Government, therefore, included a limit on the number of aircraft movements

[130] Coppel *supra* note 86 at 147; Cooper *supra* note 31 at A1-12; Another good example is the Lopez Ostra Case (*Lopez Ostra v Spain* 20 E.H.RR. 277 (1995)) where the applicant complained that severe nuisance from a waste treatment plant adjacent to her house amounted to an infringement of her right to respect for private and family life and for the home. The plant was privately owned and operated but the Spanish Government was held responsible for its operations since the municipal council had allowed the plant to be built on land formerly owned by it, and had provided subsidies for the construction works. It was also relevant that the council must have been aware of the difficulties which the plant was causing, yet did nothing and had opposed the applicants.

allowed at night. A second judicial review found that the Government's consultation exercise concerning the scheme had been conducted unlawfully and in March and June 1995, the Government issued further consultation papers. On 16 August 1995, the Secretary of State for Transport announced that the details of the new scheme would be as previously announced. The local authorities challenged the decision unsuccessfully. The applicants complained, among other things, that, following the introduction of the 1993 scheme, night-time noise had increased, especially in the early morning, which interfered with their right to respect for their private and family lives and their homes, guaranteed by Article 8 of the European Convention on Human Rights. They also claimed that judicial review was not an effective remedy within the meaning of Article 13, as it had failed to examine the merits of decisions by public authorities and was prohibitively expensive for individuals.[132]

The Court found that there had been a violation under Section 8 and 13 of the Convention. Although the planes that caused the noise were obviously not all state operated planes (most were private planes), the Court held the state responsible. In doing so the Court again confirmed that the state is responsible for human rights abuses perpetrated by private individuals if it failed to take appropriate preventative measures.

5.5.3.2 Delegation of responsibility

In certain circumstances, the public authorities may also be held responsible for the actions of a private, non-state body.[133] In *Costello-Roberts v The United Kingdom,*[134] a pupil at a private school complained that corporal punishment, which had been inflicted upon him by the headmaster, amounted to inhuman and

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[131] European Court of Human Rights 2002(a) HYPERLINK http://www/echr.coe.int/Eng/Press/2002/nov/HearingHattonGCepress.htm 1 Jun. 2004 (*Hatton v United Kingdom* 34 E.H.R.R. 1 (2002))

[132] European Court of Human Rights 2002(a) HYPERLINK http://www/echr.coe.int/Eng/Press/2002/nov/HearingHattonGCepress.htm 1 Jun. 2004.

[133] Coppel *supra* note 86 at 148.

[134] *Costello Roberts v United Kingdom* 19 E.H.R.R. 112 (1995).

degrading treatment contrary to Article 3 of the European Convention and a breach of his right under Article 8 to respect for his private life.

The United Kingdom government argued that it could not be held responsible for matters such as discipline, which arose out of the day-to-day running of a private school. The Court disagreed, noting that the disciplinary regime of a school fell within the ambit of the right to education which was guaranteed by Article 2 of the First Protocol to the Convention, and that the right was conferred upon all pupils equally, whether they attended state or private school. The Court held that the United Kingdom Government could not absolve itself from responsibility for securing the right to education by delegating its obligations to schools in the private sector. Hence the actions of a headmaster of an independent school could engage the responsibility of the state.[135]

In the case of *Young, James and Webster v. United Kingdom,*[136] a case concerning corporal punishment in private schools, the European Court held that although the defendant before the court was a State, the primary harm was caused by the actions of non-state persons or bodies. The Court found the State guilty of a violation because it failed to protect one individual from another.

5.5.3.3 Failure to take preventative measures

The Human Rights Act of 1998 in Section Six lays down an obligation upon all public authorities in the United Kingdom to protect human rights violations proactively by preventing breaches from occurring. Section 6 (b) specifically states that *"an act includes a failure to act".*[137] As signatory to the European Convention, the United Kingdom is obliged to *"secure"* to all within its jurisdiction the rights set forth in the Convention.[138]

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[135] Coppel *supra* note 86 at 148.
[136] *Young, James and Webster v United Kingdom* 4 E.H.R.R. 38 (1982).
[137] S 6 of the *Human Rights Act* 1998.
[138] *European Convention* at article 3.

In terms of Section 2 of the Human Rights Act of 1998, there is also an interpretative obligation on the courts in the United Kingdom to "take into account" the judgements of the European Court of Human Rights. [139] It is, therefore, again helpful and necessary to look at the well established case law of the European Court of Human Rights regarding the issue of positive obligation to determine the position in the United Kingdom.

In the case of *Higgs v. Minister of National Security*, Lord Cook in his dissenting judgement asserted that :

A duty of governments and courts in every civilized State must be to exercise vigilance to guard against violation of this fundamental right. Whenever violation is in issue a court will not fulfill its function without a careful examination of the facts of each individual case and a global assessment of the treatment in question. Commonly, decisions in this field are findings of fact and degree, not expositions of law. If more than the assessment is open, the choice made is not one of law or legal principle but one of evaluation. Although it may properly have some influence on a latter court faced with somewhat similar facts and anxious to achieve consistency of results, it cannot be a binding precedent. To subscribe to a contrary doctrine of precedent would be to insist on 'the austerity of tabulated legalism'. If I venture to state these dogmatically, it is only because they seem dictated by the very idea of civilization.[140]

In assessing state responsibility for acts of violence perpetrated by non-state actors, it is important to do a "global assessment' of the state's actions and omissions in the prevention of a certain threat or violation of human rights. From case law, it is clear that it is expected of states not only to refrain from violating human rights but also to take positive steps to prevent violation from occurring, also in the relations between private individuals.[141]

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[139] S 2 of the *Human Rights Act* 1998.

[140] *Higgs v Minister of National Security* [2002] 2 W.L.R. 1368; Cooper *supra* note 31 at 1-01.

[141] *A v United Kingdom* 27 E.H.R.R. 611 (1999). In *Osman v United Kingdom* 29 E.H.R.R. 245 (2000), the Court noted that "the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to *safeguard* the lives of those within its jurisdiction". (at para. 115, emphasis added).

The concept of state responsibility for misconduct, therefore, also addresses passive failure to meet positive obligations.[142] In *Airey v. Ireland*,[143] the European Court of Human Rights found a violation of Mrs. Airey's right under Article 6(1) of the European Convention to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", because no provision existed for access to affordable legal assistance. The Court required Ireland to provide procedural access to its legal remedies, since the European Convention "*necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive...*".[144] The Court also found a violation of Mrs. Airey's Article 8 right to respect for her private and family life. Noting that Article 8 does not simply compel the state to abstain from interference, but imposes a positive obligation to protect private and family life, the Court recognized that protection of private life may necessitate access to a decree of legal separation and relief from the duty to live together.[145] The Court concluded that:

Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate to anyone who may wish to have recourse thereto.[146]

The European Court of Human Rights consistently imposed affirmative obligations on member states to prevent human rights violations from occurring between private individuals. In the case of *A v. The United Kingdom*, the Court specifically held that the United Kingdom was responsible for a human rights violation committed by a private individual. The facts of the case were: [147]

In May 1990, A, a one-year-old British citizen, was placed in his local Child Protection Register because of "known physical abuse". He was removed from the

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[142] Cook *supra* note 30 at 149-150.
[143] *Airey v Ireland* 2 E.H.R.R. 305 (1979); Cook *supra* note 30 at 149-150.
[144] *Airey v Ireland* 2 E.H.R.R. 305 (1979) at para. 25.
[145] *Ibid.*; Cook *supra* note 30 at 149-150.
[146] *Airey v Ireland* 2 E.H.R.R. 305 (1979) at para. 33.
[147] *Ibid.*; Schriwer *supra* note 1 at 385.

protection register approximately one and a half years later. In February 1993, the head teacher at A's school reported to the local Social Service Department that A's stepfather was beating him with a stick. That same month a pediatrician found marks and bruises on the boy's body "consistent with the use of a garden cane, applied with considerable force, on more than one occasion". A complained to the European Court of Human Rights that the state failed to protect him from abuse by his stepfather in violation on Article 3 of the Convention.[148]

In September 1998, the European Court of Human Rights found:

It remains to be determined whether the State should be held responsible, under Article 3, for beating of the applicant by his stepfather. The Court considers that the obligation on the High Contracting Parties under Article 4 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.[149]

The Court recalls that under English law, it is a defence to a charge of assault on a child that the treatment in question amounted to "*reasonable chastisement*". The burden of proof is on the prosecution to establish beyond reasonable doubt that the assault went beyond the limit of lawful punishment. In the present case, despite the fact that the applicant had been subjected to treatment of sufficient severity to fall with the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment.

In the Court's view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. Indeed, the Government has

[148] *A v United Kingdom* 27 E.H.R.R. 611 (1999).
[149] *A v United Kingdom* 27 E.H.R.R. 611 (1999).

accepted that this law currently fails to provide adequate protection to children and should be amended.

In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.[150]

In the same vein in the case of *Z v. UK*,[151] the Court observed that:

... the protection of children who by reason of their age and vulnerability are not capable of protecting themselves requires not merely that criminal law provides protection against Article 3 treatment but that, additionally, this provision will in appropriate circumstances imply a positive obligation on the authorities to take preventative measure to protect a child who is at risk from another individual. The Commission notes in this regard the international recognition accorded to this principle in Article 19 of the United National Convention on the Rights of the Child which enjoins States to take all appropriate measure 'to protect the child from all forms of physical and mental violence, injury or abuse' .

All mature human rights codes, as the one in the United Kingdom through the Human Rights Act of 1998, are activated by the nature of the violation and the consequent suffering of the victim rather than by who committed the violation.

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[150] *A v United Kingdom* 27 E.H.R.R. 611 (1999). In coming to its decision the court referred to the following case law: *X and Y v the Netherlands* 8 E.H.R.R. 235 (1986); *Costello Roberts v United Kingdom* 19 E.H.R.R. 112 (1995); *Stubbings and Others v United Kingdom* 23 E.H.R.R. 213 (1997); *Findlay v United Kingdom* 24 E.H.R.R. 221 (1997); *H.L.R. v France* 24 E.H.R.R. 512 (1997); *Coyne v United Kingdom* [1997] IIHRL 109 (24 Sep. 1997). Also see Cooper *supra* note 31 at 225, A1-12: "In some circumstances public authorities come under a duty to protect private individuals from breaches of the Convention by other private individuals, for instance, where a father beats his child in the privacy of his own home in violation of Article 3 – "The Court considers that the obligation on the High Contracting parties under Article 1 of the Convention to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".

[151] *Z and Others v United Kingdom* 34 E.H.R.R. 3 (2002); Cooper *supra* note 31 at 2-16. The Commission in Z v United Kingdom stated: "The Court emphasized that Article 3 enshrined one of the most fundamental values of a democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment. States that had ratified the Convention were bound to ensure that individuals within their jurisdiction were not subjected to inhuman or degrading treatment, including such ill treatment administered by private individuals. Those measures had to provide effective protection, in particular, of children and other vulnerable people and included reasonable steps to prevent ill treatment of which the authorities had or ought to have had

Whether the violation was due to the conduct of the state or that of a private individual, the state who is primarily responsible to secure human rights to all within its territory are liable and responsible.

Under United Kingdom constitutional law the state is responsible for human rights abuses committed by non-state actors.[152]

5.5.4 Limitation of state responsibility

Most of the rights guaranteed by the European Convention and incorporated into United Kingdom law through The Human Rights Act of 1998, are not absolute but subject to express or implied restrictions.

The Convention for example in Article 2 states that *"Everyone's life shall be protected by law"* but then continues to provide :

No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is not more than absolutely necessary:
   a. In defence of any person from unlawful violence;
   b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

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knowledge. The court said that there was no dispute that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment".

[152]Coppel *supra* note 86 at 2-18: "Just as there is a wealth of case-law of the Strasbourg institutions on the issue of *locus standi,* so the Commission and the Court have frequently had to decide whether the actions of a person or body can give rise to responsibility on the part of the state for breach of Convention rights. In contrast with its treatment of *locus standi,* the Act does not refer directly to the Strasbourg practice on state responsibility but lays down its own definition of which persons and bodies are required to respect Convention rights. The Strasbourg case law is, nevertheless, relevant given the overall purpose of the Act to enable individuals to rely upon Convention rights in the domestic courts in the same circumstances as they can rely upon them in Strasbourg. In the light of that purpose, it would be surprising if a person or body whose actions could legitimately be attacked in Strasbourg fell outside the scope of s. 6. The converse proposition – that the range of public authorities should be no broader that the range of bodies whose actions will give rise to state responsibility in Strasbourg – may also hold good".

c. In action lawfully taken for the purpose of quelling a riot or insurrection.[153]

In so far as state responsibility for private acts of violence are concerned, the state will, therefore, not be responsible if a private person killed another in self-defence. Fundamental human rights are further restricted by and subject to:

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.[154]

In terms of Section 1 of The European Convention which determines that:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.[155]

States are allowed a *"margin of appreciation"* to secure to all within its territory the human rights set out in the Convention.

In the case of *Rasmussen v. Denmark*, the Court pointed out that :

.. the Contracting States enjoy a certain 'margin of appreciation' in assessing whether and to what extent difference in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the contracting states.[156]

From the above it is clear that when complying with their international obligations of their affirmative duties or positive obligations, contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance

[153] *European Convention* at articles 2(1) and 2(2).
[154] *European Convention* at article 10(2).
[155] *European Convention* at article 1.

with the Convention with due regard to the needs and resources of the community and of individuals.

5.6 Conclusion

The European human rights system provides an inspiring model for other regional and domestic human rights protection systems.

The European system is consistent in its protection and promotion of human rights. Rights are not only empty meaningless words but *de facto* rights that are actually protected by the law. The system also has the power to act. Member states that do not comply face serious political and economic consequences.

Philosopher John Rawls said *"The fundamental faimess of a society is best judged by an examination of its treatment of the least advantaged".*[157] By this measure it can surely be said that the protection of human rights in Europe is effective and fair.

The European Court of Human Rights has consistently found states responsible for human rights abuses by private individuals. Although states in Europe are not responsible for the actions of private actors that are in violation of the European Convention, they are responsible for their failure to meet their international obligations, even when substantive breaches originate in the conduct of private persons. A state is not internationally responsible for a private act *per se*, but is bound to exercise due diligence to eliminate, reduce and mitigate the incidence of private violations. Legal responsibility arises when a state fails to remedy violation of international human rights law. A state bears similar liability in failing to act to prevent an anticipated violation of human rights. The behaviour of private

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[156] *Rasmussen v Denmark* 7 E.H.R.R. 371 (1985) at para. 40.
[157] Schriwer *supra* note 1 at 380.

individuals or agencies may indirectly indicate a state's lack of will to really protect human rights effectively.

Through the Human Rights Act of 1998, the United Kingdom incorporated the European Convention into English Law. Under English Law, states are responsible for human rights abuse by non-state actors.

Steven Kay states that:

> No State should call itself civilized unless it is willing to expose and take steps to prevent inhuman and degrading treatment to its citizens. The mark of a civilized society is its willingness to prevent and expose acts of inhuman and degrading treatment perpetrated upon its citizens.[158]

Europe truly is a civilized society!

[158] Cooper *supra* note 31.

6. STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES COMMITTED BY NON-STATE ACTORS IN SOUTH AFRICA

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6.1 Introduction

This year South Africa celebrates ten years of democracy, freedom from oppression and the tyranny of apartheid. Our democracy was built on the solid foundation of respect for human rights and human dignity.

The eyes of the world are on South Africa as the initiator of NEPAD and the great African Renaissance.[1] The vast majority of African countries are plagued with hunger, food shortages, wars, lawlessness and no respect for the values and principles of human rights. At the heart of the aforementioned is a total disregard for human rights and the rule of law. Zimbabwe is currently an example of how disregard for the rule of law and dictatorial rule can plummet a once thriving society and economy into absolute chaos, poverty and misery.[2]

Looking back over the past ten years one can credit the new South Africa with many excellent achievements.[3] South Africa has a supreme Bill of Rights that expressly protects fundamental human rights and freedoms. The South African Constitution is one of the most progressive constitutions in the world. In the Constitutional Court of South Africa there are a number of world class jurists that preside over and that interpret and defend the Constitution. A number of institutions such as the Human Rights Commission and the Commission for Gender Equality have been established. The government provided clean water to more than nine million people who did not have access to clean water. Electricity was provided to more than two million people and telephones to more than one and a half million people. The government built almost one and a half million houses [4] for the poor and provides free health care to millions of children. The South

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[1] Jacobs and Caland *Thabo Mbeki's World* 54–81.
[2] Du Toit *Rapport* 22 Aug. 2004 4; Kahiya *Mail and Guardian* 7 Jul. 2004 15.
[3] Lamprecht *Beeld* 30 Apr. 2004 7: "Washington – Suid-Afrika het besonder goed gevaar in 'n omvattende nuwe internasionale verslag wat deursigtigheid, aanspreeklikheid en goeie regering in 25 lande meet ... Suid Afrika is een van net ses wat die tweede hoogste gradering 'sterk' verdien het. Die ander lande wat as sterk beskou word is die VSA, Portugal, Australie, Italië en Duitsland ... Suid Afrika was die enigste van ses beoordeelde Afrika lande wat 'n sterk gradering gekry het...".
[4] Sapa *Beeld* 6 Oct. 2003 8.

African economy has been resuscitated by restoring fiscal discipline, cutting the budget deficit, reducing the national debt and bringing inflation down from double figures to within a target range of 3% – 5%.[5] Interest rates are at an all time low of 11.5% prime as opposed to 24% during the pre 1994 era.[6]

Unfortunately, to most in our society, the right to be free from violence as expressed in section 12(1)(c) of the Constitution is a worthless paper guarantee, as many suffer abhorrent human rights violations at the hands of criminals on a daily basis. It is common cause that South Africa has one of the highest and most notorious crime rates in the world. Everyday people are killed, women and children are raped and the elderly butchered on their farms.[7] This awry *status quo* calls for decisive and aggressive action and engagement with the right to security and to be free from all forms of violence and the means through which it may be practically and effectively enforced.

It may be submitted that the only way these human rights atrocities at the hands of criminals can be dealt with effectively, is to hold the Government responsible for human rights abuses committed by the criminals (non-state actors) under certain circumstances. The argument for recognizing the government's duty to protect its citizens against the violent criminal behaviour of others is straightforward. The imposition of a positive legal duty will subject the passive government to potential *delictual* liability. Exposure to liability provides an incentive to act. As long as the cost of protection is

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[5] Duvenhage *Rapport* 9 Nov. 2003 3: "Die Suid-Afrikaanse ekonomie dwing in vele opsigte respek by internasionale beleggers af ... Die onlangse dalende spiraal van inflasie en rentekoerse word as 'n positiewe teken beskou terwyl daar ook erkenning gegee word aan die feit dat die land in 'n gesofistikeerde en stabiele mark ontwikkel het met gevestigde regs- en finansiële instellings".

[6] Sparks *Beyond the Miracle* 3-4.

[7] Steenkamp *Beeld* 7 Nov. 2003 7; Steenkamp *Beeld* 1 Apr. 2004 1; Tempelhoff *Beeld* 12 Mar. 2004 4; La Grange *Beeld* 1 Apr. 2004 4; Fitzpatrick *Beeld* 30 Oct. 2003 1; Du Preez *Beeld* 4 Oct. 2003 1; Momberg *The Citizen* 6 Oct. 2003 4; Venter *The Citizen* 6 Oct. 2003 4; Sapa *The Citizen* 7 Jun. 2004 6; Basson *Beeld* 23 Oct. 2003 4; Van Niekerk *Beeld* 23 Oct. 2003 4; Basson *Beeld* 25 Oct. 2003 2; Kotze *Rapport* 26 Oct. 2003 5; Eybers *Rapport* 11 Apr. 2004 9; Pelser *Rapport* 1 Jun. 2003 10; Steenkamp *Beeld* 28 Nov. 2003 1; Pelser *Rapport* 6 Jul. 2003 6; La Grange *Beeld* 13 Aug. 2003 5; Raubenheimer *Beeld* 7 Nov. 2003 1; Cruywagen *Rapport* 2 May 2004 12; Hosken *Pretoria News* 12 May 2004 3; Jacobs *Pretoria News* 12 May 2004 2 etc. etc. etc.

less than the potential liability, the rational government will act to protect citizens from criminals. The duty of government to act can also be defended in terms of reinforcing the widely shared understanding of the proper role of government. Most people will think it wrong for a government to do nothing while barbaric criminals commit gross human rights violations on a pervasive and persistent scale. Imposing an affirmative duty vindicates the community's expectations of protection and provides a means for redressing the wrong.

Although the aforementioned approach might seem strange at first glance, it is in fact in line with international human rights law as well as with South African constitutional law.

President Thabo Mbeki said: ***"It is not given to every generation that it should be present during and participate in the act of creation".*** [8]

In the New South Africa, the courts also have the opportunity to fastidiously "*create*" a society in line with the values and norms espoused by the constitution where human rights are practically protected and the rule of law is upheld.[9]

6.2 Violent crime in South Africa

It is axiomatic that crime is one of South Africa's most urgent problems.[10] Statistics show that hardly any country in the world can match South Africa's

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[8] Sparks *supra* note 6 at intro page.

[9] De Waal, Currie and Erasmus *Bill of Rights Handbook* 10: "...the purpose of the rule of law was to protect basic individual rights by requiring the government to act in accordance to pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures. Put at its simplest, the rule of law requires state institutions to act in accordance with the law".

[10] Curry ? HYPERLINK http://www.bac.co.za/ 14 Apr. 2004: "Crime is one of the cardinal problems affecting South Africa and its people. Everyday South Africans from all walks of life are crippled by its devastating effects – a declining economy, unemployment, broken families and the stress associated with a life of fear. Unless crime is confronted and addressed vigorously and without compromise, we cannot hope to develop our wonderful country to its full potential".

violent crime rate. As a result, fear plays a big part in the lives of many South Africans[11] and to many South Africans the constitutional protection of freedom from violence remains a worthless paper guarantee.

South African newspapers are filled with human rights atrocities and flagitious violent crime stories unheard of in other countries that pride themselves in effective human rights systems.[12] It has been stated that *"South Africa is the world's most violent society not at war"*. [13] It is South Africa's high level of violent crime which sets the country apart from other crime ridden societies. Since 1994, recorded violent crime has been escalating at a faster rate than any other crime category (by 33%). It is primarily violent crime which fuels people's fear of crime. To lose its label as crime capital of the world, violent crime levels will have to drop substantially in South Africa.[14]

6.2.1 Victims

Victim surveys generally show that violent crimes are a major concern to the public. The physical and emotional impact of these crimes is devastating for victims, their families and communities. The occurrence of these crimes, coupled with the fact that this subject dominates news headlines on a daily

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[11] Stoddard *Pretoria News* 30 Mar. 2004 9: "...surveys show that people feel significantly less safe than they have in the past".; Hosken *Pretoria News* 4 Mar. 2004 1: "South Africans now more than ever feel unsafe in our cities' streets with nearly 40% of the people (in a nationwide victim survey) refusing to allow their children to play on streets or walk to school".; Van Vuuren *Beeld* 15 Mar. 2004 1: "Die Immigrasie Appelhof (Kalifornia USA) het in 'n toets saak assiel toegestaan aan 'n Suid-Afrikaanse gesin wat aangevoer het dat hulle as wit inwoners van Suid afrika onveilig is ... die Thomas gesin het in 1997 van Durban na Los Angeles gevlug *om geweld en intimidasie teen hul gesin vry te spring*".

[12] All articles *supra* note 7; Steenkamp *Beeld* 7 Nov. 2003 7: "Die hoë vlak van geweldsmisdaad en verkragting in Suid Afrika ... is 'n skok vir Amerikaanse polisie hoofde ... dis beslis nie die geval in die VSA nie".

[13] Leenders and Mager 2000 HYPERLINK http://members.ams.chello.nl/~m.spoelstra/anakha/reading/sasecurity.html 24 Aug. 2004 at 1, quoting Lester, Nel and Binns *South Africa.*

[14] *Ibid.*; also see articles by Du Plessis, Olivier and Pienaar 1999 *SAPL* 515–518; Du Plessis, Olivier and Pienaar 2000 *SAPL* 214-216; Du Plessis, Olivier and Pienaar 2001 *SAPL* 217-219; Du Plessis and Olivier 1996 *SAPL* 283; Hamber 1999 HYPERLINK http://www.csvr.org.za/papers/papfearb.htm 2 Jul. 2004.

basis, heightens public fear of crime. This creates insecurity and misery for individuals and destabilises communities.[15]

Who are the primary victims of South Africa's awry high crime rate?

Police statistics and victim surveys conducted in South Africa suggest a link between social depravation, race and risk of victimisation. Victim surveys conducted from 1997 to 2000 show that the poor, the majority of whom are black and coloured and living in townships, are more at risk of being victims of interpersonal violent crimes as well as violent property crimes like robbery. By comparison, wealthy people living in the suburbs are most at risk of property crimes, in particular vehicle theft and burglary. In the 1999 National Mortality Surveillance System data, homicides of black and coloured people accounted for 93% of the 6,800 homicides reported.[16] Certain categories of people, like white Afrikaner farmers that are murdered at an alarming rate of 313 per 100 000 population group (the highest of any sector), are also more at risk to incidence of violent crime than other categories of people.[17]

In many instances women, children and the elderly are the victims of violent crimes. In South Africa:

- A rape occurs every minute-and-a-half, a burglary every two minutes, and an armed car hijacking every 36 minutes.
- Johannesburg is stated as recording the highest murder and rape rates per capita in the world.

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[15] Masuku 2002(2) *SA Crime Quarterly* 5.

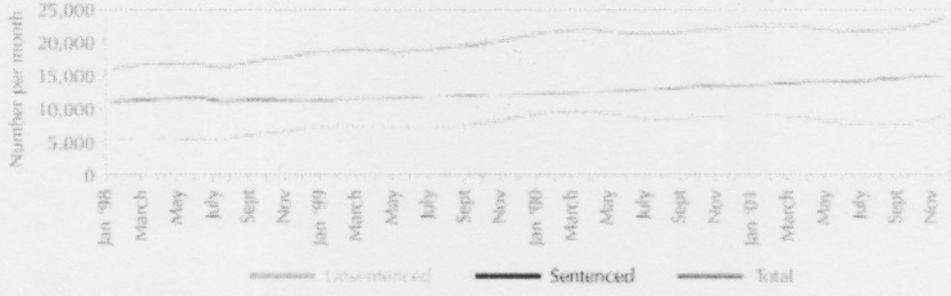
[16] This is higher than the 86% that these race groups make up of the total population recorded in the 1996 census; McCafferty 2003 HYPERLINK http://www.gunowners.org/fs0304.htm 1 Mar. 2004.

[17] Genocide Watch 2002 HYPERLINK http://www.genocidewatch.org/BoersSlain01.htm 17 Jun. 2004: The per capita murder rate of ethno-European farmers to be four (4) times greater than the average murder rate for the population of South Africa. This comparative trend analysis of murder rates for specific ethnic groups is troubling. If the per capita murder rate of the population as a whole has decreased over recent years as the South African government claims, but at the same time the per capita murder rate of a specific group (in this case Boer farmers) has increased, it is reason for alarm.

- One South African woman in three loses her virginity to a rapist.
- An individual runs almost three times more risk of being murdered, than of dying in a road accident.[18]
- 1591 farmers have been murdered since 1994.[19]

Although the above statistics are already shocking, the reality is much worse as it is widely acknowledged that crimes such as assault and rape are generally under-reported by the public and sometimes under-recorded by the police. Various South African city victim surveys have shown that over 50% of these crime types go unreported.[20]

Figure 1: Prisoners (all ages) in custody for sexual offences in South Africa, 1998-2001



Source: Department of Correctional Services

[21]

As far as children as victims are concerned, on 15 May 2002, the late Minister of Safety and Security, Steve Tshwete, gave the following figures in Parliament: from January to September 2001, 15,650 rapes of children were reported to the South African Police Services (SAPS). Of these, 5,859 children were between 0-11 years and 9,791 were between 11-17 years.[22]

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[18] Leenders and Mager 2000 HYPERLINK http://members.ams.chello.nl/~m.spoelstra/anakha/reading/sasecurity.html at 1-8 24 Aug. 2004 ; Mistry 2003 *SA Crime Quarterly* 7-12.

[19] Genocide Watch 2002 HYPERLINK http://www.genocidewatch.org/BoersSlain01.htm 17 Jun. 2004.

[20] Masuku *supra* note 15 at 7; Leggett 2002 (1) *SA Crime Quarterly* 7-9.

[21] Redpath 2003(4) *SA Crime Quarterly* 18: "What are the overall custody trends with respect to all sexual offences and all sex offenders? As of 31 March 2001, persons in prison for sexual offences comprised 13% (22.524) of all prisoners (17% (13,724) of sentenced prisoners and 16% (8.797) of unsentenced prisoners). Children comprised only 2% (525) of persons in prison for sexual offences (4% (314) of the unsentenced prisoners and 2% (211) of sentenced prisoners)".

[22] Van Niekerk 2003(3) *SA Crime Quarterly* 11: "The flood of media coverage over the past year focused attention on the horror of child rape. But for those working in the

When interpreting these figures, it should again be kept in mind that many acts of sexual assault are never reported to the SAPS.

After conducting an overview of statistics of reported child abuse over the last ten years, Childline has noted:[23]

- A massive increase in the number of reported cases of child sexual abuse: up by 400% over the past eight to nine years.
- A decrease in the average age of the sexual assault victim: in 1991 the average age of the sexually assaulted child was between ten and twelve years. Presently 50% of all children attending KwaZulu-Natal's therapy services after sexual abuse are under the age of seven years.
- An escalation of the use of brute force: many of the sexually abused children attending Childline's therapy centers are also severely beaten and physically intimidated by the person who has sexually assaulted them.
- An increase in the reported incidence of gang rape (a sexual crime against children, which is complex to manage, and which has a particularly traumatic impact on the child).
- An increase in the number of children who are HIV positive after a history of sexual assault.

Instances of physical child abuse, excluding sexual abuse, almost doubled in the last year from 2648 to 4798 cases.[24]

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field, sexual abuse of children is not a new problem. What is worrying to service providers is the massive increase in the number of reported cases, the decrease in the average age of both victims and offenders, the escalation of the use of force, the number of gang rapes, and the number of children victims who are HIV positive".; Report From Parliament, Morning Live, SABC 2, 15 May 2002.

23 Van Niekerk *supra* note 22 at 12; Stuijt (ed) ? HYPERLINK http://www.censorbugbear.com 2 Jul. 2004, where it is asserted: "Statistics of the SA Institute of Race Relations revealed 58 children a day are raped in South Africa: 21 000 a year. It is estimated that at least 9 of the 58 children raped per day are considerably younger than 11 years of age".

24 Also see Eybers *Gauteng Rapport* 28 Sep. 2003: "Kindermishandeling het meer as verdubbel van 499 tot 1033 en aanrandings het van 60468 tot 70151 gevalle gestyg".; Oelofse *Rapport* 28 Sep. 2003 8: "Voorvalle van fisieke kindermishandeling ... het die afgelope jaar byna verdubbel van 2648 tot 4798 gevalle".; Steenkamp *Beeld* 12 May 2004 2: "Suid Afrika het tussen 28 000 en 38 000 kinderprostitute en mistens 25% van die land se straatkinders verkoop seks om aan die lewe te bly. Die statistieke is

Van Niekerk asserts that:

Government has failed to implement the National Child Protection Strategy that was drawn up by the National Committee on Child Abuse and Neglect and presented to the then minister of Social Development in 1997.[25]

Section 28 of The South African Constitution clearly determines that:

Every child has the right ... **to be protected from** maltreatment, neglect, **abuse or degradation.**

Farm attacks, that are a phenomenon unique to South Africa,[26] where the elderly are most often the victims, are also at totally unacceptable levels. In 2002 Genocide Watch International warned:

Genocide Watch calls attention to this potential threat of destruction of an ethnic group, which has reached at least level four, Organisation, and probably level five, Polarization, in Genocide Watch's stages of the genocidal process. We call upon the South African government and civil society, especially human rights, legal, and religious groups, to resolutely and vocally oppose those who advocate hatred against Boer farmers. Those who have committed these murders must be brought to justice.[27]

Prof Moolman asserts that:

The severe violence attached to these attacks, is prominent and virtually out of proportion to the objectives. People are sometimes killed and tortured in front of other family members, corpses are found to be mutilated, people are tied up before they are killed while women are usually raped. In one case the corpse of a farmer who was killed at Soekmekaar in the Northern Province, was "decorated" with the head lamps and number plates of his

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....bekend gemaak tydens 'n seminaar oor mensehandel by die instituut vir Sekerheid Studies in Pretoria".

25 Van Niekerk *supra* note 22 at 14 ; this does not bode well for the fibre of South African Society as former president Nelson Mandela stated that " The true character of a society is revealed in how it treats its children" Crwys-Williams *In the words of Mandela* at 21 -22.

26 Mistry *supra* note 18 at 7; International Campaign to Stop South African Genocide 2004 HYPERLINK http://www.icssag.com/index2.html 5 Feb 2005

27 Genocide Watch 2002 HYPERLINK http://www.genocidewatch.org/BoersSlain01.htm 17 Jun. 2004; Stanton HYPERLINK http://www.gelpgsi.org/genocide.shtml 5 Feb 2005 ; Stuijt (ed) ? HYPERLINK http://www.censorbugbear.com 2 Jul. 2004; also see Steenkamp *Beeld* 28 Nov. 2003 1; Du Preez *Beeld* 4 Oct. 2003 1; Botha *Beeld* 21 Nov. 2003 13; Fitzpatrick and Louw *Beeld* 25 May 2004 8.

truck to illustrate to the farming community that the attackers are in control and that they can intimidate as they wish. The attackers do not merely intend to kill the victims, but instead to inflict pain, humiliation and suffering, especially on elderly people, not even sparing defenceless women and children. In several instances victims are killed in circumstances where the assailants have accomplished their purpose of robbing, rendering it unnecessary to kill. The victims are usually killed, not because of resistance offered by them, but apparently just for the sake of killing or eliminating them as witnesses. Violence is the norm and murders are often committed with seemingly gratuitous cruelty. If a female is present, she is usually raped (NICOC, Status Report 1997: 4). Another indication of the excess use of violence attached to these attacks is the fact that in 1997, 40% of the victims were people of 60 years and above.[28]

6.2.2 Crime Statistics

Levels of recorded crime in South Africa began to increase in the mid-1980s and dramatically so in the early 1990s. Expectations that violent crime would decrease after 1994 have not materialised. While levels of recorded crime stabilised between 1995 and 1996, crime has been increasing since then. The anomic annual increase in the overall number of recorded crimes was greater in 1999 than in any previous year after 1994. Violent crimes increased at a greater rate than any other crime class over this period. According to the latest available reliable statistics levels of recorded violent crime continue to increase.[29]

In 2000, one third of all crimes recorded by the police in South Africa were violent in nature.[30]

When comparing crime figures of April 2001 to March 2002 with that of the same period in 1994/95, the number of overall crimes increased by 20%. In the past seven years (1994/95 to 2000/01), violent crime increased by 33%, the highest increase in any crime category.[31]

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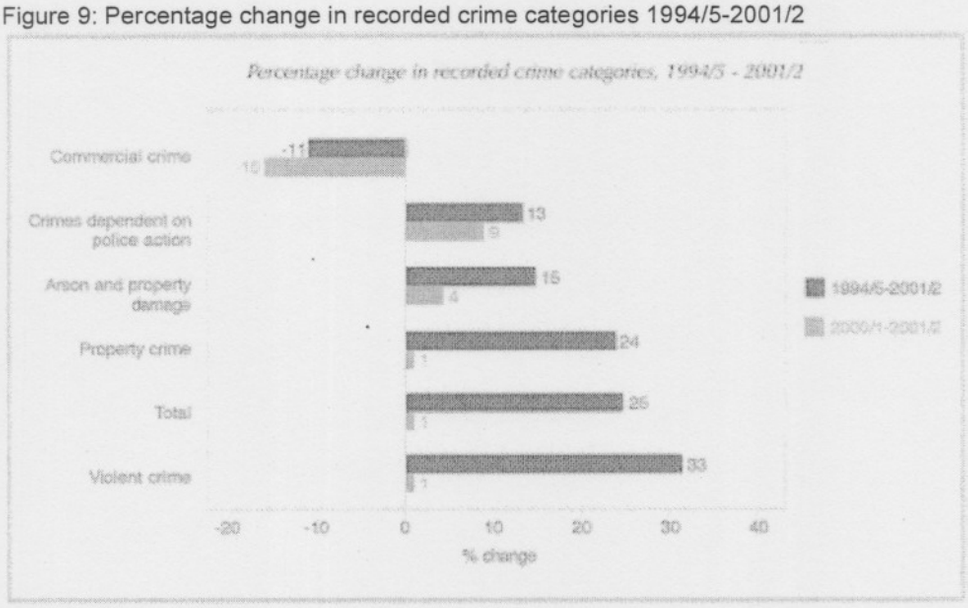
[28] Moolman 2000 HYPERLINK http://www.100megspop2.com/crimebusters/FarmMurders.html 10 May 2004.

[29] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004.

[30] *Id.* at 49.

[31] Masuku 2003(3) *SA Crime Quarterly* 18.

Figure 9: Percentage change in recorded crime categories 1994/5-2001/2



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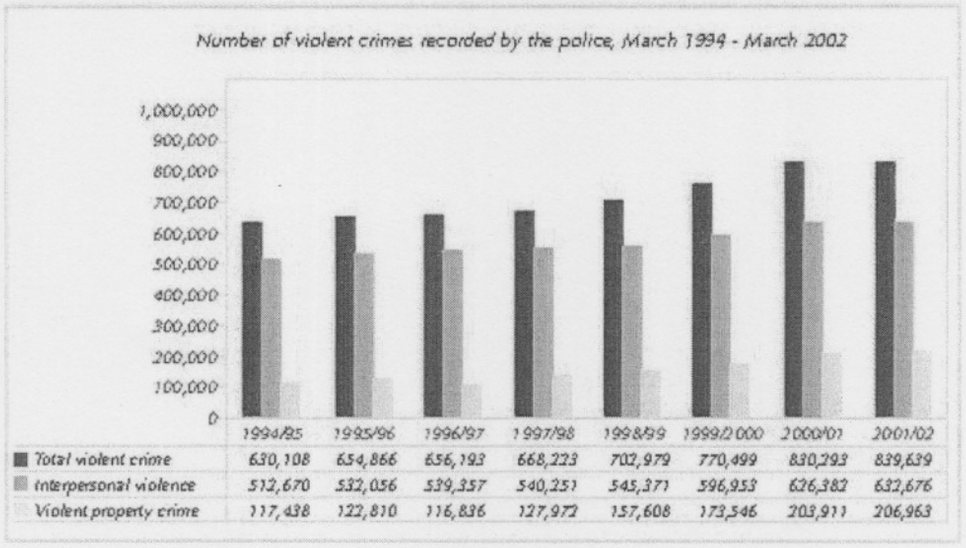
The following graph shows the increase in violent crime since the inception of the New South Africa in 1994.

Figure 10: Number of violent crimes recorded by the police 1994-2002



	1994/95	1995/96	1996/97	1997/98	1998/99	1999/2000	2000/01	2001/02
Total violent crime	630,108	654,866	656,193	668,223	702,979	770,499	830,293	839,639
Interpersonal violence	512,670	532,056	539,357	540,251	545,371	596,953	626,382	632,676
Violent property crime	117,438	122,810	116,836	127,972	157,608	173,546	203,911	206,963

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32 Masuku *supra* note 31 at 18.

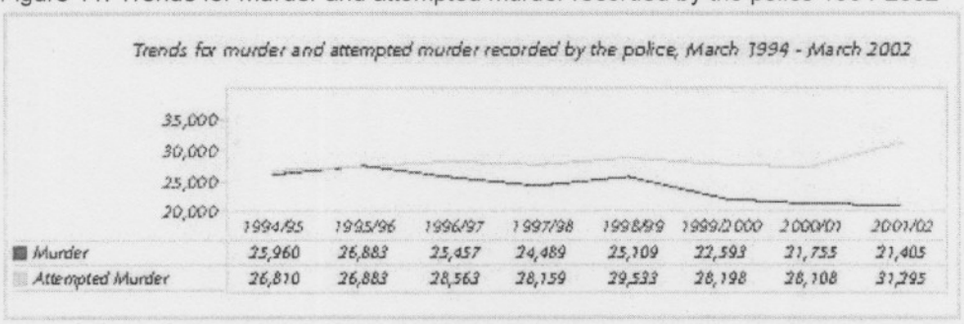
33 Masuku *supra* note 15 at 6: Interpersonal violent crime - *"murder, attempted murder, serious and common assaults, and rape"*; and violent property crime - *"all categories of robbery, i.e. robbery with aggravating circumstances (armed robbery, car hijacking etc.) and common robbery"*; SAPS ? HYPERLINK http://www.saps.gov.za/ 2 Jul. 2004.

The only sub-category in the category under crime that did not increase according to SAPS statistics is murder.[34] The graph below shows that "*murder decreased by 18% in the past seven years and by 2% in the past 12 months*".[35] Masuku points out that:

Considering that murder and attempted murder are similar types of crime, it is unusual that one is decreasing and the other is on the increase.....All other violent crimes, such as attempted murder, serious assault and rape had continued to rise.[36]

The following graph shows the unusual trend that reported murders are decreasing, while attempted murder is steadily increasing.

Figure 11: Trends for murder and attempted murder recorded by the police 1994-2002



	1994/95	1995/96	1996/97	1997/98	1998/99	1999/2000	2000/01	2001/02
Murder	25,960	26,883	25,457	24,489	25,109	22,593	21,755	21,405
Attempted Murder	26,810	26,883	28,563	28,159	29,533	28,198	28,108	31,295

[37]

Contrary to the above figures of the Police, a recent report by the Medical Research Council (MRC) states otherwise.[38] While police crime statistics

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[34] McCafferty 2003 HYPERLINK http://www.gunowners.org/fs0304.htm 1 Mar. 2004 at 5, quoting Masuku *supra* note 31.

[35] Masuku *supra* note 31 at 19. If the figures of the police were to be accepted, it still places South Africa's homicide rate second only to Colombia; Stoddard *Pretoria News* 30 Mar. 2004 9; Rense ? HYPERLINK http://www.rense.com/general39/reose.htm 8 Apr. 2004: "...Numerous experts are quoted as 'serious under reporting'"; "perhaps these figures are concealed for political reasons"; "the reason for this under reporting could be the desire to change the ongoing reputation of South Africa as the crime capital of the world".

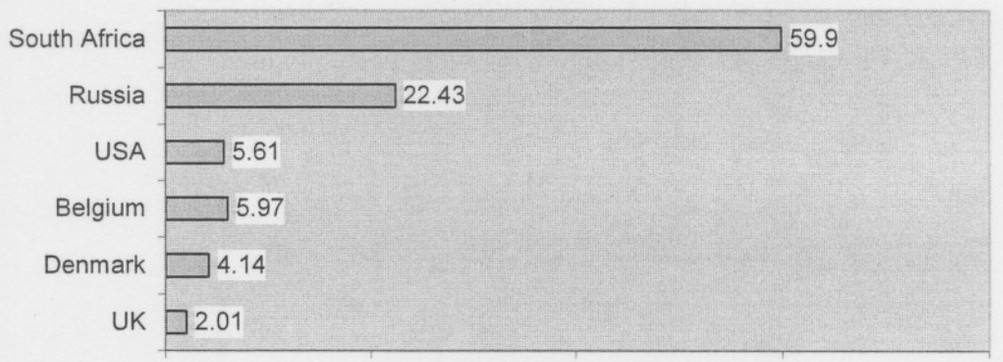
[36] Masuku *supra* note 31 at 17-24; McCafferty *supra* note 16 at 3; Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 3 asserts that: "by global standards, South Africa has high levels of violent crime. In 1999, a third of all crimes recorded by the police in South Africa were violent in nature. In the United States, which is considered to be a relatively violent society, 15% of all recorded crimes are violent, while about 6% of recorded crimes in the United Kingdom are violent in nature".

[37] SAPS Crime Information Analysis Centre 2001 HYPERLINK http://www.saps.gov.za/8_crimeinfo/bulletin/942000/murder.htm 2 Jul. 2004; SAPS 2004 HYPERLINK http://www.saps.gov.za/8_crimeinfo/bulletin/ 2 Jul. 2004.

show there were 21,683 murders in 2000, the MRC puts the figure at 32,482. The MRC's estimate is close to the figure from the Department of Home Affairs, which is 30,068. This is a third more murders than reported by the SAPS, a discrepancy of more than 10,000 murders.[39]

Unfortunately the Minister of Safety and Security placed an embargo on the release of crime statistics and the crime statistics released by the police have been received with great scepticism by the media, general public and international observers.[40] Inter pol claimed that there were approximately double the numbers of "murders known to police" in South Africa than the official police statistics reveal. This is substantial, for example, while the SAPS claims there were 26,883 murders in 1995/96, Interpol claims there were 54,298.[41]

Figure 12: Number of murders recorded per 100000 of the population 2001/2002



Interpol International Crime Statistics[42]

[38] McCafferty 2003 HYPERLINK http://www.gunowners.org/fs0304.htm 1 Mar. 2004 at 3.

[39] McCafferty 2003 HYPERLINK http://www.gunowners.org/fs0304.htm 1 Mar. 2004 at 3.

[40] Hosken *Pretoria News* 4 Mar. 2004 1: "South Africans feel less safe than ever despite the fact that crime levels have dropped".; Redakteur *Beeld* 24 Sep. 2003 8: "Daar is een groot fout met die regering se hantering van misdaadsyfers: pleks van demokratiese debat aan te moedig, vereger dit die wantroue ... (die regering) probeer hard om die syfers te gebruik om te wys dat misdaad nie so erg is nie. Vertel dit vir die miljoene slagoffers en hulle familie en vriende. Hulle glo dit nie".; Oelofse *Rapport* 28 Sep. 2003 8.

[41] Interpol ? HYPERLINK http://www.interpol.int/Public/Statistics/ICS/default.asp 10 Mar. 2004.

[42] Interpol ? HYPERLINK http://www.interpol.int/Public/Statistics/ICS/default.asp 10 Mar. 2004.

If any problem is to be seriously addressed it is of crucial importance that one knows exactly what one is dealing with. Fastidiously collected accurate and reliable crime statistics and data are needed to address crime in South Africa. An evidence based and science driven approach to human rights is important to enforce human rights effectively and provide both a transparent account of progress made and shortcomings encountered. This will lead to progressive realisation and sustained efforts to meet the demands of the South African Constitution. In this respect it is important to note that **section 195** of the Constitution determines that

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

f. Public administration must be accountable.
g.Transparency must be fostered by providing the public with timely, accessible and accurate information.

(2) The above principles apply to:

a. Administration in every sphere of government.

The South African Minister of Safety and Security is under a constitutional obligation to provide reliable crime statistics that are open to public debate and scrutiny.

Crime statistics are useful for the public because it provide information on:[43]

- How crime levels change over time,
- Present and future trends,

[43] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 17 states: "It is difficult to measure crime accurately over sustained periods. For crime to make it onto the official police records two things need to happen. First, victims or witnesses must report the incident to the police. Secondly, the police must record it in their records. As many crimes fail to make it over these hurdles, official statistics significantly undercount the number *of crimes* that are committed. Victimisation surveys - which ask a random sample of the population whether they have been victims of crime - are estimated to uncover between 60% and 70% more crime than that reported by official statistics (for more on the nature of police crime statistics and their accuracy, see appendix 1)".

- How crime rates compare in different areas, and
- The nature of certain crimes.[44]

Statistics are also a fundamental tool for designing, monitoring[45] and evaluating human rights protection initiatives. Rhetoric statements and business as usual politics with no results can no longer be accepted. The Constitution demands concrete facts, evidence of actual progress and signs of real resolve.[46] The emphasis must shift from affirmation to action and from commitments to actual enforcement and from policy design to implementation and evaluation. It is not sufficient to design a policy or have a right on paper if the effects are not seen in practice, in actual enforcement and implementation.[47]

6.2.3. Reasons for violent crime

Why does South Africa have such consistently high levels of crime? There is no single satisfactory answer to this question. There are, however, a number of factors that contribute to the current high levels of crime:[48]

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[44] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 17.

[45] In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) [44]: "Reasonableness should also be understood in the context of the Bill of Rights as a whole ... a society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable measures cannot leave out of account the degree or extent of the denial of the right they endeavour to realise. **If measures, though statistically successful, fail to correspond to the needs of those most desperate they may not pass the test"** (emphasis added).

[46] Keppler *Rapport* 28 Sep. 2003 11; Steenkamp *Beeld* 22 Oct. 2003 1; Redakteur *Beeld* 21 Nov. 2003 12.

[47] Garonna and Balta 2002 *Statistical Journal Of The United Nations Economic Commission for Europe* 277-291.

[48] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 19: "There is no one satisfactory explanation for South Africa's high levels of crime - especially the high and increasing levels of violent crime. There are, however, a number of explanations, which help to explain South Africa's consistently high levels of crime since the country's first non-racial democratic election some seven years ago".

6.2.3.1 Weak criminal justice system.

The failure of the criminal justice system is portrayed by the following statistics: for every 1,000 crimes committed in South Africa, only 430 criminals are arrested, furthermore, only 77 are convicted and despite the large number of violent crimes being committed (33%), only 8 are sentenced to 2 or more years of imprisonment. It is estimated that South Africa has a 94% recidivism rate. Ninety-four percent of all persons released after serving a jail sentence immediately become involved in crime again. Only 1 of the 8 actually gives up criminal activity.[49]

Schonteich and Louw asserts that:

South Africa's criminal justice system is not performing optimally. In 1999, some 2.4 million crimes were recorded by the police and 200 000 crimes ended in the conviction of the perpetrators. While it is true that not all recorded crimes should necessarily result in a conviction (some charges are false, some are fraudulent, cases might be withdrawn by the complainant), the number of convictions in South Africa is low. On average, fewer than 9% of recorded crimes result in the conviction of the perpetrators. For some serious crimes, the number of convictions as a proportion of recorded cases is even lower. In 1999, the number was 2% for car hijacking, 3% for aggravated robbery and 8% for rape.

For a criminal justice system to be successful, it must apprehend, convict and punish most of the offenders. Currently this is not the case in South Africa where fewer than one in ten offenders are convicted.

The primary aim of the criminal justice system is to process cases and offenders effectively and to hand down appropriate sentences to those

[49] McCafferty *supra* note 16 at 11; Leggett 2003(5) *SA Crime Quarterly* 11-14: "Figures that suggest only six out of every 100 violent crimes recorded by the South African Police Service result in conviction are cause for concern".; Nedcor *Nedcor Project on Crime* 5; Masuku *supra* note 31 at 20 points out that only half of all murder cases are sent to court, while only 4 007 resulted in guilty verdict. "In 2000, only half of all murder cases were sent to court, and only 4 007 of the 'official murders' resulted in a guilty verdict. The MRC reported 32 482 murders in 2000. This means that for every 8 murders in 2000, only one murderer was convicted. Obviously there is a delay factor to sentencing; however, the murder rate has been consistently high and the conviction rate considerably low by comparison".

convicted of an offence. A well functioning criminal justice system is important for several reasons:[50]

- A relatively small group of people are believed to commit the majority of serious crimes. If these perpetrators are apprehended and convicted quickly and effectively, certain crimes can be reduced.

- A functional system deters some potential offenders from committing a crime.

- An effective and efficient criminal justice system inspires confidence among the general public, victims and witnesses.

- Criminal justice successes are essential for boosting public confidence in the government's ability to reduce crime and make people feel safer.[51]

6.2.3.2 Transitional period

The political transition in South Africa brought about a restructuring of the criminal justice system, the abolition of a number of laws and the promulgation of new ones. As a result, many criminal justice functions have been operationally weakened. Some of the experienced personnel working in the system, who were trained in the policing methods of the old order, are now unsure how to function effectively within a new legal framework based on the rule of law and a constitutionally entrenched bill of rights.[52] Many highly skilled and trained policemen have also left the police service due to no future prospects as a result of "affirmative action" and low salaries. Many of the affirmative action appointments also have limited field experience if

[50] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 6.
[51] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 6.
[52] *Id.* at 4.

compared to first world countries where it will take more than 15 years to become a senior officer.

6.2.3.3 Organised crime

Organised crime syndicates are behind a significant number of hijackings, vehicle thefts, armed robberies and burglaries.[53]

A report from the world Economic Forum states that South Africa's organised crime was second only to Colombia's, with its frightening drug cartels and Russia's with its omni-present mafia.[54]

Police estimates further suggest that there are about 700 extremely well-financed and superbly armed crime syndicates operating in and from South Africa.[55]

6.2.3.4 Illegal immigrants

In a study conducted by Professor Mike Hough from the University of Pretoria Institute for Security Studies it has been found that illegal immigrants play a massive role in South Africa's high crime rate.

Zimbabweans, Mozambicans and Nigerians are involved in a large number of murder, rape and theft incidents in South Africa. Almost 30% of criminally accused persons in the Johannesburg Magistrate Court in January 2004

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[53] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 5; Rense ? HYPERLINK http://www.rense.com/general39/reose.htm 8 Apr. 2004; McCafferty 2003 HYPERLINK http://www.gunowners.org/fs0304.htm 1 Mar. 2004 at 9: Mark Shaw at the Institute of Security Studies (ISS) argues that: "crime grows most rapidly in periods of political transition and violence, when state resources are concentrated in certain areas only and gaps emerge in which organized criminal gangs may operate".

[54] McCafferty 2003 HYPERLINK http://www.gunowners.org/fs0304.htm 1 Mar. 2004 at 9.

[55] *Id.* at 10.

were illegal immigrants from other African countries.[56]

6.2.3.5 Firearms

South Africa is a heavily armed society. According to the police's Central Firearms Registry, 3.5 million South Africans legally possess 4.2 million firearms. It is estimated that a similar number of illegal firearms are circulating in South Africa.[57]

Firearms are used in most violent crimes reported to the police. About 10,854 (49%) of murders recorded by the police in 2000 were committed with a firearm. The trend for attempted murder is quite different: 21,967 out of 29,418 attempted murders (75%) recorded by the police in 1998 involved the use of a firearm, as did 80% of 110,590 serious robberies recorded in 2000. South Africa has too many illegal firearms in circulation. It is likely that many illegal firearms were once legally owned guns. Estimations are that about 82 privately owned firearms are lost or stolen every day. According to the SAPS, the police destroyed about 30,000 firearms between July and November 2001. Given the above estimates of illegal firearms, the police confiscation rate of illegal firearms is too low.[58]

6.2.3.6 Culture of violence

South Africa's political history also contributed to the current high rate of violent crime. Families suffered from institutional violence through the disruption of their lives by mass removals and the migrant labour policies of apartheid. Political violence further disrupted normal family life. The

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[56] Van Eden *Rapport* 11 Apr. 2004 1.
[57] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 5.
[58] Masuku *supra* note 15 at 6.

weakening of the family unit and parental control over children prompted criminal behaviour among the youth.[59]

Although the liberation movement's strategy of ungovernability was directed against th e apartheid state, it had other destructive side effects. In the process of destabilising black local government, leading violent campaigns against black policemen and urging a people's war, which involved the youth in particular, massive violence was unleashed in black communities, which bred a culture of violent lawlessness and a distrust of authority. Since 1994, little has been done to reverse these awry tendencies and to draw young South Africans back into a society governed by the rule of law. [60]

6.2.3.7 Poverty

The denial of human rights is inherent in poverty.[61] It is also a worldwide phenomenon that crime rates are higher in poor cities than in rural areas. Population density is associated with crime in that greater concentrations of people lead to competition for limited resources, greater stress and increased conflict.[62]

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[59] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 5.

[60] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 5.

[61] Hunt Nowak Osmani 2002 HYPERLINK http://www.unhchr.ch/development/povertyfinal.html 29 Nov. 2004 at preface "Eradicating poverty must be our first goal in this new millennium. Governments have committed themselves to taking action through strategies and programmes which aim to reduce poverty and eliminate extreme poverty. The denial of human rights is inherent in poverty, something which is powerfully recorded in recent studies, such as *Voices of the Poor.* Poverty cannot be banished without the realization of human rights. In the words of the Human Development Report 2000: "A decent standard of living, adequate nutrition, health care, education and decent work and protection against calamities are not just development goals – they are also human rights".

[62] Hunt Nowak Osmani 2002 HYPERLINK http://www.unhchr.ch/development/povertyfinal.html 29 Nov 2004; *Contra* Human Rights Watch 2001 HYPERLINK http://www.hrw.org/reports/2001/safrica2/Safarms1.htm#_1_1 31 Mar. 2004: "Violent crime is a major problem in South Africa, with reported murder and rape at among the highest rates in the world. Crime rates do not differ significantly between rural and urban areas".

At a community and neighbourhood level, violent crimes are influenced by factors such as overcrowding, poor housing design and a lack of infrastructure and development. Most residential areas inhabited by the poor, particularly the informal settlements, tend to be overcrowded with little living space for individuals and families. In most of these areas, families share stands and are without the basic amenities such as water taps, toilets, and, in some instances, electricity. These conditions are likely to create ongoing tensions between individuals and families and may eventually lead to serious violent behaviour.

Poor areas also tend to lack facilities such as street lights, open routes and well-maintained public spaces, which are essential for both the police and the public in helping to prevent crime.[63]

6.2.3.8 Youthful population

There is a strong relationship between age and crime.[64] Studies have shown that, as far as age is concerned, the likelihood of involvement in violent crime increases around age 15 and remains high until the mid-30s. When gender is also factored in, males between the ages of 15 and 25 years are more likely to be perpetrators of violent crimes than are females.[65]

According to the Department of Correctional Services 2001 Annual Report, a total of 26,682 prisoners were between the ages of 14 and 20 years (16% of all prisoners). Considering that in the 1996 census, 10% of the population was aged between 15 and 19 years, this suggests that this age group is

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[63] Masuku *supra* note 15 at 9-10.

[64] Schonteich and Louw 2001 HYPERLINK http://www.iss.co.za/PUBS/PAPERS/49/PAPER49.HTML 2 Apr. 2004 at 5. South Africa has a relatively youthful population. According to the last census, a third of the South African population was under the age of 15 years, and 44% was under the age of 20 years in 1996. The numerically largest population segments were those aged 5 to 9 years and 10 to 14 years, each of which made up almost 12% of the total population. Over the last five years many children in the 1996 population 'bubble' of 5 to 14-year-olds will have moved into the crime prone ages of 12 to 19 years.

[65] Stoddard *Pretoria News* 30 Mar. 2004 9: "We have a youthful population with a high percentage of males between 16 to 25-year-old bracket associated with most violent crime".

over-represented in prison. Of all the juvenile prisoners, 26,204 were male (98%) and 484 were female (2%).[66]

6.2.3.9 Lack of resources

The share of the national budget claimed by the criminal justice system has remained fairly constant over the last number of years garnering between 9% and 11% of the gross national state expenditure.[67] With violent crime increasing by 33% one should expect an increase in the budget for the criminal justice system to combat crime effectively. In the 2004 budget, Minister Trevor Manual made a welcome announcement that fighting crime and streamlining the justice process continue to be central priorities. Minister Manual promised:

> The budget allocates an additional R1.9bn over the next three years for enhanced safety and security. In policing this allows for additional personnel, modernizing and expanding the vehicle fleet and upgrading support system.[68]

Despite the above prospect, many police stations complain of being understaffed, underpaid and not having sufficient police vehicles.[69]

The following graph shows the number of police officers per recorded murder in South Africa compared with other countries:[70]

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[66] Masuku *supra* note 15 at 4.
[67] Leggett *et al.* 2003 HYPERLINK http://www.iss.co.za/pubs/Monographs/No88/Chap2.html 2 Mar. 2004.
[68] Manual *This Day* 19 Feb. 2004 22-23; Manual *Business Day* 19 Feb. 2004 10. It is important to note that a lack of resources is not a legitimate defense for lack of prevention of crime in terms of international law. See *supra* chapter 3.
[69] Kotze *Rapport* 19 Oct. 2003 12: "...hy (Nqakula) het polisie-manne die kop gewas wat 'n gebrek aan vervoer en mannekrag as verskoning gebruik het om nie by misdaad-tonele uit te kom nie".
[70] Altbeker 2001 *Nedbank ISS Crime Index* 2.

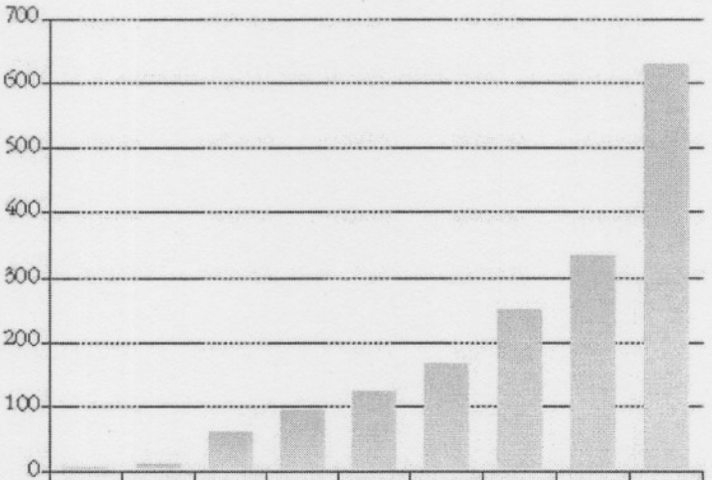

Figure 13: Number of police officers per recorded murder

Given the above statistics it would be rash to claim that South Africa is not in fact under policed.[71]

Whatever the reasons for the unacceptable levels of violent crime in South Africa ultimately in terms of both international and domestic human rights law, the South African government is responsible to take affirmative measures of a judicial, legislative and executive nature, *to:*

> organise the governmental apparatus and in general, all the structure through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights.[72]

The South African government further has an international legal obligation *"to take reasonable steps to prevent human rights violations"* by public and private actors. The duty to prevent includes all those means of legal, political, administrative and cultural nature that promote the protection of human rights and ensure that all violations are considered and treated as illegal acts, which as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.[73]

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[71] Altbeker 2001 *Nedbank ISS Crime Index* 2.
[72] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 163.
[73] *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 175.

For most victims of violence and violent crimes in South Africa, the constitutional guarantee to be free from all forms of violence as expressed in section 12(1)(c) of the Constitution[74] amounts to a mere empty paper guarantee. By holding the state delictually liable for human rights abuses committed by non-state actors, the judiciary can participate in creating a society free from violence and also send out a message that human rights in South Africa are more than paper guarantees.

6.3 The Constitution of the Republic of South Africa

The Interim Constitution of the Republic of South Africa came into effect on 27 April 1994.[75] Its effect on the South African legal system can be described as revolutionary.[76] The Interim Constitution brought about three fundamental changes:

- For the first time in South African history, political and civil rights were afforded to all citizens irrespective of race.

- The doctrine of parliamentary sovereignty was replaced by a doctrine of constitutional supremacy.

- The Constitution contained a Bill of Fundamental Human Rights that had to be respected, protected, promoted and fulfilled by the state.[77]

The Courts were now empowered to declare government laws and conduct that is inconsistent with fundamental human rights invalid.[78]

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[74] S 12(1)(c) of the *Constitution of the Republic of South Africa*, 1996 determines that: *Everyone has the right to freedom and security of the person, which includes the right* ***to be free from all forms of violence from either public or private sources*** (emphasis added).
[75] De Waal, Currie and Erasmus *supra* note 9 at 2.
[76] *Ibid.*
[77] De Waal, Currie and Erasmus *supra* note 9 at 2.
[78] *Ibid.*

On 7 May 1996, the Constitutional Assembly adopted the final constitution of the Republic of South Africa.[79] *Section 1* of the Constitution states that:

1) The Republic of South Africa is one, sovereign, democratic state founded on the following **values**:

   a) **Human dignity, the achievement of equality and the advancement of human rights and freedoms.**
   b) Non-racialism and non-sexism.
   c) **Supremacy of the constitution and the rule of law.**
   d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[80]

Section 2 that deals with the supremacy of the Constitution determines:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and **the obligations imposed by it must be fulfilled.**[81]

The Oxford Dictionary defines fulfilled as *"to achieve or realize something promised or predicated"*.[82] It is important to note that the obligations imposed by the Constitution "*must be fulfilled*". The state must not aim to fulfil or endeavour to fulfil but actually fulfil the obligations imposed by the Constitution.

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[79] *Constitution of the Republic of South Africa*, 1996. The 1996 Constitution was for the most part similar to the 1994 Constitution and all the fundamental human rights guaranteed by the 1994 Constitution remained.

[80] S 1 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added).Section 1 is of great importance as it sets out the values on which South Africa through the Constitution is founded. Determining whether the state owed a legal duty to prevent loss is a conclusion of law that depended on a consideration of all the circumstances of each particular case and on the interplay of many factors. In essence the issue will always be one of reasonableness, that is to be determined with reference to the legal convictions of the community as determined by the court. As the Constitution is the supreme law of South Africa, the values and norms it embodies must necessarily be taken into account and afforded substantial weight.

[81] S 2 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added). It is important to note that section 2 unequivocally obliges the state to fulfil the obligations imposed by the Constitution. To fulfil the obligations imposed by the Constitution is not discretionary but mandatory. The obligation imposed is also of immediate effect. There are no words such as "progressively" or "in due course". The state must now fulfil the obligations set out in the Constitution. Section 237 of the *Constitution of the Republic of South Africa*, 1996 also determines that " All constitutional provisions must be performed diligently and without delay."

[82] Pearsall (ed) *Concise Oxford English Dictionary* 464.

Chapter 2 of the South African Constitution deals with the Bill of Rights and section 7, that is the first section of chapter 2, determines that:

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) **The state must respect, protect, promote and fulfil the rights in the Bill of Rights.**[83]

The state generally fulfils its obligation to "*respect*" by refraining from violating human rights itself. The obligations to "*protect*", "promote" and "*fulfil*" fundamental human rights on the other hand, calls for specific positive action by the state to ensure that individuals actually enjoy the fundamental human rights set out in the Bill of Rights. Human rights under the South African Constitution's Bill of Rights are "negative" in the sense that the government must not obstruct the enjoyment of human rights, but also positive in the sense that the state must take affirmative measures to prevent violations of human rights from occurring.[84]

The South African Constitution *inter alia* guarantees the following civil and political rights:

- The right to equal protection and benefit of the law[85]
- The right to have one's dignity respected and protected[86]
- The right to life[87]

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[83] S 7 of the *Constitution of the Republic of South Africa*,1996 (emphasis added).
[84] Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines .html 23 Jun. 2004 Regarding the obligation to " *to respect, protect and fulfil*" the Maastricht Guidelines at section 6 determine that: Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.
[85] S 9 of the *Constitution of the Republic of South Africa*, 1996.
[86] S 10 of the *Constitution of the Republic of South Africa*, 1996.

- The right to freedom and security of the person[88]
- The right to be free from slavery, servitude and forced labour[89]
- The right to privacy[90]
- The right to freedom of religion, belief and opinion[91]
- The right to freedom of expression[92]
- The right to assembly, demonstration, picket and petition[93]
- The right to freedom of association[94]
- The right to freedom of movement and residence[95]
- The right of children to be safe and protected[96]

Importantly the above protection espoused by the South African Constitution applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[97]

Sections 1, 2, 7 and 8 read together with sections 9–34 clearly and explicitly place a positive legal duty on the state to prevent human rights abuses from occurring also at the hands of private individuals.[98]

6.3.1 The right to freedom and security of the person

Of specific relevance and importance to state responsibility for human rights committed by non-state actors is the right to security of the person. It is also this fundamental human right that is often violated by criminals in South Africa. The right to security and the right to be free from violence in general

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[87] S 11 of the *Constitution of the Republic of South Africa*, 1996.
[88] S 12 of the *Constitution of the Republic of South Africa*, 1996.
[89] S 14 of the *Constitution of the Republic of South Africa*, 1996.
[90] S 15 of the *Constitution of the Republic of South Africa*, 1996.
[91] S 16 of the *Constitution of the Republic of South Africa*, 1996.
[92] S 17 of the *Constitution of the Republic of South Africa*, 1996.
[93] S 18 of the *Constitution of the Republic of South Africa*, 1996.
[94] S 19 of the *Constitution of the Republic of South Africa*, 1996.
[95] S 22 of the *Constitution of the Republic of South Africa*, 1996.
[96] S 29 of the *Constitution of the Republic of South Africa*, 1996.
[97] S 8(1) of the *Constitution of the Republic of South Africa*, 1996; Steytler *Constitutional Criminal Procedure* at 15.
[98] Certain sections, for instance the section that deals with children (section 28), expressly states that: 28(1) Every child has the right to be protected against maltreatment, abuse, neglect or degradation even further confirming the states affirmative duty to protect.

terms include the right to wellbeing and to pursue happiness, wealth, and an education in a secure environment. The right to security is of fundamental importance as it is interlinked and has interdependence with almost all the other human rights. In the event of "security" not being enjoyed none of the other fundamental human rights can be enjoyed to the fullest.[99]

Section 12 of the South African Constitution determines that:

12. (1) Everyone has the right to freedom and security of the person, which includes the right

c. **to be free from all forms of violence from either** public **or private sources**;
d. not to be tortured in any way; and
e. not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right

b. to security in and control over their body[100]

The right to freedom from violence as expressed in section 12(1)(c) was an innovation of the 1996 Constitution. Some argue that, although it has no direct equivalent in the 1993 Constitution, it can be seen as a component of the right to security of the person.[101] The researcher concurs with those who view section 12(1)(c) as a separate fundamental guarantee.[102]

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[99] *S v Baloyi* 2000 2 SA 425 (CC) at [13]; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [13]: "Freedom from violence is recognized as fundamental to the equal enjoyment of human rights and fundamental freedoms". In the US case of *Meyer v Nebraska* 262 U.S. 390 (1923) at 399 the court held that security "is not merely freedom from bodily restraint but the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, have children, establish a home, and bring up children and to worship God ... and generally to enjoy those privileges ... as essential to the orderly pursuit of happiness by free men".

[100] S 12 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added).

[101] De Waal, Currie and Erasmus *supra* note 9 at 258.

[102] Pieterse 2002 *SALJ* 27. Forming part of the right to freedom and security of the person in s 12 of the Constitution, the right to be free from private or public violence had no explicit equivalent in the Interim Constitution (*Constitution of the Republic of South Africa* Act 200 of 1993). There has also been little judicial contemplation on the significance of its explicit inclusion in the final Constitution, save for the Constitutional Court stating in *De Lange v Smuts* 1998 3 SA 785 (CC) at [16] that s 12(1)(c) "either incorporates a new right or makes explicit what was previously implicit", and a similar passing observation in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) at [47] that "these rights to be violence-free are additional to and not

Very important is the fact that section 12(1)(c) expressly requires of the state to protect individual's fundamental human right to be free from violence both by refraining from such invasions itself[103] and by preventing private individuals from committing such invasions. In the recent case of *Van Eeden v Minister of Safety and Security*, the Supreme Court of Appeals held that:

In terms of s 12(1)(c) everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources **....section 12 (1) (c) requires the state to protect individuals, both from refraining from such invasions itself and by taking active steps to prevent violation of the right.**[104]

There can be no uncertainty that in terms of the Constitution there is an obligation on the state to prevent human rights abuses committed by non-state actors. The framers of the Constitution could not have made this obligation clearer. The state must ensure that *"everyone"* is *"free from all forms of violence"* also from *"private sources".* The explicit provisions contained in section 12(1)(c) read together with sections 2 and 7 leave no room for any contrary argument.[105]

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substitutes for the right not to be punished in a cruel, inhuman or degrading way". Certainly, in the absence of an equivalent in the Interim Constitution, an argument could be made that a right to be free from violence was implied in s 11 (freedom and security of the person) of that Constitution, but whether s.12(l)(c) constitutes a separate entitlement or merely an explicit element of the right to freedom and security of the person does not in principle influence its justiciability. For practical purposes, however, it is submitted that s 12(l)(c) is best read as a separate guarantee.

[103] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [13]; De Waal, Currie and Erasmus *supra* note 9 at 258; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) at [47]; The Oxford Dictionary (Pearsall *supra* note 81) defines *"...security..". as inter alia "safety"* and *"safety or precaution against danger".* "...Secure..". is defined as "safe", "certain not to slip or fall" and "guarantee by pledging", "safe" is then being defined as "being safe" but importantly as *"FREEDOM FROM RISK OF DANGER".* The last mentioned definition of "safe" as "freedom from risk or danger" in everyday language obviously entails freedom from violence. Per definition "security" equals "precaution against danger". In a society "precaution" must be taken by government to ensure the security and safety of all who live and pursue their dreams and ideals within the boundaries of the state's jurisdiction. There is an affirmative duty on government to take positive preventative measures to ensure and enforce individuals' right to be free from violence from third parties and private actors and of course the state itself.

[104] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at 397 (emphasis added).

[105] Combrinck 1998 *Hum. Rts. Q.* 683: "The formulation of section 12(1)(c) is also very clear in its reference to violence from both public or private sources ... this provision clearly implies that the state should not only respect the rights of women to be free from

In the case of *Christian Education South Africa v Minister of Education*, the Constitutional Court held:

Section 12 of the Constitution now adds to the rights protected by the interim Constitution the following provisions: (1) Everyone has the right to freedom and security of the person, which includes the right–(c) to be free from all forms of violence whether from public or private sources (2) Everyone has the right to bodily and psychological integrity, which includes the right–(b) to security in and control over their body . . . " It should be noted that these rights to be violence-free are additional to and not substitutes for the right not to be punished in a cruel, inhuman or degrading way. Under section 7(2) the State is obliged to "respect, protect, promote and fulfil" these rights. It must accordingly take appropriate steps to reduce violence in public and private life. Coupled with its special duty towards children, this obligation represents a powerful requirement on the State to act.[106]

6.3.2 Interpretation of Bill of Rights

With the advent of democracy in 1994, South Africa literally exploded onto the international scene. Former President's Nelson Mandela and FW de Klerk were jointly honoured with the Nobel Peace Prize and President Mandela was regularly seen in the presence of the world's most powerful leaders like President Bill Clinton of the United States of America.

South Africa was an example to the rest of the world and as such, South Africa proceeded to sign all the international treaties and conventions that deal with the protection of human rights without any reservations and by doing so, legally binding the South African government to *"respect and ensure"* fundamental human rights to all who live in South Africa.[107]

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all forms of violence (in the sense of refraining from the commission of acts of violence against women), but should take active steps to protect this right".

106 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at [47].

107 Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003: South Africa ratified the International Covenant on Civil and Political Rights on 10 March 1999 without any reservations; the International Covenant on Economic, Social and Cultural Rights on 4 October 1994 without any reservations; the Convention on the Elimination of all Forms of Racial Discrimination Against Women on 14 January 1996 without any reservations; the Convention on the Elimination of Racial Discrimination on 10 October 2003; the Convention Against Torture and Other Cruel,

Apart from the aforementioned international legal obligation discussed in Chapter 3[108], section 39 of the South African Constitution determines that:

39(1) When interpreting the Bill of Rights, a court, tribunal or forum

a. **must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;**
b. **must consider international law;** and
c. may consider foreign law.

(2) When interpreting any legislation, and **when developing the common law** or customary law, every court, tribunal or forum **must promote the spirit, purport and objects of the Bill of Rights.**[109]

It is important to note that in terms of section 39(1)(b) a court "*must*" consider international law. It is not discretionary but obligatory.

In *S v Makwanyane*, the Constitutional Court stated that both binding[110] and non-binding[111] public international law may be used as tools for interpretation.

International agreements and customary international law provide a framework within which ... (the Bill of Rights) can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights ... and the European Court of Human Rights ... may provide guidance as to the correct interpretation of particular provisions.[112]

Inhuman and Degrading Treatment on 9 January 1999 without any reservation; and the Convention on the Rights of the Child on 16 July 1995 with out any reservation. See *supra* chapter 3.

[108] *Supra* chapter 3.

[109] S 39(1) and 39(2) of the *Constitution of the Republic of South Africa*, 1996 (emphasis added); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [26] "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa,28 it may be directly applicable; Steytler *supra* note 97 at 10-3.

[110] Binding international law are the various conventions and treaties that South Africa has ratified. Binding international law has greater persuasive force since "the law makers of the Constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law". (*Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) at [26]; De Waal, Currie and Erasmus *supra* note 9 at 141, footnote 61.

[111] De Waal, Currie and Erasmus *supra* note 9 at 141.

[112] *S v Makwanyane* 1995 3 SA 391 (CC) at [36]-[37]; Section 231 – 233 of of the *Constitution of the Republic of South Africa*, 1996 determines: **International**

The Constitutional Court further held that:

Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence, but well developed in mature constitutional democracies.[113]

Chapter 3[114] dealt in detail with the international position regarding state responsibility for human rights abuses committed by non-state actors and Chapter 4[115] and 5[116] with the international position in Europe and the Americas. As is clearly shown in the aforementioned chapters, the state is responsible for human rights abuses committed by non-state actors if it failed to act in accordance with the due diligence principle. There is a clear international duty on the South African government to first of all prevent violations from occurring and in the event of a violation occurring, the state must investigate the violation, punish the perpetrator and provide an effective remedy to the victim or to the victim's family.

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agreements 231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect. **Customary international law** 232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. **Application of international law** 233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

113 *S v Makwanyane* 1995 3 SA 391 (CC) at [37]. State responsibility for human rights abuses committed by non-state actors is one such area. Venter 2000 *Utilizing Constitutional values* at 33 "Exactly because these and similar constitutional notions share a multinational history and universal acceptance as standards for sound constitutional structuring, the constitutional lawyer cannot but be a comparatist".

114 *Supra* chapter 3.

115 *Supra* chapter 4.

116 *Supra* chapter 5.

In terms of section 39(2), the court is also under an obligation to develop the common law in line with the spirit, purport and objects of the Bill of Rights. In the recently decided case of *Carmichele v Minister of Safety and Security*, the Constitutional Court asserted that:

This requires not only a proper understanding of the Constitution and its objective normative value system, but also a proper understanding of the common law ... there are notionally different ways to develop the common law under section 39(2) of the Constitution, all of which might be consistent with its provisions ... before the advent of (the Constitution), the refashioning of the common law in this area entailed "policy decisions and value judgements" which had to "reflect the wishes often unspoken, and the perceptions often but dimly discerned, of the people". A balance had to be struck between the interest of the parties and the conflicting interest of the community according to what "the court conceives to be society's notions of what justice demands". Under section 39(2) the Constitution concepts such as "policy decisions and value judgements" reflecting "the wishes ... and the perceptions ... of the people" and "society's notions of what justice demands" might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.[117]

In terms of section 173 of the Constitution the courts also have inherent power to develop the common law in the interests of justice.

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

6.3.3. Principles of co-operative government

In terms of the Constitution there is a duty on the government to act to *secure the well-being of the people of the Republic of South Africa.*[118] There is a positive legal duty on the South African government to provide effective, transparent and accountable government to the people.[119] This obviously

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[117] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at 961- 962 and 962–963.

[118] S 41(1)(b) of the *Constitution of the Republic of South Africa*, 1996: well-being of people obviously includes safety and to be free from violence. Well-being can not be experienced when one lives in fear and in a society that experience violent criminal attacks on a daily basis.

[119] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [20].

entails an effective police force and effective criminal justice system as well as effective internal security. Measured against normal tests of reasonableness and what result a reasonable government should achieve, it is clear that having the highest crime rate in the world and one of the lowest conviction rates is not effective government.

Section 41 of the Constitution determines that:

41. (1) **All spheres of government and all organs of state** within each sphere **must**:

a) preserve the peace, national unity and the indivisibility of the Republic;
b) **secure the well-being of the people of the Republic**;
c) **provide effective, transparent, accountable and coherent government** for the Republic as a whole;
d) **be loyal to the Constitution**, the Republic and its people;
e) respect the constitutional status, institutions, powers and functions of government in the other spheres.[120]

Section 195 that deals with the values and principles that govern public administration further supports and underscores the norm of accountability and determines that:

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a. A high standard of professional ethics must be promoted and maintained.

f. **Public administration must be accountable.**

(2) The above principles apply to:

a. administration in every sphere of government.

Sections 41(1)(c) and 195(1)(f) expressly demand accountable government from all organs of state. Where the state, represented by persons performing functions on its behalf, acts in conflict with its constitutional

[120] S 41 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added).

duties, the norms of effective and accountable government will render the state liable.[121]

6.3.4 Security services

The police force is one of the state's primary agencies responsible for the discharge of the state's constitutional duty to protect. It is, therefore, important to consider whether the Constitution imposes any legal duty on the police force to prevent violent human rights violations from occurring over and above the obligations as set out in sections 2, 7, and 12(1)(c).[122]

Section 205 of the Constitution that specifically deals with the police service expressly determines that:

205 (3) **The objects of the police service are to prevent**, combat and investigate **crime,** to maintain public order, **to protect and secure the inhabitants of the Republic**... and to uphold and enforce he law.[123]

The Police Act of 1958 and the South African Police Services Act of 1995 further also place a duty on members of the police force to prevent crime:[124]

The functions of the South African police shall be, *inter alia*-
(a) the preservation of the internal security of the Republic;
(b) the maintenance of law and order;
(c) the investigating of any offence or alleged offence;
(d) the prevention of crime.[125]

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[121] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [22], 448C-E.

[122] Neethling 2000 *THRHR* 150: "Nou is dit belangrik om daarop te let dat die Grondwet (a 7(2)) die staat – waarvan die polisiediens 'n bepaalde orgaan is – in die besonder verplig om die regte in die handves van regte te eerbiedig, te beskerm, te bevorder en te verwesenlik".

[123] S 205 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added) ; s 215 of the *Constitution of the Republic of South Africa* Act 200 of 1993 provided that: "The powers and functions of the service shall be (1) the prevention of crime; (2) the investigation of any offence or alleged offence; (3) the maintenance of law and order; (4) the preservation of the internal security of the Republic".

[124] *Police Act* 7 of 1958; *South African Police Service Act* 68 of 1995; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at 963I–963C; *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (E).

[125] S 5 of the *Police Act* 7 of 1958.

In the words of Chief Justice Rumpff in *Minister van Polisie v Ewels*[126]:

wat misdaad betref is die polisieman nie net afskrikker of opspoorder nie, maar ook beskermer.[127]

The police must *prevent crime* and *secure the citizens of South Africa* against the invasion of their fundamental human rights.[128] The first priority is to take all appropriate measures to prevent the violation from occurring at all. All appropriate measures includes having an effective police force,[129] the proper monitoring of violations, the devising of appropriate action plans and the monitoring of their effectiveness after implementation.[130]

6.4 Interpretation and application

The South African Constitutional Court and the Supreme Court of Appeals recently, through a number of ground-breaking decisions, confirmed that acts of violence committed by private persons can be attributed to the state when the state fails to act in accordance with its constitutional obligations to protect citizens against the violent behaviour of others.

The South African courts found that there is a legal duty on the state to act positively to prevent private acts of violence from occurring and in doing so

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[126] *Minister van Polisie v Ewels* 1975 3 SA 590 (A).

[127] *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [20].

[128] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [16] 398C/D–D/E; *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) 582H: "Die doelwitte (objects) en rede vir die bestaan van die polisiediens is die volgende ... : The object of the SAPS: The responsibilities of the SAPS are to: (a) prevent combat and investigate crime... and ... The values held by the SAPS are to: protect everyone's right and to be impartial, respectful, open and accountable to the community; use the powers given to it in a responsible way; provide effective and high quality service with honesty and integrity; evaluate its services continually ... Dit en die Grondwet plaas 'n plig op die polisie om te alle tye op te tree 'to protect and secure the inhabitants of the Republic'".

[129] In *Feldman (Pty) Ltd. v Mall* 1945 AD 733 741 it was held that: "[A] master who does work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or insufficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work...". Regarding vicarious liability of the police service, also see *Minister of Police v Rabie* 1986 1 SA 117 (A) at 134H; Martin 1989 *THRHR* 273; Van der Walt 1988 *THRHR* 515.

[130] Garonna and Balta *supra* note 47 at 277-291.

made a great contribution to creating a legal framework in South Africa where human rights can be enforced and protected effectively.

6.4.1 Carmichele v Minister of Safety and Security[131]

The case of *Carmichele v Minister of Safety and Security* was the first case after the coming into effect of the Interim Constitution and final South African Constitution where the Constitutional Court dealt with the duty of the South African courts to develop the common law and delictual principles in accordance with the spirit, purport, and objects of the Bill of Rights and the state's responsibility and liability for human rights abuses committed by non-state actors in the context of the norms and values that the Constitution espouse.[132]

The facts of the case were that a young man, Coetzee, violently attacked Alex J Carmichele, a 28 year-old woman, hitting her over the head with a pick handle, breaking her arm and stabbing her in the chest with a knife so forcefully that the blade of the knife buckled in the process. Coetzee had previously been convicted on charges of housebreaking and indecent assault. At the time of the attack on the Carmichele, Coetzee was facing a charge of rape in the magistrate's court, but had been released from custody by the magistrate acting on the recommendation of the investigating officer. Even though the investigating officer had been aware of allegations that Coetzee had previously been convicted for rape, he had nonetheless told the prosecutor that there was no reason to deny Coetzee bail and recommended that Coetzee be released on warning. The prosecutor did not oppose Coetzee's release. Julie Gosling, Carmichele's friend, after gaining knowledge of Coetzee's violent tendencies towards women, expressed concern about Coetzee to the police and the senior public prosecutor and

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[131] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA).

[132] S 215 *Constitution of the Republic of South Africa* Act 200 of 1993 and the *Police Act* 7 of 1958, both relevant at the time Carmichele had been assaulted, declare the prevention of crime to be one of the functions of the police force; also see Pillay 2002 *SACJ* 147.

requested his detention, pending trial.[133] The police advised Gosling to take the matter up with the public prosecutor who told Gosling that nothing could be done unless Coetzee committed another offence. Shortly thereafter Coetzee attempted to commit suicide and was interviewed by the prosecutor. The interview revealed serious sexual deviation on the part of Coetzee. He was sent to a psychiatric hospital for observation, but the hospital reported that he was capable of understanding the court proceedings and had been mentally capable at the time of the alleged rape. Coetzee again appeared in the magistrate's court and pleaded not guilty, whereupon he was released again pending a decision by the attorney general on whether the case should proceed in the High Court. After Coetzee's release, Carmichele saw him prowling around Gosling's house. Both Carmichele and Gosling again spoke to the senior prosecutor and told him that they fear Coetzee might harm them, and were again told that the state was powerless to do anything. A few days later the attack on Carmichele took place in Gosling's house. After the attack on the applicant, Coetzee was tried on the charge of rape and convicted of attempted rape. Later that year Coetzee was prosecuted for the attack on Carmichele and convicted of housebreaking and attempted murder.

Mrs Carmichele instituted a claim in delict (tort) against the state alleging that the police officers and prosecutors, acting in the course and scope of their employment with the state, had owed her a legal duty to act in order to prevent Coetzee from harming her, and that they negligently failed to comply with that duty. The case went on trial in the Cape Provincial Division of the High Court, and then went on appeal, first to the Supreme Court of Appeal and thereafter to the Constitutional Court who, after finding in favour of Mrs Carmichele, referred the matter back to the Cape Provincial Division.

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[133] Knobel 2002 *Codicillus* 96.

6.4.1.1. Judgements of the Cape Provincial Division and the Supreme Court of Appeal

The Cape Provincial Division held that there was no evidence to reasonably find that the legal duty to prevent harm existed. An order for absolution from the instance was granted. Carmichele appealed to the Supreme Court of Appeal. The judgement on appeal dealt with the question of whether the police and prosecutors owed the applicant a legal duty to act.[134]

The Supreme Court pointed out that the test for determining the wrongfulness of an omission had been settled in a number of decisions of the Appellate Division.[135] According to the aforementioned test, the existence of a legal duty to prevent loss is a conclusion of law depending upon a consideration of all the relevant circumstances and facts of each particular case, which must be considered. In essence the issue is one of reasonableness, determined with reference to the legal perception of the community or *boni mores* as assessed by the court. The interests of the parties and the interests of the community must be weighed and a balance must be struck in accordance with what the court conceives society's notion of justice to be. The question must always be whether the defendant ought reasonably and practically to have prevented harm, in other words, whether it is reasonable to expect of the defendant to have taken positive steps to prevent the harm in a certain set of circumstances.[136] The appeal was dismissed unanimously.[137]

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134 Knobel *supra* note 133 at 97; the judgement of the Supreme Court of Appeal was reported as *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA).

135 Knobel *supra* note 133 at 97; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 317–318; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) at 27; and *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) at 367.

136 Knobel *supra* note 133 at 97-98. There is a difference between morally reprehensible and legally actionable omissions, and a legal duty is not determined by the mere recognition of social attitudes and public and legal policy.

137 Van der Walt 2002 *TSAR* 148-149. Judges of Appeal Van Heerden, Howie, Schultz and Zulman all concurred with Vivier JA's judgement that the appellant had indeed failed to provide sufficient evidence for finding that the respondents had a legal duty to prevent Coetzee from assaulting her.

The Supreme Court of Appeals held that:

(a) The contended legal duty consisted in the duty of the police to provide the public prosecutor with all relevant information regarding the case and the duty of the prosecutor to subsequently oppose bail and provide the court with all the relevant information as to why Coetzee should have remained in custody.[138]

(b) There is no absolute duty on a prosecutor to oppose bail in all cases. The prosecutor has a public duty to oppose bail in appropriate cases, but a breach of this duty does not necessarily constitute a legally actionable omission at the instance of any individual member of the public.[139]

(c) Whether a legal duty to oppose bail is owed in a particular case to an individual member of the public depends on what is reasonable, having full regard to the facts and circumstances of the particular case and the information at the disposal of the prosecutor.[140]

(d) The legal duty to oppose bail also depends on whether a *"special relationship"* existed between the claimant and defendant that distinguished the claimant from any other member of the public.[141]

With regards to (a) the Court found that the police fully complied with their legal duty. All relevant information regarding Coetzee and his previous offences had been submitted to the prosecutor.[142] In respect of (c) the Court found that it was not unreasonable not to oppose bail under the

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[138] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 497D; Van der Walt *supra* note 137 at 149.

[139] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 497G–H; Van der Walt *supra* note 137 at 149.

[140] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 497H; Van der Walt *supra* note 137 at 149.

[141] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 497I; Van der Walt *supra* note 137 at 149.

[142] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 497E–F; Van der Walt *supra* note 137 at 149.

circumstances. The factors considered in this regard were that (i) the attorney general had not seen fit to instruct the prosecutor to oppose bail.[143] (ii) The psychiatric report had not declared Coetzee a danger to society.[144] With regards to (d), the Supreme Court found that there was no special relationship between the claimant and defendants on which a legal duty could be based to protect the claimant from particular harm. General risk of harm to all members of the public does not suffice in this regard.[145] The fact that a number of women of the specific community of Knoetzie were more at risk than women elsewhere and the fact that they had repeatedly warned the police of the danger, did not change the general relation between the police and applicant's case.[146]

6.4.1.2. Judgement of the Constitutional Court

The Constitutional Court did not agree with the Supreme Court of Appeals.

The court held that in essence Carmichele's claim was based on delict. To *have a successful claim* she was required to prove that the South African Police Service (SAPS) and the Justice Department had a legal duty to protect her; that they acted in breach of this duty and did so negligently, and that there was a causal connection between their negligent breach and the

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[143] The Attorney General had in fact at the time been circulating instructions to prosecutors in his area that awaiting trial accused had a right to be released pending the trial. According to the instructions, if the state wished to oppose bail, it bore the *onus* of proving that it would be contrary to the interests of justice to release the accused.

[144] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 498A–D. This state of affairs led to an attitude among magistrates to grant bail irrespective of the seriousness of the offence and the conflicting interests of the community that woman should be protected from sexual assault.

[145] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 498E-G.

[146] Van der Walt *supra* note 137 at 150 asserts that: "He relied in this regard on the judgement of Harms JA in *Gordon Lloyd Page and Associates v Rivera* (2001) and accordingly held that the inference regarding the cause of action on which the plaintiff relies on a claim for damages, must be *a reasonable one,* although not necessarily *the only reasonable one* under the circumstances. The question regarding whether an order for absolution should be granted or not, be concluded, depends on the trial court's own judgement in this regard, not on what another court or reasonable person might think. He nevertheless confirmed Chetty J's finding in the trial court judgement that the plaintiff had not provided sufficient evidence on which a legal duty to prevent harm could be based".

damage she suffered.[147] Both courts *a quo* considered only the first element and having found this lacking need to go no further.

In her particulars of claim Carmichele contended that the SAPS and the prosecutors owed her a duty:

...to ensure that she enjoyed her constitutional rights of *inter alia* the right to life, the right to respect for and protection of her dignity, the right to freedom and security...[148]

It was claimed by Carmichele that the courts *a quo* did not apply the relevant provisions of the Constitution in determining whether the state owed a legal duty to the applicant to protect her. In particular Carmichele relied on the constitutional obligation on all courts to develop the common law with due regard to the *'spirit, purport and objects of the Bill of Rights.'*[149] Carmichele submitted that, had the common law been so developed, the High Court and the SCA would have found that there existed a legal duty to act.[150]

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147 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [25]: "The applicant's case is founded in delict. The direct cause of the damages she suffered was the assault by C. However, the applicant wishes to hold the respondent liable because of the alleged wrongful acts or omissions of the police officer (Klein) and prosecutors at times when they were acting in the course and scope of their employment with the state. In order to succeed the applicant will have to establish at trial that: 1) Klein and the prosecutors owed a legal duty to the applicant to protect her, 2) Klein and the prosecutors respectively acted in breach of such a duty, 3) there was a causal connection between the negligent breach of the duty and the damage suffered by the applicant".; also see Neethling and Potgieter 2002 *THRHR* 265-273. Importantly the Constitutional Court held that there is thus not a new Constitutional claim against the state for failing in its duty to protect but the common law has been developed (by the Constitutional Court and Supreme Court) to be in line with the norms and values embodied in the Constitution to now afford a claim against the state where prior to the Constitution there was none.

148 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [27].

149 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [28]; Botha 2001 *SAYIL* 253. The constitutional issues were raised for the first time in the present case before the Constitutional Court.

150 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [29]. Carmichele relied on sections 9 (equality), 10 (human dignity), 11 (freedom and security of the person), 13 (privacy), and 215 (functions of the security services) of the Interim Constitution which was in operation at all relevant times. Carmichele submitted that: "the IC imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular". The Court was referred to the statement of the SCA in *S v Chapman* 1997 3 SA 341 (SCA): "rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of

Judges Ackerman and Goldstone *inter alia* held that:

Section 39(2) of the Constitution places an obligation on all courts in South Africa to develop the common law through a process which will promote the 'spirit, purport and objects' of the Bill of Rights. The court stated that it follows implicitly that, where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing the deviation.[151]

The Constitutional Court pointed out that in exercising their powers to develop the common law, judges should be mindful of the fact that the 'major engine' for law reform remains the legislature and not the judiciary.[152] The court quoted the dictum of Iacobucci J in *E R v Salituro* that was cited in *Du Plessis v De Klerk* with approval.[153]

Judges can and should adopt the common law to reflect the changing social, moral and economic fibre of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law ... In a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform ... the judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

The Constitutional Court further held:

In South Africa the IC brought into operation, in one fell swoop, a completely new and different set of legal norms. In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights.

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every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights".

151 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 954 at [33].

152 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 954 at [36].

153 *Ibid.*

The Constitutional Court pointed out that since the proceedings in the High Court and the Supreme Court of Appeals took place after 4 February 1997 when the Constitution became operative, both courts were obliged to have regard for the provisions of section 39(2); however,

both courts assumed the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind. In our respectful opinion they overlooked the demands of section 39(2).[154]

The court emphasised that the duty of the courts to develop the common law as required by section 39(2) is not discretionary.

It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39 (2) objectives is not purely discretionary. On the contrary, it is implicit in section 39 (2) read with section 173 that where the common law as it stands is deficient in promoting the section 39 (2) objectives, the courts are under a general obligation to develop it appropriately. One says a general obligation because one does not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and if so, how it is to be developed under section 39 (2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.[155]

The Constitutional Court held that the development of the common law must be approached in two stages that cannot be hermetically separated from one another.[156] **First**, existing common law must be tested against the spirit

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[154] Botha *supra* note 149 at 255–256. As proceedings in both courts *a quo* post-dated the Constitution, they were obliged to have regard to section 39(2) in developing the common law of delict ; *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC).

[155] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [39].

[156] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [40] and [41] "...there is an obligation on litigants to raise constitutional arguments in litigation at the earliest possible opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible".

purport and objects of the Bill of Rights. If it is found to be deficient, the **second** question arises, *viz* how must the development take place.[157]

Regarding the **first stage**, the Constitutional Court found that the High Court and Supreme Court of Appeal had not considered the impact of the Bill of Rights on the common law pertaining to the dispute. In answering the question of whether a duty to prevent harm existed under the circumstances, they relied only on the understanding of wrongfulness developed in the common law over many years. They paid no attention to the possible effect of the 1993 and 1996 Constitutions on the common law understanding of wrongfulness and the legal duty to prevent harm. They did not engage in any of the two stages of the inquiry as to whether and how the common law should be developed.[158]

Regarding the **second stage**, the Constitutional Court refrained from deciding the questions of whether the common law pertaining to the dispute should be developed beyond existing precedent and how this should be done.[159] The Constitutional Court held that:

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[157] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [40]..

[158] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [37]–[40]; Ackermann and Goldstone JJ intimated that this failure may well be due to the way the case was argued [40]); Van der Walt supra note 129 at 151.

[159] Although the Constitutional Court has jurisdiction to develop the common law in order to promote the objectives of section 39(2) in terms of section 173, it was held that it should, where possible, not make final decisions on the development of the common law without taking into account the views of the Supreme Court of Appeal and High Courts on the particular matter. The Constitutional Court held that "it is moreover not ordinarily in the interests of justice for a court to sit as court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgement is based. And of reconsidering and refining arguments previously raised in the light of such judgement". *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [53] the Constitutional Court held: "The Supreme Court of Appeals have jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise of the common law, its views as to whether the common law should or should not be developed is a 'constitutional' matter are of particular importance". At [58] the Constitutional Court held: "Our common law of delict spans many centuries and the debate regarding delictual liability, its elements and their relationship to one another remains lively. Without the benefit of a fully considered judgement from either the SCA or the High Court as to whether, from the perspective of the common law, one solution would be better than any other, this court is at a grave disadvantage...".

The proper development under the common law under s 39 (2) requires close and sensitive interaction between, on the one hand the High Courts and Supreme Court of Appeals and on the other hand this Court. Not only must the common law be developed in a way that meets the s 39 (2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm.

The Constitutional Court's balanced approach in *Carmichele* regarding the application of the Constitution to the law of delict provides the foundation for a sound interaction between the *de lege lata*[160] delictual principles and the *de lega ferenda*[161] role that the spirit, purport and objects of the Bill of Rights must play in this area of law.[162]

The Constitutional Court further held that:

Under section 39(2) the constitutional concepts such as 'policy decisions and value judgements' reflecting 'the wishes ... and the perceptions ... of the people's and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.[163]

The Constitutional Court stated that it is by no means clear how these constitutional obligations on the state will translate into private law duties towards individuals.[164]

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[160] The law already passed.

[161] The law as it should (ideally) be.

[162] Neethling and Potgieter supra note 147 at 272–273: "Die konstititionele hof se gesonde benadering in Carmichele tot die toepassing in die handves van regte op die deliktereg verdien instemming. Dit verskaf naamlik die grondslag vir 'n gesonde wisselwerking tussen die *de lege lata* deliktereg beginsels en die *de lege ferenda* rol wat die gees, strekking en oogmerke van die handves op hierdie regsgebied moet speel".

[163] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [55]-[57].

[164] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [57] where the Court held that: "A consequence of such an approach might be: (a) to accentuate the objective nature of unlawfulness as one of the elements of delictual liability, particularly in the context of bail hearings where the roles and general duties of investigating officers and prosecutors are more clearly defined than would normally be the case; (b) to define it more broadly; and (c) to allow the elements of fault and remoteness of damage to play the greater role in limiting liability".

Importantly, even though the Constitutional Court refrained from deciding on the second stage, it made it very clear how it felt about the matter by highlighting the following considerations as indicative of the possibility of finding a legal duty to prevent harm after a full hearing:

- The exercise in proportionality previously conducted by the courts to determine the duty to act in delictual cases in which the interests of the parties and the conflicting interests of the community were weighed and balanced was consistent with the Bill of Rights.[165] The approach of the courts to establish wrongfulness on the basis of "*policy decisions and value judgements*" that "*reflect the wishes, often unspoken,*[166] *and the perceptions often but dimly discerned, of the people*" would henceforth have to be "***replaced, supplemented and enriched by the appropriated norms of the objective value system embodied in the Constitution***".[167] The Constitutional Court held that:

  Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the spirit, purport and objects of the Bill of Rights and the relevant factors must be weighed in the context

[165] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [42]. The Court referred to and applied the case of *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 318E–H where Judge Hefer stated the nature of the enquiry into wrongfulness as ".... conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgements which shape, and at times refashion the common law and must reflect the wishes, often unspoken, and the perceptions often dimly discerned of the people .... What is in fact required is that not merely the interests of the parties *inter se*, but also the conflicting interest of the community, be carefully weighed and that a balance be struck in accordance with what the court conceives to be societies notions of what justice demands...", the Constitutional Court continued. Hefer also stressed "...the difference between morally reprehensible and legally actionable omissions and warned that a legal duty is not determined by the mere recognition of social attitudes and public and legal policy. The question must always be whether the defendant ought reasonably and practically have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm".

[166] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [56].

[167] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [56] (emphasis added); Van der Walt supra note 129 at 153 "The constitutional guarantee of personal dignity, security, freedom and quality before the law to all members of society would require that the danger of rape and assault of women plays an especially important role with regards to the question of whether breach of legal duty and wrongfulness are at issue in a particular case, given the fact that the scourge of rape and assault of women constitute major obstacles in the way towards real equality before the law between men and women and real freedom and security of women in society".

of a constitutional state founded on dignity, equality, and freedom and in which the government has positive duties to promote and uphold such values.[168]

- The provisions of the South African Constitution clearly point towards a positive duty to prevent the violations of the right to life, dignity, freedom and security. Referring to section 8(1) of the final Constitution the Court stated that:

  It follows that there is a duty imposed on the state and all its organs not to perform any act that infringes these rights. **In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.**[169]

- The Constitutional Court asserted that the provisions of our Constitution are in line with the positive duty to prevent harm that the European Court of Human Rights inferred from article 2(1) of the European Convention[170] which provides that "*(e)veryone's right to life shall be protected by law*".[171] The European Court of Human Rights found against the so-called immunity approach of the English courts[172] in terms of which a

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[168] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [43]; Van der Walt supra note 129 at 152. It was pointed out within the parameters of the common law in *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 318E-H.

[169] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [44] (emphasis added).

[170] *Osman v United Kingdom* 29 E.H.R.R. 245 (2000) at para. 115.

[171] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [45]; the duty imposed by the South African Bill of Rights therefore transcends the duty *not to positively cause harm* that the United States Supreme Court (*DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989)) inferred from the Due Process Clause in the 14th Amendment to the United States Constitution. *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [45]; Van der Walt supra note 129 at 152 asserts that: "It is interesting to note - and highly significant for the further development of South African law - that the court relied virtually exclusively on international law jurisprudence in reaching this conclusion. The *status quo* within existing South African common law is weighed, therefore, against international law norms and precedents. Reliance, furthermore, is on a treaty to which South Africa is not a party, an attitude unthinkable in pre-constitution days when the application of even customary international law, was subject to South African common law. This not only confirms the approach in *S v Makwanyane* (1995 6 BCLR 665 (CC)) that in interpreting the Bill of Rights the country may have regard to both binding and non-binding international law; but also gives the first example in clear and unequivocal terms that this extends to treaty law and in this sense overrides the incorporation provisions of section 231(4). The court then turns to an examination of the second question: how must the common law be developed".

[172] *Osman v United Kingdom* 29 E.H.R.R. 245 (2002) and *Z v United Kingdom* 34 E.H.R.R. 3 (2002).

public authority should be immune from delictual liability in the case of mere omissions to prevent harm.[173] The Constitutional Court adopted the following statement in *Osman v United Kingdom:*[174]

> It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. **It is thus accepted ... that Art 2 of the Convention may also imply in certain well defined circumstances a positive obligation on the authorities to take preventative operational measures** to protect an individual whose life is at risk from the criminal acts of another individual.[175]

- Fears expressed that delictual liability for omissions by government or the state to prevent harm might hamper public authorities in the proper execution of their tasks or that the floodgates of litigation will be opened, can be sufficiently addressed by the proportionality exercise. A proper execution of the proportionality exercise and due consideration to the foresee ability and proximity requirements will establish reasonable limits to delictual liability in cases where public authorities failed to prevent harm.[176]

- Our Constitution is not merely a formal document regulating public power. It also embodies an objective normative value system.[177] It is

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[173] Moreover, the immunity approach has given way to a more a flexible approach in English law itself as is clear from the decision in *Barrel v Enfield London Borough Council* [1999] 3 All ER 193 at [46]-[48].

[174] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [45].

[175] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [45] (emphasis added).

[176] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [49]; Van der Walt *supra* note 129 at 152.

[177] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [54] where the Court held that "as was stated by the German Federal Constitutional Court 'the jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic rights norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of law, acts as a guiding principle and stimulus for the legislature, executive and judiciary. The same is true of our Constitution".

within the matrix of this objective normative value system that the common law must be developed.[178]

- The Constitutional Court also referred to the relevant sections of the **Interim Constitution** and the relevant sections of the **Police Act** that set out the duties of the police service, one of them being the prevention of crime. The Court asserted:

> Thus one finds positive obligations on members of the police force both in the IC (Interim Constitution) and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from threat of sexual violence. As it was put by council on behalf of the amicus curiae: "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self determination of South African women".
>
> South Africa is also under an international law obligation to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms **and to take reasonable and appropriate measures to prevent the violation of those rights.** The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.[179]

The Constitutional Court upheld the appeal, set aside the orders of the Cape Provincial Division and the Supreme Court of Appeal and referred the case back to the Cape Provincial Division to continue the trial.[180]

The Constitutional Court made legal history in South Africa with this judgement.[181] The Court made it very clear that the values entrenched in the

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[178] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [54].

[179] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [62] (emphasis added).

[180] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [80]–[81]; The referral was necessitated, however, by the finding that the granting of the order of absolution from the instance was unacceptable under the circumstances. The case was complex enough, argued Ackermann and Goldstone JJ, to assume a real possibility of finding a legal duty to prevent harm under the circumstances after a full hearing. The Constitutional Court did not wish to act effectively as a court of first instance in issues of fundamental importance to the development of the common law.

[181] Neethling and Potgieter *supra* note 147 at 273: "Vandag sou dit ondenkbaar wees om enige iets oor die onderwerp te sê of te beslis sonder om ... die beginsels en riglyne

South African Constitution of dignity and security must be properly given effect to through an effective criminal justice system. This judgement of the Constitutional Court provided much needed guidance on the interplay between the Constitution and the common law. Generally speaking the common law principles remain intact but the Constitution provides a new dynamic which obliges courts to reflect the norms set out in the Constitution. The judgement encourages courts not to accept traditional norms without question but to test them against the Constitution.[182]

6.4.1.3 Final judgement: Cape Provincial Division[183]

As stated above, the Constitutional Court did not decide whether in the present matter the common law of delict had to be developed in the way that Carmichele contended.[184] This had to be considered afresh by Chetty J. who formulated the question which arose for adjudication as follows:

> ...whether, on the facts, the police and/or the prosecutors were under a legal duty to protect the plaintiff; whether they breached that duty and were negligent ...; whether the law of delict should, in the light of the Constitution and the demands of s 39(2), be developed to afford the plaintiff a right to claim damages from the defendants.[185]

The Court found that Carmichele's claim had to fail on the application of the pre-constitution common law test and proceeded to determine whether the conventional test for the existence and scope of a private law duty of care needed to be developed in the light of **section 39(2)** of the Constitution, which requires that the common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Court then pointed out that there is a constitutional duty to protect enshrined in sections 10, 11 and 12, which entrench the right to dignity, life, freedom and security

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wat aldaar [*Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC)] aan die hand gedoen is, deeglik in ag te neem".; Visser 2003 *Tul. L. Rev.* 67–70.

182 Leinius and Midgley 2002 *SALJ* 27.

183 *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C).

184 Du Plessis 2003(423) *De Rebus* 36-37.

185 *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) at [6].

of the person. Furthermore, section 2 and 7(2) impose a duty on the State to respect, protect, promote and fulfil these rights.[186]

The Court concluded that in the enquiry whether the state owed a private law duty to exercise reasonable care in the prevention of crime, the proper application of the test required that primary significance had to be attached to the relevant constitutional imperatives and norms. On the application of that test the state did owe Carmichele a legal duty to protect her against the risk of sexual violence perpetrated by Coetzee. The negligent failure to do so was regarded as unlawful. [187]

It was then necessary to determine whether the requirement of causality had been met in the present case. The Court followed an objective approach and found that if the state had performed their duties as they should have done, and disclosed certain facts about Coetzee's sexual urges to a 'reasonable court', such a court would have refused Coetzee bail.[188] The Court held that such 'but for' causation is of course not sufficient in itself and it further had to be determined whether the omissions of the state were sufficiently closely linked to Carmichele's loss. Chetty J. found that the link between the omissions and Ms Carmichele's harm was indeed sufficiently close.[189] It was consequently ordered that the state was jointly and severally liable to Carmichele in delict for the damage suffered as a result of the attack by Coetzee (a private person).

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[186] *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) at [30]; Du Plessis *supra* note 184 at 37.

[187] *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) at [32] "Consequently, in the enquiry whether the State owed the public in general, and women in particular, a duty at private law to exercise reasonable care in the prevention of violent crime, the proper application of the test requires one to attach primary significance to these constitutional imperatives. On the application of that test, Klein, Hugo and Louw owed the plaintiff a legal duty to protect her against the risk of sexual violence perpetrated by Coetzee. The negligent failure to do so, was, therefore unlawful."; Du Plessis *supra* note 184 at 37.

[188] *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) at [37].

[189] *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) at [30]; the subsequent appeal against the judgement was dismissed with cost ,see *Carmichele v Minister of Safety and Security* 2004 (2) BCLR 133 (SCA) at [73].

Following the Constitutional Court's ruling in Carmichele, the Supreme Court of Appeals recently dealt with additional cases centring around state duties to provide protection against violence and as such with state responsibility for human rights abuses committed by non-state actors.

6.4.2 Minister of Safety and Security v Van Duivenboden

Neil Brooks, who lived in Bothasig in the Cape with his wife, Dawn, and their two children, Nicole and Aaron, owned two licensed firearms. He habitually consumed alcohol to excess and, while under its influence, was inclined to become aggressive and to abuse his family. On 21 October 1995, a domestic squabble between Neil Brooks and his wife developed after Neil had consumed excessive amounts of alcohol. Neil loaded both his firearms, strapped extra ammunition round his waist and shot at his wife, who escaped with Aaron, their young son, across the road to the respondent's property. After shooting and killing their daughter Nicole, Neil pursued his wife and killed her. He also shot the respondent in the ankle and shoulder. The police had been in possession of information which reflected on Neil Brook's fitness to possess firearms long before the respondent had been shot. While some information had emanated from Brook's wife, members of the police had direct information as a result of two occasions on which they had been summoned to defuse Brook's threats to shoot his wife and family. The second of these occasions, on 27 September 1994, had necessitated the eventual presence of approximately a dozen police officers, including members of the Internal Stability Unit, after Brooks had locked himself into the house, threatening to shoot anyone approaching. When the police entered the house after a siege lasting many hours, they found that Brooks had lined up at least 20 boxes of spare ammunition and had reduced the house to a shambles. The respondent sought to recover from the Minister of Safety and Security the damages he had sustained as a result of his injuries on the grounds that, notwithstanding that a number of police officers knew, from the events of 27 September 1994, that Brooks was unfit to possess firearms, they negligently failed to take steps available to them in terms of

section 11 of the Arms and Ammunitions Act[190] to deprive him of his firearms. As a result of that failure, Brooks had still been in possession of his firearms on 21 October 1995 when the tragedy occurred. The respondent's claim was dismissed by a single judge, but allowed on appeal to a full bench that reversed the decision. A further appeal was made to the Supreme Court of Appeals.[191]

To be successful the respondent had to prove that the police were duty bound in law to act, that they were negligent in failing to do so and that their negligent omission was a sufficiently potent cause of the harm and attendant loss suffered.[192]

The Supreme Court of Appeals *inter alia* held that:

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[190] Because of the centrality of s 11 of the *Arms and Ammunitions Act* 75 of 1969 to the issues that arise in the van Duivenboden case it is worth setting out its terms. Section 11 determines: "(1) If the commissioner is of the opinion that on the ground of information contained in a statement under oath, other than such a statement made by the person against whom action in terms of this section is contemplated, there is a reason to believe that any person – (a) ... (b) who has threatened or expressed the intention to kill or injure himself or any other person by means of an arm or (c) whose possession of an arm is not in the interest of that person or any other person as a result of his mental condition, his inclination to violence, whether the arm was used in the violence or not, or his dependence on intoxicating liquor or a drug which have a narcotic effect (d) ... he may ... call upon such a person to appear before the commissioner ... in order to advance reasons why such a person shall not be declared unfit to possess any arm on any ground aforesaid so specified. (2) (a) The commissioner may, if he has reason to believe that the person to whom the said notice has been addressed, have an arm in his possession, issue a warrant for the search and seizure thereof ... (4) upon proof that the notice referred to in s (1) was duly delivered or tendered ... the commissioner may at any time subsequent to the time specified in the notice, whether or not such a person complies with the notice, declare such a person unfit to possess any arm at any time during a specified period of not less than two years, if the commissioner having regard to- (a) any reasons, submissions, or evidence advanced under oath advanced by or on behalf of the said person (b) any other sworn information or evidence at his disposal...".

[191] Facts taken from flynote of case; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [4]–[11]: "Simply from the events that occurred on 27 September 1994 it was known to a number of police officers, more than a year before the respondent was shot, that while he was in a drunken state Brooks had threaten to shoot himself and any person who attempted to intervene, including the police. That itself warranted Brooks being declared unfit to poses firearms ... All that was required for the requisite procedure to commence was for any one of the police officers to reduce that information to writing under oath and to forward the statement to the person responsible for holding such enquiries. There was no proper explanation in the evidence for why that was never done...".

[192] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [31].

- The state in terms of section 7 of the Constitution is obliged not only to respect but also to protect, promote and fulfil the rights in the Bill of Rights and section 2 demands that the obligations imposed by the Constitution must be fulfilled. In the words of the Court:

  ...it must be kept in mind that in the constitutional dispensation of this country, the state (acting through appointed officials), is not always free to remain passive. The state is obliged by the terms of s 7 of the 1996 Constitution not only to respect but also to "protect, promote and fulfil the rights in the Bill Of Rights" and s 2 demands that the obligations imposed by the Constitution must be fulfilled ... while private citizens might remain passive while the constitutional rights of other citizens are under threat ... the state has a positive duty to act in the protection of the Bill of Rights.[193]

- The existence of this legal duty to act implies accountability. Section 41(1) of the South African Constitution expressly demands that all spheres of government and all organs of state within such sphere must provide government that is not only effective, transparent and coherent, but also a government that is accountable. The court asserted that:

  The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will play a central part in realizing our constitutional vision of open, incorrupt and responsive government.[194]

  When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not

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193 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [20] and [22] Where there is a potential threat of the kind that is now in issue, the constitutionally protected rights to human dignity, to life and to security of the person are all placed at peril and the state represented by its officials, has a constitutional duty to protect them.

194 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [20] quoting and applying the dictum in *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) at [31]; *contra* Marais JA Minority Judgement at [34]–[35]: "...I doubt that the accountability of which section 41(1)(c) of the Constitution speaks ... can be regarded as *prima facie* synonymous with liability under the *lex aquila* for damages for omissions to act. I accept that in a given case the accountability requirement may prompt a finding that there is liability for negligent omission to act, but I would prefer not to elevate accountability to the status of a factor giving rise to something akin to a reputable presumption of liability to pay damages under the lex aquila. Generalisations of that kind may result in consequences which were never intended when applied to other situations".

an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect the rights in the Bill of Rights ... the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case.[195]

- In this instance there was no effective way of holding the state accountable other than by way of an action for damages. In the absence of any norm or consideration of public policy outweighing it, the constitutional norm of accountability required that a legal duty to protect must be recognised. The negligent conduct of police officers in those circumstances was accordingly actionable and the state was vicariously liable for the consequences of any such negligence.[196]

- Negligence is not inherently unlawful. It is unlawful, and, therefore, actionable, only if it occurs in circumstances that the law recognises it as unlawful. Unlike the case of a positive act causing physical harm, which is presumed to be unlawful, a negligent omission is unlawful only if it occurs in circumstances that the law regards it as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep this concept separate from the concept of fault. Where a legal duty is recognised by the law, an omission will attract liability only if the omission was also culpable according to the

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[195] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [21] the court pointed out: "The norm of accountability, however, need not always constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account..." and at [22]: "It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether a action should be allowed...".; also see *Knop v Johannesburg City Council* 1995 2 SA 1 (A).

[196] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [21]. The court referred, with approval, to *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) at [69] where Ackerman J pointed out that "...without effective remedies for breach of rights entrenched in the Constitution, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions where the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve that goal".

separate test **of whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.**[197] A negligent omission is regarded as unlawful when the circumstances of the case are such that the omission not only evokes moral indignation but the legal convictions of the community require that it should be regarded as unlawful.[198]

- The question in determining the existence or otherwise of a legal duty is one of legal policy, which must of necessity be answered against the background of the norms and values of the particular society in which the principle is sought to be applied.[199] The court stated that:

  what is ultimately required is an assessment in accordance with the prevailing norms of this country, of the circumstances in which it should be unlawful to culpably cause loss.

- In South Africa the *'legal convictions of the community'* must necessarily be informed by the norms and values of South African society as they have been embodied in the Constitution of the Republic of South Africa of 1996. In the words of the Court:[200]

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197 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [12] as applied in *Kruger v Coetzee* 1966 2 SA 428 (A).

198 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [13]. The Court considered the English case of *Anns and Others v London Borough of Merton* [1977] 2 All ER 492 where the court attempted to formulate a coherent principle "[in determining whether] ... a duty of care [legal duty] arises in a particular situation it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to be negative, or to reduce or to limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise". The Supreme Court of Appeals further quoted the case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) that, referring to the Anns case, stated: "...it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible to any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which on detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care".

199 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [16].

200 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [17].

In applying the test that was formulated in the Minister of Police v Ewels 'the convictions of the community' must necessarily now be informed by the norms and the values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have any legal validity, which have the effect of making the Constitution a system of objective, normative values for legal purposes.[201]

- Whether the wrongful conduct had been a factual cause of the respondent's loss, a plaintiff is required to establish, ***not a causal link with certainty, but that the wrongful conduct had probably been a cause of the loss.*** This calls for a sensible retrospective analysis of what would probably have occurred if a hypothetical course of lawful conduct (instead of the wrongful conduct) had been pursued, based upon the evidence and on what could be expected to occur in the ordinary course of human affairs.[202]

- In the present case it had been reasonably foreseeable that harm might ensue if B's fitness to be in possession of firearms were not enquired into in terms of section 11 of the Arms and Ammunition Act. *A reasonable police officer would have taken the initiative* to cause such an enquiry to be held. The police officers who had knowledge of what had occurred on 27 September 1994 had, therefore, clearly been called upon to initiate a section 11 enquiry and, in the absence of an explanation, their failure to do so had been negligent.[203]

The Court concluded that there had been a direct and probable chain of causation between the failure of the police to initiate an enquiry into Brooks fitness to possess firearms following the incident that had occurred on 27

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201 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [17].

202 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [25]; also see *Mkhatswa v Minister Of Defence* 2000 1 SA 1104 (SCA) at [23] "...a realistic sensible judicial approach to all the relevant circumstances in the matter was required. Furthermore it was the 'foresight of the reasonable possibility of harm' which had to be established. Foresight of a mere possibility of harm will not suffice".

203 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [23].

September 1994 and the shooting of the respondent and as such the state was liable.[204]

It must be pointed out that Marais JA held in a minority judgement that in the particular circumstances of the case, the police were under a legal duty to act even on the application of the traditional test for delictual wrongfulness and that it was not necessary to have regard to the Constitution.[205] Marais held:

I am satisfied that the police were duty bound in law to act, that they were negligent in failing to do so and that their negligent omission was sufficiently potent cause for which respondent suffered.

I reach that conclusion by applying the tests set forth in Minister van Polisie v Ewels and Kruger v Coetzee and regard it unnecessary to bolster it by reference to either the Interim Constitution or the Constitution. For all their momentous and enormous historic, symbolic, legal, and emotional significance and status as the supreme law, in my view, their existence has little bearing upon this particular case.

Prior to the advent it was the law that assault was unlawful, that the police are under a positive duty in law to protect citizens from assault when in a position to do so and that, if they negligently fail to do so, the state will be liable for damages.[206]

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[204] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [30].

[205] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) [31]. Similarly in *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 1 SA 771 (T) the court held that the responsible authorities and personnel at a mental hospital owed a legal duty to members of the public to take reasonable steps to prevent mental patients from leaving the hospital premises and causing them harm. The court relied on two factors in particular as indicative of the existence of a legal duty, namely that the defendant was in control of a dangerous situation and that it could easily have taken proper preventative measures such as fencing or guarding the premises. The court did not find it necessary to rely on the constitution in finding a legal duty existed; also see *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [36]: "....I have reached the conclusion that there was indeed a legal duty on the relevant police members as contented for by the respondent. The source of this legal duty are both the common law and the statutory provisions ... I have reached this conclusion without relying directly on the provisions of the Bill Of Rights in either the 1993 or 1996 Constitutions ... I am however satisfied that the existence of a legal duty on the police in these circumstances is entirely consistent with the norms and values of the South African Constitution. "

[206] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) [31]-[34]. Marais JA stated: "I hesitate to accept unreservedly that the listing in the Bill of Rights of a right (whether it be a newly accorded right or a long standing one) necessarily gives rise to the existence of a legal duty to act where none existed previously. For example, consider the right to life. It can hardly be suggested that an omission by an ordinary citizen to rescue someone in peril or to come to the defense of someone under attack, which would not have been regarded as a breach of a legal duty prior to the Constitution, will now have to be so regarded". and at [36]: "As I see the position, whether or not the particular right which has been assailed or infringed as a

Even on the proper application of the common law test the state is responsible for human rights abuses committed by non-state actors.

6.4.3 Van Eeden v Minister of Safety and Security[207]

The case dealt with the positive legal duty that rested on the state to protect people against violence committed by non-state actors.

The appellant, a 19-year-old woman, was sexually assaulted, raped and robbed by a certain Andre Gregory Mohamed, a known dangerous criminal and serial rapist who had escaped from police custody in Durban (through an unlocked security gate) some two-and-a-half months before. At the time of his escape, he was facing no fewer than 22 charges including indecent assault, rape and armed robbery committed in the Durban area. Within six days of his escape Mohamed resumed his sexual attacks on young women, this time near Pretoria. The Appellant was the third victim of the latter series of attacks. The appellant instituted an action for delictual damages against the state in a Provincial Division. She claimed that the police owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and harming her and that they negligently failed in that duty.

At trial the parties agreed to separate the question of liability from that of the quantum of damages. The respondent conceded vicarious liability, negligence and causation *so that the only issue remaining was whether the police had owed the appellant a legal duty to prevent Mohamed from escaping and causing harm.* This issue was further narrowed by the respondent's admission that at the time of Mohamed's escape the police had realised that he was a dangerous criminal who was likely to commit

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consequence of an omission to act is one included in the Bill of Rights, the test set forth in the Ewels case will have to be applied. If the right happen to be one of those listed in the Bill of Rights, that will of course put an end to any argument that might otherwise have arisen as to whether it is a right to which society attaches great significance. But the ultimate question will remain: is an omission to act which is out of kilter with the value society assigns to the right and which results in loss to be actionable".

207 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [1]–[5].

further sexual offences; that his continued detention was necessary for the protection of the general public and their personal rights and property; that his escape could easily have been prevented and that the police regarded escapes from police custody and sexual attacks on women as 'policing priorities'. The Court *a quo* dismissed the appellant's claim.[208]

The Supreme Court of Appeal had a different opinion and held:

- that the state was under a ***legal duty to act positively to prevent harm to the plaintiff if it was reasonable to expect of it to have taken positive measures to prevent the harm***. The Court's finding of what is reasonable depended on the Court's perception of the legal convictions of the community and on considerations of policy.[209] In assessing the legal convictions of the community, the Court was not concerned with what the community regarded as socially, morally, ethically or theologically right or wrong, but with whether the community regarded a particular act or form of conduct as delictually wrongful.[210] The Supreme

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[208] *Van Eeden v Minister of Safety and Security* 2001 4 SA 646 (T) on the ground that in light of *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) the police had owed the appellant no legal duty to act positively in order to prevent harm. An appeal against this judgement was upheld by the Constitutional Court (*Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC)). Also see Neethling and Potgieter *supra* note 147 at 273.

[209] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [9]: "Our common law employs the element of wrongfulness ... to determine liability for delictual damages caused by an omission. ... The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgement based, *inter alia*, upon its perceptions of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of many factors".

[210] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [9]–[11] the court asserted: "The South African Police Service owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing harm and that they negligently failed in that duty ... our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damage caused by an omission. The appropriate test for determining wrongfulness has been settled by a long line of decisions by this court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value

Court of Appeals again confirmed that the concept of *"the legal convictions of the community"* must now necessarily incorporate the norms, values and principles contained in the Constitution.

> ...the concept of the legal convictions of the community must now necessarily incorporate the norms values and principles contained in the Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms or values that are inconsistent with it can have any legal validity, which have the effect of making the Constitution a system of objective, normative values for legal purposes. [211]

- That the right of freedom and security of the person entrenched in section 12(l) (c) of the Constitution included the right to be free from all forms of violence from both private and public sources.[212] The Court asserted that freedom from violence was fundamental to the equal enjoyment of human rights and fundamental freedoms and that section 12(l)(c) required of the state to protect individuals both by itself refraining from such invasions and by taking active steps to prevent the violation of the right at the hands of private parties. The Court ruled that section 12(1)(c) placed a positive duty on the state to protect everyone from violent crime.[213]

- That section 12(1)(c) had to be read with section 7(2) of the Constitution, which imposed a duty on the state to ***'respect, protect, promote and***

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judgement based *inter alia* upon its perception of the legal convictions of the community and on considerations of policy".

211 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [12] "... the entrenchment of fundamental rights and values in the Bill of Rights ... enhances their protection and affords them a higher status in that all law, state actions, court decisions ... may be tested against them and all private law rules, principles and norms, including those regulating the law of delict, are subject to and thus given content in light of the basic values in the Bill of Rights".

212 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [13].

213 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [13] "In terms of s 12 (1) (c) everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources ... section 12 (1) (c) requires the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the state to protect everyone from violent crime". At [23] the Court further held that the requirements of a special relationship between a plaintiff and defendant as an absolute prerequisite for imposing a legal duty could no longer be supported in light of the constitutional imperative. It should not be regarded as anything more than one of several factors to be considered in deciding the reasonableness of an omission to prevent violent conduct.

fulfil the rights in the Bill of Rights'. Thus the state had a positive constitutional duty to act in the protection of the rights contained in the Bill of Rights.[214]

- That section 39(I)(b) of the Constitution, furthermore, imposed the duty on the state to fulfil its obligation under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. In the words of the Court:

> **...the state is, furthermore, obliged under international law to protect women against violent crime** and against the gender discrimination inherent in violence against women. The obligation was imposed on the state by s 39 (1) (b) of the Constitution, read with the preamble of the Universal Declaration of Human Rights, art 4 (d) of the Declaration on the Elimination of Violence Against Women and art 2 of the Convention on the Elimination of All Forms of Discrimination Against Women.[215]

The aforementioned is of great importance in that the Supreme Court of Appeals acknowledged South Africa's legal duties in terms of the international conventions. All the conventions signed and ratified by South Africa, therefore, impose a legal obligation on the state to act. In this respect the jurisprudence of the Human Rights Commission is particularly relevant.

- That section 205(3) of the Constitution and the Police Service Act 68 of 1995 made it clear that the functions of the police included the maintenance of law and order **and the prevention of crime.**

The police service is, therefore, one of the primary agencies of the state responsible for the discharge of its constitutional duty to protect the public in general and women in particular against the invasion of their

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[214] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [14]; importantly the Court expressly stated that our Constitution points in the opposite direction to the Due Process Clause of the United States Constitution, which was held in the Deshaney v Winnebago County Case (*DeShaney v Winnebago County Department of Social Services* 109 S. Ct. 998 (1989)) not to impose affirmative duties on the state.

[215] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [14]–[15] 397H-398B (emphasis added).

fundamental rights by perpetrators of violent crime.[216]...the entrenchment of the right to be free from violence in **s** 12 (1) (c) read together with s 205 (3) would in appropriate circumstances be strongly indicative of a legal duty resting on the police to act positively to prevent violent crime.

- An important consideration in favour of recognising the state's delictual liability for damages in circumstances such as the present was that *there was no other practical and effective remedy available to the victim* of violent crime; conventional remedies such as review and mandamus or interdict did not afford the victim of crime any relief at all.[217]

The Supreme Court of Appeals concluded that the police did owe the appellant a duty to act positively to prevent Mohamed's escape. The existence of such a duty accorded with the legal convictions of the community and there were no considerations of public policy militating against the imposition of such a duty. This conclusion stemmed from the state's constitutional duties; the fact that the police had control over Mohamed, who was known to them to be a dangerous criminal who was likely to commit further sexual offences against women should he escape and the fact that measures to prevent his escape could reasonably and practically have been required of the police. Accordingly, the police had acted wrongfully, and in the view of the admission of negligence, vicarious

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[216] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [16] and at [21] – [22] the Court held that the recognition of a legal duty in respect of the control the police are required to exercise over a known dangerous criminal in their custody, in other words in respect of the operational implementation of police policies as opposed to the policy itself, would not disrupt the efficient functioning of the police, nor would it necessarily require additional resources. There was accordingly no reason to fear that it might inhibit the proper performance by the police of their primary functions or lead to defensive policing. The Court further held as to the argument that the imposition of a legal duty on the police in cases such as the present would open the 'floodgates' of litigation and result in limitless liability for public authorities, that the requirements for establishing negligence and causation provided sufficient practical scope for limiting liability.

[217] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [19]: "An important consideration in favour of recognizing delictual liability for damages on the part of the state in circumstances as the present is that that there is no other practical or effective remedy available to the victim of violent crime".

liability and causation, the state was liable for all damages suffered by the appellant.[218]

6.4.4 Rail Commuter Action Group v Transnet[219]

The case deals with the legal duty that the state and its rail operators owe to the public. The applicants asked relief to ensure a safe rail and commuter service in which violent attacks on passengers are prevented.

The Rail Commuter Action Group, a voluntary association, established at a public meeting with the objective of taking Transnet Limited[220] and some of its business divisions to task about the crime on trains and to impress on them that the public had had enough of violent crime on trains and wanted immediate action. Under section 15(1) of the South African Transport Services Act of 1989, Transnet is obliged to provide a rail commuter service "that is in the public interest". The applicants brought an application asking for both declaratory and mandatory relief against the respondents based on the legal duty owed by the respondents to the rail commuters in the Western Cape to protect the lives and property against the criminal activities of third parties on commuter trains and stations. The applicants contended that the relief sought was based on three pillars, namely a statutory pillar arising from the application of certain provisions of the South African Transport Services Act, a delictual pillar based upon the principles of Aquilian liability, as underpinned and expanded by the Constitution of the Republic of South Africa of 1996, and a contractual pillar sourced in the contract of carriage concluded between Transnet and the provider of commuter rail services in the Western Cape and all fair paying customers.[221]

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218 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [24].

219 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C).

220 A public company established pursuant to the provisions of s 2 of the *Legal Succession to the South African Transport Services Act* 9 of 1989 as amended. Upon incorporation the state became its only member and shareholder in terms of section 2(2) of the said act. Metrorail is one of several divisions of Transnet.

221 The applicants, *inter alia*, sought orders declaring that first and second respondents were not providing a service in the public interest, that the first and second respondents had a legal duty to protect the lives and property of members of the public who

With regards to the state's legal duty to protect the lives and property of commuters the Court *inter alia* held:

- That in the context of the present dispute, commuters enjoyed, in terms of section 11 and section 12(1)(c) of the Constitution of the Republic of South Africa, a constitutional right to life, as well as a constitutional right to freedom and security of the person,[222] which included the right to be free from all forms of violence from either public *or private sources.*[223]

- That, in the circumstances of this case, commuters who were subjected to violent crime at the hands of private individuals which jeopardised their right to life and their right to freedom and security of their person were effectively remediless unless it could be said that a legal duty existed whereby the state had to act to minimise the extent of violent crime and lack of safety on the commuter rail service.[224]

- That a prayer declaring that the respondents' conduct was and is negligent must be sought by way of a delictual action, rather than by the back door of a prayer for a declarator. The court was careful to point out that abstract relief of this kind should not generally be granted and that a finding of negligent conduct should only follow upon a careful examination of the evidence provided by the parties.[225] In the finding of a legal duty the question should always be:

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commuted by rail and that the respondents should be directed to take all such steps as are reasonably necessary to put in place a proper and adequate safety and security service.

222 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 573DE–E.

223 In reaching its conclusion, the Court stated that the provisions in the *Legal Succession to the South African Transport Services Act* 9 of 1989 imposed obligations on Transnet that were similar to those imposed on the police in terms of the *South African Police Service Act* 68 of 1995 in the Van Eeden case (at 573C).

224 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 573E/F–F/G.

225 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 573G/H–H/I.

In light of all the circumstances of the particular case, have these respondents infringed the interest of the applicants in an unreasonable manner?

Reasonableness, therefore, becomes the critical concept.

The Court is not required to prefer a particular plan over another. It is enjoined to test whether the manner in which (Transnet and Metrorail) have conducted the operation of the commuter rail service ... is reasonable viewed in the context of the evidence which was placed before it.[226]

- That the state should take all such steps including interim steps that were reasonably necessary to put in place adequate safety and security services.[227] The Court declared that:

...the first and second respondent (Transnet and Metrorail) **have a legal duty to protect the lives and property of members of the public who commute by rail.**[228]

Although the Supreme Court of Appeals dismissed the Courts ruling, due to the fact that the applicants case was seriously flawed, the Court did lay down some important principles. [229]

6.4.5 Botha v Minister van Veiligheid en Sekuriteit[230]

In the case of *Botha v Minister van Veiligheid en Sekuriteit,* an individual was shot by a criminal non-state actor that was in the process of being arrested by the police.

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[226] *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 579H–I.

[227] *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 491F/G–H/I.

[228] *Ibid.* (emphasis added).

[229] *Transnet Ltd t/a Metrorail and Others v Rail Commuters Action Group and Others; Rail Commuters Action Group and Others v Minister of Safety and Security and Another* 2003 (12) BCLR 1363 (SCA).

[230] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T).

The incident occurred when a policeman, Inspector Saaiman, went alone to investigate a charge of housebreaking. On the scene, Inspector Saaiman failed to call for back up and proceeded alone to confront the suspect and arrest him. Saaiman did not have his handcuffs with him and failed to handcuff the suspect in contravention of police standing orders regarding what equipment to take on patrol and how to act when arresting a suspect. While Saaiman was in the process of putting the suspect into the police van, the suspect overpowered him and took control of his service pistol. Numerous shots were fired and at least one hit the plaintiff. The plaintiff instituted action for damages against the Minister of Safety and Security.

The only points in dispute were: a) whether there was a legal duty on the defendant towards the plaintiff to prevent the shooting incident in which the plaintiff was injured; b) whether the failure to prevent it was unlawful; c) whether Saaiman was negligent and whether it was reasonably foreseeable that his failure would cause damages for the plaintiff; and d) whether the act or failure was causally connected to the damages that the plaintiff suffered.

The Court *inter alia* held that:

- The police standing orders documented the required minimum standard at which a reasonable policeman should have conducted himself and the failure to comply therewith, especially with regards to handcuffs and the use thereof in the circumstances of the present case was such that Saaiman did not act as a reasonable member of the Police Service.[231] The court held that by not complying with the standing orders, Saaiman was guilty of a serious dereliction of his duties as a policeman and as such acted unreasonably in every aspect.[232]

[231] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) 581I–582A.
[232] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 582E–F and G/H-H, 585F-I, 585I-I/J.

- On the facts and with reference to the objects and reasons for the police service in South Africa, the Constitution and the respective tests set out in decided cases, unlawfulness, negligence and causation had been proved and therefore the defendant was liable for the plaintiffs damages.[233]

  With regards to the objects and rationale for the existence of a police service in South Africa the Court *inter alia* stated that: *"the object of the SAPS ... are to: ...prevent, combat and investigate crime"* and further

  ...die Grondwet plaas 'n plig op die polisie om te alle tye op te tree 'to protect and secure the inhabitants of South Africa'.[234]

- Regarding unlawfulness, the Court referred to the tests laid down in the Carmichele and van Eeden cases[235] and with reference to section 12(1)(c) and section 205(3) again confirmed that there is a legal duty on the police to act positively to prevent crime. The Court found that in the present case Saaiman did act unlawfully.

The court found that Saaiman did not act as the reasonable police officer should have and that it was reasonably foreseeable that harm might ensue and such negligence was established.[236]

In concluding that there was a causal connection between the negligent actions of the defendant and the injuries of the plaintiff, the Court referred to the case of *Mkhatswa v Minister of Defence* with approval.[237] In considering causality:

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[233] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA (T) at 582H–583E, 585B/C–D, 587G-J.

[234] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T)at 582H-J and 583A.

[235] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 583A–J, 584A–I, 585A-B.

[236] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 585A–J and 586A–J: "Die *diligens paterfamilias* in hierdie saak is die diligens lid van die polisie, met ander woorde het Saaiman sy pligte onder die Grondwet en die Polisie Wet uitgevoer? ... Die redelike lid van die polisie is een wat ondere andere die standard handhaaf wat ... as die vereiste norm daar gestel [word] ... In elke opsig het Saaiman onredelik opgetree".

[237] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) 587G.

(A) realistic and sensible judicial approach to all the relevant circumstances in the matter was required. Furthermore, it was the 'foresight of the reasonable possibility of harm' which had to be established. 'Foresight of a mere possibility of harm will not suffice.' [238]

The Botha case further confirms and establishes the principle that the state can be held responsible and liable for human rights abuses committed by non-state actors if the state failed in its constitutional duty to protect citizens against the violent behaviour of others.

6.5 Scope and elements of a legal duty to protect

The state's positive constitutional legal duty to protect citizens from acts of violence committed by private non-state actors as guaranteed by Section 12 (1) (c) of the South African Constitution has only recently been recognised by our courts. The inescapable reality is that constitutional positive legal duty claims based in delict will continue as a result of egregious government conduct.[239]

The Constitutional Court and Supreme Court made it clear that the Constitution places a positive legal duty on the state to protect citizens from human rights abuses by non-state actors. Although it is the Constitution that places this legal duty on the state, a plaintiff claim is not based on a new or special Constitutional claim but in delict.[240] Due to the fact that the

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[238] *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) 587G referring to *Mkhatswa v Minister Of Defence* 2000 1 SA 1104 (SCA) at 1104 [23], 1112H-I.

[239] State responsibility to protect persons against the violent behavior of third parties received attention in a number of cases: see *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Mtati v Minister of Justice* 1958 1 SA 221 (A); *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (E); *Mpongwana v Minster of Safety and Security* 1999 2 SA 794 (C); *Minister of Police v Skosana* 1977 1 SA 31 (A); *Minister of Law and Order v Kadir* 1995 1 SA 303 (A). For a discussion of these cases see Carpenter *Right to Physical Safety* 146-147; Neethling 2001 *THRHR* 489; *Geldenhuys v Minister of Safety and Security* 2002 4 SA 719 (C); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T).

[240] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at 950 B-C. In *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 573 the High Court specifically held that " As discussed above, it was held in the Van Eeden Case supra that the appellant had no practical and effective remedy other than a claim in delict. In the circumstances of this case, commuters who are subjected to violent crime which jeopardises their right to life and their right to freedom and security of their

Constitution is the supreme law in South Africa, its effect on the common law is that the traditional tests for a delictual claim (that developed over the centuries) must now be informed and influenced by the Constitution.[241] The common law must now be developed to reflect the "*changing social, moral and economic fibre of the country*".[242] There is, therefore, not a new Constitutional claim against the state for failing in its duty to protect but the common law has been developed (by the Constitutional Court and Supreme Court) to be in line with the norms and values embodied in the Constitution to now afford a claim against the state, where prior to the Constitution there was none.

In rendering the state liable, all five the delictual principles of action or omission, wrongfulness, negligence (fault), causation and injury must, therefore, be established.[243] Although all five the aforementioned elements must be proven only the elements of wrongfulness, fault and causation will be scrutinised in detail hereinafter as the common law principles regarding action or omission and injury are not affected or changed by the Constitution and as such have been dealt with extensively in other works.[244]

In determining state responsibility and delictual liability for human rights abuses committed by non-state actors, the courts found that an applicant will have to prove that:

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person, are effectively also remedyless unless it can be said that a legal duty exists whereby first and second respondents must act to minimize the extent of violent crime and lack of safety on commuter rail service. Thus, in our view, applicants have made out a case for the relief sought by them in terms of [a] prayer.....A prayer of this kind must be sought by way of delictual action, rather than by the back door of a prayer or a declarator".

241 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [33]–[39].

242 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [36].

243 *Geldenhuys v Minister of Safety and Security* 2002 4 SA 719 (C) 727B: "It is perhaps trite to set out the well known elements of the Aquilian action ... The six elements are (i) voluntary conduct (ii) unlawful or wrongful (iii) capacity (iv) fault either in the form of *dolus or culpa* (v) causation and (vi) loss".; Neethling, Potgieter and Visser *Deliktereg* 2nd ed 4: "'n delik is 'n handeling van 'n persoon wat op 'n onregmatige en skuldige wyse nadeel vir 'n ander veroorsaak".

244 Neethling, Potgieter and Visser *supra* note 243 *at* 27-32 regarding conduct and 211–255 regarding damage.

- the state owed a legal duty to protect;[245]
- the state acted in breach of such a duty and did so negligently;
- there was a casual connection between such negligent breach of the duty and the damage suffered.[246]

It is important to note that the Supreme Court of Appeals have on several recent occasions indicated that the enquiry of the existence or otherwise of a legal duty is conceptually anterior to the question of fault viz that liability for negligence is conditional upon, and presupposes wrongfulness.[247]

6.5.1 Wrongfulness

In terms of the common law, the finding of wrongfulness (or whether a legal duty to protect or to act positively to prevent harm exists) must be determined by way of a proportionality exercise through the weighing and striking of a balance between the interest of the parties and the interest of the community.[248]

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[245] *Mukheiber v Raath* 1999 3 SA 1065 (SCA) at 1075F: "...without this legal duty there can be no unlawfulness. And unlawfulness is *sine qua non* of Aquilian liability..." quoted with approval in *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 583 B-D.

[246] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at 950[25].

[247] *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [14]; Neethling *supra* note 238 at 493: "...[dit] moet weereens beklemtoon word dat daar logieserwys net van skuld (negligence) ... sprake kan wees waar 'n persoon onregmatig opgetree het; iemand se optrede is regtens **verwytbaar** waar hy nie regmatig opgetree het nie".; *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) at 113G–114D.

[248] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [43]; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [17]; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) at [27]. The court set out the following passage of Fleming *Law of Torts* 4th ed 136 with approval: "In short recognition of a duty of care in the outcome of a value judgement, that the plaintiffs invade interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall..."; *Administrateur, Transvaal v Van Der Merwe* 1994 4 SA 347 (A) at 361: "Die onderliggende filosofie is dat die gevolg slegs onregmatig is indien in die lig van al die omstandighede redelikerwys van die verweerder verwag kan word om positief op te tree ... ten einde vas the stel of 'n ... late sodanig is dat dit as onregmatig aangemerk kan word ... moet die onderskeie belange van die partye, die verhouding waarin hulle tot mekaar staan en die maatskaplike gevolge van die oplegging van aanspreklikheid in die betrokke soort gevalle, versigtig teen mekaar opgeweeg word ".

Regarding the test for determining the existence of a legal duty the Supreme Court of Appeals held:

The existence of a legal duty to avoid or prevent loss is a conclusion of law depending on a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court.[249]

In the case of *Van Eeden v Minister of Safety and Security* the Supreme Court of Appeals asserted:

Our common law employs the element of wrongfulness (in addition to the elements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions settled by this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have done so by making value judgement based, *inter alia*, upon its perceptions of the legal convictions of the community and on considerations of policy

The question whether a legal duty exists in a particular case is thus a conclusion of law depending on consideration of all the circumstances of the case and interplay of many factors which have to be considered.[250]

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[249] *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 494C–D. In the *locus classicus* case of *Minister van Polisie v Ewels* 1975 3 SA 590 (A) at 597 Chief Justice Rumpff asserted: "...'n sekere voorafgaande gedrag of die beheer oor eiendom mag 'n faktor wees in die totaal van omstandighede van 'n bepaalde geval waarvan onregmatigheid afgelei word, maar is nie 'n noodwendige onregmatigheid vereiste nie. Dit skyn of die stadium van ontwikeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatng beskou behoort te word en dat die gelede skade vergeld behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree".; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A); *Mukheiber v Raath* 1999 3 SA 1065 (SCA) at 1075E–F: "Common to all approaches of unlawfulness ... is to be found in the violation of the rights of the person suffering damage as a consequence of the act complained of and that whether or not there was a violation of the right of the claimant (or the converse a dereliction of a duty by the defendant) depends on a number of considerations, including in the final instance public policy ... thus the key to liability is the existence of a legal duty on the part of the defendant ... for without this legal duty there can be no unlawfulness. And unlawfulness is *sine qua non* of Aquilian liability."; *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T).

[250] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [9] 395 H–J and 396A–C/D: "In applying the concept of the legal convictions of the community the Court

In *Carmichele v Minister of Safety and Security,*[251] the Constitutional Court held that the common law test for wrongfulness is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the *"spirit, objects and purport of the Bill of Rights"* and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.[252]

> Our Constitution is not merely a formal document regulating power ... (it is) ... an objective, normative value system. ... it is within the matrix of this objective normative value system that the common law must be developed. This requires not only a proper appreciation of the Constitution and its objective but also a proper understanding of the common law.[253]

It follows that, when determining wrongfulness, by taking all the relevant factors and circumstances of each particular case into consideration, the general delictual principles regarding reasonableness and the *boni mores* or legal convictions of the community that have come to the fore over a long

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is not concerned with what the community regards as socially, morally, ethically, or religiously right or wrong, but whether the community regards a particular act or conduct as delictualy wrongful".; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) at [14]–[17]; *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA) at [6]; *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) at [13]; *BOE Bank Ltd v Ries* 2002 2 SA 39 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [16]; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [16]; *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 584A–G; *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) at 114, quoting Neethling, Potgieter and Visser *Deliktereg* 3rd ed with approval: "whether failure to act positively in particular circumstances is wrongful must be judged with reference to the different interest of the parties, their relationship with one another and the social consequences of imposing liability in the kind of case in question. Factors that ought to be considered and balanced are, *inter alia*, the possible extent of the harm, the degree of risk of the harm materializing, the interests of the defendant and the community, the availability of reasonably practically preventative measures and the changes of their being successful, and whether the cost involved is ... reasonably proportional to the harm".

251 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

252 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [43]; Leinius and Midgley *supra* note 182 at 17.

253 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [54]–[55]; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396 at [12]: "The concept of the legal convictions of the community must now necessarily incorporate the norms, values, and principles contained in the Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms and values that are inconsistent with it can have legal validity, which has the effect of making the Constitution a system of objective, normative values for legal purposes".

period of time and that serve as an indication that a legal duty to act positively to prevent harm exists, must still serve as a *prima facie* indication of the reasonableness or otherwise of the omission.[254] The factors (although not a *numerus clausus*) that may indicate the existence of a legal duty to act positively to prevent harm such as prior conduct, control of a dangerous object, rules of law, special relationship, contractual undertaking for the safety of a third party, creating the impression that the interest of a third party will be protected and the breach of a statutory duty still serves as a *prima facie* indication of wrongfulness. These factors must now be applied in the light of the spirit, purport and objects of the Bill of Rights.[255]

It further follows that in the era of the new constitutional dispensation such an exercise must take the express provisions in the Bill of Rights, placing a positive duty on the state to protect, into serious consideration in applying the various common law delictual principles. In this regard section 2, section 7(2),[256] section 8(1),[257] section 12(1)(c),[258] section 41(1)(a)–**(e)**[259]

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[254] Neethling and Potgieter *supra* note 147 at 272: "...daarom word aan die hand gedoen dat by die uitoefening van hierdie proses, die algemene beginsels wat reeds met betrekking tot die redelikheidskriterium vir deliktuele onregmatigheid uitgekristaliseer het, steeds ook in die lig van die gees, strekking en oogmerke van die handves as *prima facie* aanduiding beskou kan word van die redelikheid al dan nie van 'n handeling"..... "In die lig hiervan behoort die beginsels wat reeds in die regspraak met betrekking tot byvoorbeeld die vasstelling van 'n regsplig wat op die staat rus ... steeds as vertrekpunt te dien".

[255] Neethling, Potgieter and Visser *Law of Delict* 4th ed 58.

[256] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at 446A: "The state is obliged by the terms of the 1996 Constitution not only to respect but also to "protect, promote and fulfil the rights in the Bill of Rights and s 2 demands that the obligations imposed by the Constitution must be fulfilled".

[257] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [44] referring to section 8(1) asserts: "It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection".

[258] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [13]: "In terms of section 12(1)(c) everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources ... Section 12(1)(c) requires the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the state to protect everyone from violent crime".

[259] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [20] - [21].

and section 205(3)[260] are of principal importance to state responsibility for human rights abuses committed by non-state actors.

Section 12(1)(c) read together with section 7(2) imposes a clear legal obligation on the state to act positively to prevent human rights abuses from occurring also at the hands of private parties.[261] The state must, therefore, not only abstain from human rights abuses itself but must proactively act positively to protect private parties from the violent behaviour of other individuals.

Section 41(1) expressly demands accountable government from all organs of the state. The constitutional law norm of accountability demands that a private law legal duty must be recognised. In the case of *Minister of Safety and Security v Van Duivenboden,* the Supreme Court of Appeals held that:

...**in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.** The very existence of that duty implies accountability and s 41 (1) furthermore provides expressly that all spheres of government and all organs of state within such sphere must provide government that is not only effective, transparent and coherent, but also government that is accountable.[262]

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[260] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [18]: "...our courts have in a number of recent decisions recognized that the entrenchment of the right to be free from violence in s. 12(1)(c) read with section 205(3) would ... be strongly indicative of a legal duty resting on the police to act positively to prevent crime".; Neethling and Potgieter supra note 147 at 270: "In die besonder verplig die Grondwet (a 7(2) en 205(3)) die staat ...om die regte in die handves van regte te eerbiedig, te beskerm, te bevorder en te verweselik".; Combrinck *supra* note 105 at 683 "The formulation of section 12 (1) (c) is also very clear in its reference to violence from both public and private sources. Further, section 12 should also be read with section 7 of the Constitution, which provides in subsection 7(2): "The state must respect, protect, promote and fulfil the rights in the Bill of Rights". This provision clearly implies that the state should not only respect the rights of women to be free from all forms of violence (in the sense of refraining from the commission of acts of violence against women), but should take active steps to protect this right".; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [61]–[62] referring to section 215 of the Interim Constitution's section 215 that is similar to section 205 of the final South African Contitution.

[261] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [14]: "Section 12 should be read with section 7(2) ...in this country the state has positive constitutional duty to act in the protection of human rights".; *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 585.

[262] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [20] (emphasis added); *Olitzki Property Holdings v State Tender Board* 2001 3 SA (SCA) at 1247 where Cameron JA said the following: "The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of

When determining whether the law should recognize the existence of a legal duty in any particular circumstance what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state ... is in conflict with its constitutional duty to protect rights in the Bill of Rights ... the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case.[263]

6.5.2 Negligence

The classic test for establishing the existence or otherwise of negligence is that formulated by Holmes JA in the case of *Kruger v Coetzee* where the court stated that:[264]

For the purposes of liability *culpa* arises if –

a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another ... and
(ii) would take reasonable steps against such occurrence.

b) the defendant failed to take such steps.

Whether a *diligens paterfamilias* in the position of the defendant would take any guarding steps at all, and if so, what steps would be reasonable must always depend on the particular circumstances of each case.[265]

Not all omissions are inherently unlawful. An omission is unlawful and actionable only if it occurs in circumstances that the law recognises it as

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civil remedies securing its observance will play a central part in realizing our constitutional vision of open uncorrupt and responsive government".

263 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [21].

264 *Kruger v Coetzee* 1966 2 SA 428 (A) at 430; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [37]; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) at [21]; *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 585; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [23]: "whether a person is required to act at all to avoid reasonably foreseeable harm; and if so what that person is required to do, will depend on what can reasonably be expected in the circumstances of the particular case".; *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 472.

265 *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [37].

unlawful.[266] In the case of *Minister of Safety and Security v Van Duivenboden,* the Supreme Court of Appeals held that:

Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability if also culpable as determined by the separate test ... namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but acted to avert it.[267]

What is important is that in determining negligence and applying the above test of the *diligens paterfamilias,* the fact that the Constitution places a positive legal duty on the state must be taken into consideration by the courts. An omission that may not have been unlawful prior to the constitution, can now be seen as unlawful due to the positive legal duty that the constitution places on the state to ensure that individuals are protected and free from all forms of violence. The advent of the constitution thus changed the way the *diligens paterfamilias* must act.

6.5.3 Causation

In *International Shipping Company (Pty) Ltd v Bentley,*[268] it was pointed out by Corbet JA that causation involves two distinct enquiries:

The first is a factual one and relates to the question as to whether the defendant's wrongful act was the cause of the plaintiff's loss. This has been referred to as factual causation. The enquiry as to factual causation is generally conducted by applying the so called "but for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiffs loss would have ensued or not ... If the wrongful act is shown in this way not to be a *causa sine quo non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* does not necessarily result in legal liability. **The second** question then arises, viz

[266] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [13].
[267] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [12].
[268] *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) at 700.

whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution in which considerations of policy may play a part. This is sometimes called legal causation.[269]

With regard to the first leg of the enquiry (factual causation) it is important to note that he plaintiff is not required to establish a causal link with certainty, but simply to establish that the wrongful and negligent conduct complained of was probably the cause of the loss sustained.[270] The specific facts and circumstances of each particular case will be of critical importance to determine this.

The second leg of the enquiry (legal causation or remoteness) involves the question:

...whether or to what extent the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical policy, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This enquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgements must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default. [271]

In *S v Mokgethi en Andere,*[272] Van Heerden JA mentioned a number of criteria referred to in various authorities as being relevant to the determination of legal causation, including the absence of a *novus actus*

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[269] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [24]-[25]; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [42]; *Geldenhuys v Minister of Safety and Security* 2002 4 SA 719 (C) at 731.

[270] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [25]; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [43].

[271] Fleming *Law of Torts* 7th ed 173 quoted with approval in *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [42] and in *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 473.

[272] *S v Mokgethi en Andere* 1990 1 SA 32 (A) at 39-40.

interveniens, approximate cause, foreseeability, and "adekwate veroorsaking" before concluding:[273]

Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kennne nie dat een of selfs meer van die kriteria nie by die toepassing van soepele maatstaf op n bepaalde soort feitekompleks subsidier nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feite komplekse, en vir die doeleindes van die koppeling van enige vorm van regsaanspreeklikheid, as n meer konkrete afgrensings maatstaf gebruik kan word nie.

Similarly, in *Standard Chartered Bank of Canada v Nedperm Bank Ltd,* [274] the test was described as being:

a flexible one in which factors such as reasonable foreseeabillity, directness, the absence or presence of a *novus actus interveniens,* legal policy, fairness and justice all play their part [275]

The test for legal causation is, therefore, in general, a flexible one that will depend on the particular facts and circumstances of each case.[276]

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[273] *S v Mokgethi en Andere* 1990 1 SA 32 (A) at 40 -41 quoted with approval in *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 473.

[274] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A).

[275] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765 (in a passage referred to with approval in *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 474). Also in *Smit v Abrahams* 1994 (4) SA 1 (A) at 17 Botha JA pointed out that it was wrong to regard the question of reasonable foreseeability as being the single decisive criteria in the determination of liability and that while reasonable foreseeability can be used as a subsidiary test in the application of the flexible approach, it did not displace it.; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765 (in a passage referred to with approval in *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 474).

[276] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 1 SA 827 (SCA) at 840 Scott JA stated: "The Problem is always to decide where to draw the line, particularly in those cases where the result is readily foreseeable but not the cause. This is more likely to arise in situations, ...where it is common cause [that] there is another person whose wrongdoing is more obvious than that of the chosen defendant. It is here that a degree of flexibility is called for. Just where the inquiry as to remoteness (or legal causation) begins - both of which may involve the question of foreseeability – must therefore to some extent depend on the circumstances ....". In *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) at 699 Nuggent JA asserted "I have already drawn attention to the fact that the test for legal causation is, in general a flexible one. When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the

In determining whether the requirement of causality has been met, an objective common sense approach to proximity should be followed. This calls for a sensible retrospective analysis of what would probably have occurred if a hypothetical course of lawful conduct instead of wrongful conduct had been pursued, based upon evidence and what could be expected to occur in the ordinary course of human affairs.[277] In the case of *Minister of Safety and Security v Duivenboden* the Supreme Court of Appeals held that:

A plaintiff is not required to establish a causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss.[278]

Importantly the existence of a positive legal duty on the state to protect individuals from human rights abuses by non-state actors is a crucial factor to be taken into consideration in the determination of causation. In *Van der Spuy v Minister Of Correctional Services,*[279] Leach J stated that:

Similarly, in the present case, it seems to me that the defendants servants were under a legal duty to protect individuals by taking active steps to prevent dangerous persons held in the prison from escaping into the community if they were likely to commit acts of violence if they did escape. Although the reasoning.... [is] relevant to the assessment of unlawfulness ....it also seems to me to be relevant to the question of causation. After all, legal policy plays its part in the assessment of remoteness and it seems to me that **where employees of the state owe a duty to act positively to prevent a dangerous criminal being freed from the bonds of custody, the existence of the duty is relevant to the issue of legal causation when the criminal proceeds to escape and then injures a member of**

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new act occurring will clearly play a prominent role.....If the new intervening cause is neither unusual or unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability". *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 474: " ...each case must be decided in the light of its own particular facts and circumstances and, depending on the facts, an intervening cause may well not break the chain of causation..".

277 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [25].

278 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [25]; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) at [43]: "...it must be remembered that a plaintiff is not required to prove a causal link with certainty, but simply to establish that the wrongful and negligent conduct complained of was probably a cause for the loss sustained. This enquiry calls for a sensible retrospective analysis of what can be expected to occur in the ordinary course of human affairs...".

279 *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 475- 476.

the public, as the possibility of that consequence taking place is directly related to the duty to prevent the escape in the first place.

And further:

Taking this into account ....**including the evidence that .....the defendant and his servants owed a duty to the public at large to prevent potentially dangerous persons escaping into the community,** I have concluded that the damage suffered by the plaintiff was not so remote that the chain of causation should be regarded as having been interrupted and that the defendant is therefore liable to the plaintiff for whatever damages he may have suffered as a result of he injuries sustained in the shooting.[280]

6.6 Section 12 (1) (c) Appropriate relief

6.6.1 Constitutional remedy

Section 12 (1) (c) guarantees the right to be free from all forms of violence from both public and private sources. From the previous section it is clear that there is a positive legal duty on the state to ensure that this right is fulfilled. What remedy is available to the victim of violent crime once it has been established that the state acted negligently in breach of its positive legal duty to protect?

To call the right to be free from all forms of violence, entrenched in the Constitution, a constitutional guarantee and at the same time deny the holders of this valuable right any remedy in law obviously would be to reduce the safeguards enshrined in the Constitution to nothing.[281] Where there is a right there is a remedy- *Ubi ius ibi remedium*. What remedies are

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[280] *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 476 (emphasis added).

[281] In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [34] The Constitutional Court held "That a right requires an appropriate remedy was trenchantly affirmed by Centlivres CJ in Minister of the Interior and Another v Harris and Others[281] To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined [in the Constitution] to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*."

there for a breach of the supreme law, or a failure to fulfil the obligations imposed by it?

Generally it can be stated that there are four major types of constitutional remedies: 1) declarations of invalidity, 2) prohibitory interdicts, 3) mandatory interdicts and 4) awards of damages.[282]

Section 172 (1) of the Constitution [283] provides that:

When deciding a constitutional matter within its power, a court
a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; [284]and
b. **may make any order that is just and equitable**.....

In addition, section 38 of the Constitution provides that:

Anyone .....has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened **and the court may grant appropriate relief**, including a declaration of rights.[285]

The Constitutional Court held that "*it is left to the courts to decide what would be appropriate relief in any particular case*". [286] The courts, therefore, possess a broad power under the Constitution to fashion appropriate, just and equitable remedies designed to provide effective relief when

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[282] Currie and de Waal *The New Constitutional and Administrative Law* at 287: "Of the four, the declaration of invalidity is unusual in the sense that it is not a discretionary remedy. The consequence of constitutional supremacy is that laws or conduct inconsistent with the constitution are invalid. To put it another way, invalidity follows as a matter of law from inconsistency with the constitution. Section 172 (1), therefore, provides that when deciding a constitutional matter, a court *must* declare that any law or conduct that is inconsistent with the constitution is invalid".

[283] Section 172 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added).

[284] Erasmus 2004 *Int'l J Legal Info* at 252: "The South African Constitution is quite clear as to the consequences of violations of the Constitution. All law or conduct inconsistent with the Constitution must be declared invalid to the extent of its inconsistency. Courts may also make orders to ensure that their rulings result in equitable outcomes and that the relief granted will be appropriate".

[285] Section 38 of the *Constitution of the Republic of South Africa*, 1996 (emphasis added).

[286] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [19].

constitutionally entrenched human rights are infringed. [287] In *Fose v Minister of Safety and Security,* [288] the Constitutional Court held that:

[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.[289]

The Constitutional Court further held that an appropriate remedy means an effective remedy. Ackerman J asserted:

I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.

The purpose of a constitutional remedy is to vindicate the Constitution and to deter future infringements.[290]

It is also important in a country like South Africa, where few people have the means to enforce their rights through the courts, that on the occasions when the legal process does establish that an infringement of an entrenched fundamental human right has occurred, it be vindicated effectively. The

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[287] Woolman *Constitutional Law* at 41-52.

[288] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

[289] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [19]; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [102].

[290] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [96] and [97]: "Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement....Once the object of the relief in .....has been determined, the meaning of "appropriate relief" follows as a matter of course. When something is appropriate it is "specially fitted or suitable". Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter three. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate". Sanderson v Attorney General (Eastern Cape) 1998 (2) SA 38 (CC); Currie and de Waal *The New Constitutional and Administrative Law* at 288.

courts have a particular responsibility in this regard and are obliged to '*forge new tools*' and shape innovative remedies, if need be, to achieve this goal.[291]

6.6.2 Delictual damages

The Constitutional Court found that when the state negligently breached its legal duty to protect, the victim of a human rights abuse committed by a non-state actor's claim is in essence based in delict.[292] After a finding that in the particular set of circumstances there was a) a legal duty to protect, b) the state breached this duty and did so negligently, and c) there was a causal connection between the negligent breach of the duty and the damages suffered, the state will be delictualy liable.[293] When the state failed in its positive legal duty to protect as guaranteed by section 12 (1) (c) of the Constitution[294] the victim is, therefore, entitled to delictual damages.[295] In *Van Eeden v Minister of Safety and Security*, the Supreme Court of Appeals held that:

An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and mandamus or

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[291] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [69]; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [21].

[292] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 950: "The applicant's case is founded in delict. The direct cause of the damages she suffered was the assault by C. However, the applicant wishes to hold the respondent liable because of the alleged wrongful acts or omissions of the police officer (Klein) and prosecutors at times when they were acting in the course and scope of their employment with the state. In order to succeed the applicant will have to establish at trial that: 1) Klein and the prosecutors owed a legal duty to the applicant to protect her, 2) Klein and the prosecutors respectively acted in breach of such a duty, 3) there was a causal connection between the negligent breach of the duty and the damage suffered by the applicant."

[293] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at [25]; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [19]; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) at [31]: "The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central role in realising our constitutional vision of open, uncorrupt and responsive government".

[294] The *Constitution of the Republic of South Africa*, 1996.

[295] The principles relevant to delictual damages have been dealt with extensively in a number of other works and as such will not be addressed here.

interdict do not afford the victim of crime any relief at all. The only effective remedy is a private law delictual action for damages. [296]

In *Fose v Minister of Safety and Security*,[297] the Constitutional Court observed that the South African law of delict is flexible and will, in most cases, be broad enough to provide "*appropriate relief*" in the form of damages for a breach of constitutional rights and obligations.[298] Delictual damages will also serve the purpose of a constitutional remedy in that the Constitution will be vindicated and it will most definitely act as a deterrent for future breaches of the duty to protect. As long as the costs of protection are less than the potential liability, the rational government will act decisively to protect its citizens against violent crime.

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[296] *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) at [19]; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at [21]: "The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting . . . There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm...."*Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 335: "A prayer of this kind must be sought by way of a delictual action, rather than by the back door of a prayer for a declarator". *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) at [32] "In addition, the absence of a public law remedy compels the recognition of a private law claim for damages in delict." *Minister of Safety and Security and Another v Carmichele* 2004 (2) BCLR 133 (SCA) at [38]:"From this it follows that where, as in circumstances such as the present ...., someone in the position of the plaintiff has no other effective remedy against the State, an action for damages is the norm unless public policy considerations point in the other direction."

[297] *Fose v Minister of Safety and Security* 1997 (3) SA 786 CC at [58].

[298] *Fose v Minister of Safety and Security* 1997 (3) SA 786 CC at [58 and at [98] : "I have argued that "appropriate relief" vindicates the Constitution and deters further violations of it. I see no reason in principle why common law and statutory remedies can never be suitable for this purpose..... Of course, there will be instances where these remedies are ill-suited. For example, a common law remedy is unlikely to address a diffuse and systematic pattern of rights violations. Nevertheless, common law remedies – particularly delictual remedies – have been designed to protect personality interests such as dignity which are central to chapter three. In cases where the harm arising from a rights violation is highly localised, a common law remedy may well be appropriate, that is, it may effectively vindicate the Constitution and deter further violations of it".

6.6.3 Constitutional damages

There is nothing in the Constitution[299] that prohibits the courts from awarding constitutional damages as a remedy for the violation of fundamental human rights.[300]

When delictual damages have already been awarded to a victim of violent crime, he or she will, however, not be entitled to claim an additional amount of damages for breach of the right to be free from all forms of violence. In other words, the plaintiff cannot be compensated twice for the same wrong.[301]

Since the Constitutional Court has clearly ruled that when the state breached its positive legal duty in terms of section 12 (1) (c),[302] the victim's claim is based in delict and constitutional damages will not be applicable to the victim of violent crime.

6.6.4 Interdicts

Apart from awards of delictual damages for breaches of section 12 (1) (c)[303] courts can also direct the state through mandatory and structural interdicts to bring policies in line with constitutional standards or to perform certain positive actions to remedy unconstitutionality.[304]

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299 The *Constitution of the Republic of South Africa*, 1996.

300 Currie and de Waal *The New Constitutional and Administrative Law* at 297.

301 *Fose v Minister of Safety and Security* 1997 (3) SA 786 CC at [67] "In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgement finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages"; Currie and de Waal *The New Constitutional and Administrative Law* at 297.

302 Section 12 (1) (c) the *Constitution of the Republic of South Africa*, 1996.

303 Section 12 (1) (c) of the *Constitution of the Republic of South Africa*, 1996.

304 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [98]: "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should

In *Mohamed v President of the RSA,*[305] the Constitutional Court held that:

Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.[306]

The power of the Courts to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented. In *Pretoria City Council v Walker,*[307] for example, learned Judge Langa DP of the Constitutional Court said:

[T]he respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.[308]

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be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy"; Erasmus 2004 *Int'l J Legal Info* at 250 "What remedies will a court then impose when [human rights] rights are violated? A declaration of invalidity of the infringing law or conduct is the most obvious one. South African courts have also developed the so-called structured interdict (which directs a violator to take particular steps to rectify violations of rights under the court's provision) and declaratory relief."

305 *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

306 *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) at [71]; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [103].

307 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

308 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at [96]; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [104] and at [105]: "This Court has said on other occasions that it is also within the power of courts to make a mandatory order against an organ of State and has done so itself. For instance, in the Dawood case (supra), a mandamus was issued directing the Director-General of Home

More recently, in the case of *Minister of Health v Treatment Action Campaign,*[309] the Constitutional Court again affirmed:

We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place .... a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. **Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.**[310]

The nature of the right infringed and the nature of the infringement will provide guidance to the courts as to the appropriate relief in a particular case.[311] It will, for instance, be possible for a court to direct the state and in particular, the security services to send more policemen to a severely under serviced area or to submit a detailed plan as to how the state is going to rectify unacceptably high levels of violent crime within a particular township.

In *Government of the Republic of South Africa v Grootboom,*[312] the Constitutional Court stated that:

In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the State to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.[313]

Affairs and immigration officials to exercise the discretion conferred upon them in a manner that took account of the constitutional rights involved. In the August case (supra) a mandatory order, coupled with an injunction to submit a detailed plan for public scrutiny, was issued by this Court against an organ of State – the Electoral Commission"; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at [67] and [70]; *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at [42].

309 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC).

310 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [106] (emphasis added); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at [45].

311 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [106]; Erasmus *supra* note 304 at 252.

312 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

313 *Government of the Republic of South Africa v Grootboom*[313] 2001 1 SA 46 (CC) at [96]; Erasmus *supra* note 304 at 250 "...in the case of Grootboom the ruling of a lower court which provided for detailed instructions on dates and specific steps to provide housing was set aside on appeal. The right in question did not grant applicants an immediate

The Courts may, therefore, direct the state *"to devise, fund, implement and supervise measures to provide"* security services to those in desperate need.[314] The following example is illustrative. A certain township

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claim to housing. The Constitutional Court held that it was necessary and appropriate to award a declaratory order. That order set out the shortcomings in the state's housing policy and declared that steps must be taken to remedy these shortcomings. It suggested certain means to achieve this result and require the state to devise and implement, within its available resources, a comprehensive and coordinated program for the progressive implementation of the right to access to adequate housing. The Court also appointed the Human Rights Commission to monitor the implementation of this order."

[314] In *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) the Constitutional Court also did a brief survey of foreign jurisprudence regarding the issuing of injunctive relief against the state and concluded that the granting of injunctive relief is appropriate and does not breach the separation of powers. *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [107] – [112] "n examination of the jurisprudence of foreign jurisdictions on the question of remedies shows that courts in other countries also accept that it may be appropriate, depending on the circumstances of the particular case, to issue injunctive relief against the State. In the United States, for example, frequent use has been made of the structural injunction – a form of supervisory jurisdiction exercised by the courts over a government agency or institution. Most famously, the structural injunction was used in the case of Brown v Board of Education [*Brown et al v Board of Education of Topeka et al 347 US 483 (1954) (Brown I) and Brown et al v Board of Education of Topeka et al 349 US 294 (1955)(Brown II)*] where the US Supreme Court held that lower courts would need to retain jurisdiction of Brown (supra) and similar cases. These lower courts would have the power to determine how much time was necessary for the school boards to achieve full compliance with the court's decision and would also be able to consider the adequacy of any plan proposed by the school boards "to effectuate a transition to a racially non-discriminatory school system". Even a cursory perusal of the relevant Indian case law demonstrates a willingness on the part of the Indian courts to grant far-reaching remedial orders. Most striking in this regard is the decision in *MC Mehta v State of Tamil Nadu and Others* [[1996] 6 SCC 756.] where the Supreme Court granted a wide-ranging order concerning child labour that included highly detailed mandatory and structural injunctions. Although decisions of the German Federal Constitutional Court are mostly in the form of declaratory orders, the Court also has the power to prescribe for a temporary period which steps have to be taken in order to create a situation in conformity with the Basic Law. The most far-reaching execution order was probably that made by the Court in the *Second Abortion* Case,[BVerfGE 88, 208.] declaring several provisions of the Criminal Code unconstitutional and void and replacing them by a detailed interim law to remain in place until new legislation came into force. In Canada, it appears that both the supreme and the lower courts have the power to issue mandatory orders against organs of State. Canadian courts have, however, tended to be relatively cautious in this regard. For example, in *Eldridge v British Columbia (Attorney General)* [(1997) 151 DLR (4th) 577 (SCC) at para 96.], the Supreme Court of Canada considered a declaration of unconstitutionality preferable to "some kind of injunctive relief" on the basis that "there are myriad options available to the government that may rectify the unconstitutionality of the current system". The Canadian courts have also tended to be wary of using the structural injunction. In the United Kingdom, although injunctive relief may be granted against officers of the Crown, the House of Lords has held that this should only be done in the "most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations." [In re M. [1994] 1 AC

experiences an extremely high incidence of violent crime. In fact when compared to other regions in South Africa, the violent crime rate is ten times more. The police are well aware of this and despite numerous rapes and murders in the area, do nothing to improve the security situation. If X is raped and stabbed and the court finds that the state acted negligently in breach of its constitutional duty, X would be entitled to delictual damages and the court could also direct the state to *devise, fund, implement and supervise measures to provide proper* security services in the specific area.

6.7 Conclusion

Violent crime, abhorrent human rights abuses and the infringement of the right to be free from violence from both public and private sources continue to severely impact many South Africans. Women and children are especially vulnerable and suffer the most.[315]

Cowling asserts that:

If the fundamental rights contained in the Bill of Rights are to have any real meaning to South African subjects, it is necessary for state organs and institutions to function in accordance with basic duties that serve this protection. This means that where a duty has been breached the state should be held liable.[316]

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377 (HL) at 422–3.] What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the State's obligations are not performed diligently and without delay."

[315] This is of particular concern as was pointed out by the Constitutional Court in the Carmichele case at [62] that South Africa has an international law obligation to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

[316] Cowling 2002 *SACJ* 257.

In *Minister of Health and Others v Treatment Action Campaign and Others (No 2),*[317] the Constitutional Court held that:

The primary duty of the courts is to the Constitution and to the law "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

In *Carmichele v Minister of Safety and Security*, the Constitutional Court opened the door to the development of the common law to ensure the vindication of the right to be free from public or private violence as guaranteed by section 12(1)(c).[318] In a number of decisions following the Carmichele case, the Supreme Court of Appeals held that there is a legal duty on the state to protect private citizens from human rights abuses at the hand of other private citizens and that the state can be held liable for human rights abuses committed by non-state actors.

Pieterse asserts that:

Eradicating a culture of violence of course requires more than merely making justifiable a particular provision of the Constitution. Nevertheless, as long as violence remains to impair the human dignity and security of the person of most South African citizens, the constitutional vision enunciated by s 12(1)(c) will remain nothing more than a paper guarantee. Establishing a society free from violence requires an integrated approach targeting various social factors and requires committed and sustained efforts by all branches of government and citizens themselves. Through recognizing and giving effect to the fundamental character of s 12(l)(c), the judiciary can participate in the establishment of such a society and send out the message that constitutional rights amount to more than wishful thinking.[319]

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[317] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) [99].
[318] Pieterse *supra* note 102 at 39.
[319] *Ibid.*

The function of a government in a liberal democracy (with a Constitution that places a very high value on human rights and its protection and realisation like South Africa) is to serve the welfare of the citizen. Government must recognize the worth of human beings in its charge and take active practical steps to secure and ensure their safety.

The imposition of a legal duty to protect citizens against the violent behaviour of criminals provides an incentive for government to take effective steps to do something about the unacceptable high crime rates that still plague the society. As long as the costs of protection are less than the potential liability, the rational government will act decisively to protect its citizens against violent crime.[320] Encouraging cost effective, efficient protection would reduce the overall injury cost to society and eliminate some violent human rights abuses.

Former President Nelson Mandela said that "*The long walk is not yet over. The prize of a better life has yet to be won*".[321]

A better life includes a life free from constant fear of harm or death at the hands of criminals. In the Carmichele case, the Constitutional Court opened the door for the judiciary to apply the Constitution impartially and without fear, favour or prejudice and to hold the state liable where fundamental human rights are violated at the hands of criminals. In terms of South African law, the Constitution is a citadel for human rights protection and the state is responsible for human rights abuses committed by non-state actors.

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[320] If one looks at the current crime statistics there is a huge potential delictual liability for government; especially in cases where crimes are pervasive and persistent in nature as in the case of township violence, abuse of women, the abuse of children and farm attacks.

[321] Sparks *supra* note 6 at 251.

7. LIMITATION OF STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES COMMITTED BY NON-STATE ACTORS

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7.5 Conclusion

7.1 Introduction

From the previous chapters it is clear that the state is responsible for human rights abuses committed by non-state actors if it negligently failed in its positive legal duty to prevent the violation from occurring.[1] Obviously the state cannot be held liable in all circumstances as fundamental human rights are not absolute but subject to restrictions under certain circumstances.[2] The challenge of the positive legal duty cases is to devise rules that give due regard not only to the state interest in allocating scarce resources, but also to the plaintiff's interest in recovering damages where the government failed in its legal duty to prevent human rights violations and specifically the right to be free from all forms of violence from occurring.[3]

When the state fails in its positive legal duty to protect citizens against the violent behaviour of non-state actors, it has the effect that the full enjoyment of the right to security and to be free from all forms of violence as guaranteed by section 12 (1) (c)[4] are infringed or limited. It is, therefore, necessary to assert what the Constitution determines with regards to the limitation of fundamental human rights. As fundamental rights are not absolute but subject to restriction by *inter alia* other rights and the legitimate needs of society, not all infringements are unconstitutional. An infringement that takes place in line with a valid *ratio* that is recognised as a legitimate justification by the Constitution, will not be regarded as illegal. It must, however, be emphasised that fundamental human rights cannot be limited for any reason. The reasons for limiting a Chapter 2 right (like the right to security), needs to be exceptionally strong. The limitation must serve a purpose that society regards as extremely important. As de Waal asserts:

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1 Cowling 2002 *SACJ* 257.

2 De Waal, Currie and Erasmus *Bill of Rights Handbook* 144: "Fundamental human rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society. Generally, it is recognized that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights".; Woolman *Constitutional Law* 12-1; Basson *South Africa's Interim Constitution* 51.

3 Eaton and Wells 1991 *Wash. L. Rev.* 142.

4 The *Constitution of the Republic of South Africa*, 1996.

..... however important the purpose of the limitation, restriction on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other way in which the purpose can be achieved without restricting rights.

The limitation on state responsibility for human rights abuses committed by non-state actors has two components: a) limitation of international legal obligations, and b) limitation of domestic legal obligations.

7.2 Limitation of international legal obligations

In terms of international legal obligations, it is important to ascertain:

- which treaties and conventions South Africa ratified;[5]
- whether South Africa formally entered any reservation when ratifying the treaty;
- whether the treaty is currently in force;
- what exact international legal obligations are imposed on South Africa by the treaty or convention;
- is South Africa fulfilling its international *obligatio et iuris?*

The state is under an international legal obligation to give effect to treaty provisions when it signed and ratified the convention without explicitly entering a reservation. South Africa signed and ratified all the major human rights conventions without any reservations.[6] In terms of international law, South Africa

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5 International conventions allow reservations that are compatible with a treaty's objects and purposes. Article 19 of the Vienna Convention on the Law of Treaties *(Vienna Convention on the Law of Treaties* 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980), reprinted in 8 I.L.M. 679 (1969)) states that a state may enter a reservation unless *the reservation is prohibited by the treaty*, or *the treaty only provides for specified reservations* or if the reservation *is incompatible with the object and purpose of the treaty*; Cook 1994 *Harv. Hum. Rts. J.* 173.

6 *Supra* chapter 3; Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003.

has a duty "*to ensure*" to all within its territory, the human rights guaranteed by the various human rights conventions including *inter alia* the right to life, the right to human dignity and the right to be free from violence and torture . The positive legal duty to "ensure" *inter alia* means that:

- States are responsible for human rights abuses by non-state actors if they failed to meet their international obligations. [7]
- Human Right treaties must be implemented effectively in line with *the principle of effectiveness.* [8]
- The positive legal duty includes ensuring that the framework of the law provides adequate protection, and taking reasonable steps to avoid a risk of human rights violations of which the authorities know or ought to know.

As far as the limitation of state responsibility for human rights abuses goes, it has been determined that states have a "margin of appreciation"[9] (an area of

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7 *Supra* chapter 3; Office of the UNHCHR 2004(b) HYPERLINK http://www.unhchr.ch/pdf/report.pdf 20 Oct. 2003; Cook *supra* note 5 at 142, 151 and 162 and footnote 144; Moore 1999 *Colum. Hum. Rts. L. Rev.* in general on duty of due diligence to observe international law when breach originated in private conduct; Universal Declaration (Jefferson 1776 HYPERLINK http://www.yale.edu/lawweb/avalon/declare.htm 6 Sep. 2004) in general; *Velasquez Rodriguez Case* Judgement of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988); *Godinez Cruz Case* Judgement of 20 January 1989, *Inter-Am. Ct. Hr.* (Ser. C) No. 5 (1989); the Human Rights Committee held the same view in *Herrera Rubio v Colombia* Views adopted on 2 November 1987, Communication No. 161/1983 (1 December 1983), U.N. Doc. CCPR/C/31/D/161/1983; *Delgado Páez v Colombia* Views adopted on 12 July 1990, Communication No. 195/1985 (4 October 1985), U. N. Doc. CCPR/C/39/D/195/1985; Shelton *State Responsibility; Vienna Declaration and Programme of Action* World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) 20-46 (1993) (adopted on June 25, 1993), reprinted in 32 I.L.M. 1661 (1993) at Preamble; Danailov *Accountability of Non-State Actors* 17; Engstrom 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/ville.pdf 17 Jun. 2004 at 17–19; Farrior 1998 *Am. Soc'y Int'l L. Proc.* at 300-301; Finell 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/peter.pdf 25 Jun. 2004 at 20; Luopajarvi 2002 HYPERLINK http://www.abo.fi/instut/imr/norfa/katja.pdf 17 Jun. 2004at 7-11.

8 Danailov *supra* note 7 at 19; Meron *Human Rights and Humanitarian Norms* 263.

9 *Supra* chapter 3 at 3.3.1.5; the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004) at 8 determines that "As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of

discretion) to implement human rights protection plans or what measure to take to best protect human rights.[10]

In *Rees v The United Kingdom,* the European Court of Human Rights noted that:
[11]

.. as far as those positive obligations are concerned, the notion of "respect" is not clear cut; having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the...requirements will vary considerably from case to case. Accordingly, **this is an area in which the Contracting Parties enjoy a wide margin of appreciation** in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and individuals.

The margin of appreciation is the discretion left to a particular state to implement its preventative protection programme the way it sees fit. Coppel states that:

The state must convincingly establish that a particular measure is necessary in the interest of a legitimate objective and national decision-makers (whether executive, legislature or courts) are, in principle, in a better position to determine the necessity of a measure than is the international judge. **They have a margin of appreciation, an area of discretion**, within which the Court will not intervene to overturn their judgement. The margin of appreciation is, in short, "the amount of latitude left to national authorities once the appropriate level of review has been decided upon by the Court.[12]

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universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the "progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds".

10 *Supra* chapter 3.

11 *Rees v United Kingdom* 9 E.H.R.R. 56 (1987) at para. 37 (in the context of Article 8).

12 Coppel *Human Rights Act* 164 (empasis added).

The margin of appreciation[13] is wider where the complaint is that the state authorities have violated their positive legal obligations to protect individuals from interference with their Convention rights. It can be said that positive legal duties can be met in a variety of ways and that the choice of means adopted is, in principle, a matter for the state concerned.[14]

7.3 Limitation of national legal obligations

Typically the analysis of a Constitutional violation under Chapter 2 takes the form of a two step analysis.[15] First the applicant is required to demonstrate that his or her ability to exercise or enjoy a fundamental human right has been violated. The applicant must then further show that the law or government action in question

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[13] *Handyside v United Kingdom* 1 E.H.R.R. 737 (1979-80). *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at [109] "The European Convention also has no general limitations clause, but makes certain rights subject to limitation according to specified criteria. The proportionality test of the European Court of Human Rights calls for a balancing of ends and means. The end must be a "pressing social need" and the means used must be proportionate to the attainment of such an end. The limitation of certain rights is conditioned upon the limitation being "necessary in a democratic society" for purposes defined in the relevant provisions of the Convention. The national authorities are allowed a discretion by the European Court of Human Rights in regard to what is necessary – a margin of appreciation – but not unlimited power. The "margin of appreciation" that is allowed varies depending upon the nature of the right and the nature and ambit of the restriction. A balance has to be achieved between the general interest, and the interest of the individual. Where the limitation is to a right fundamental to democratic society, a higher standard of justification is required; so too, where a law interferes with the "intimate aspects of private life". On the other hand, in areas such as morals or social policy greater scope is allowed to the national authorities. The jurisprudence of the European Court of Human Rights provides some guidance as to what may be considered necessary in a democratic society, but the margin of appreciation allowed to national authorities by the European Court must be understood as finding its place in an international agreement which has to accommodate the sovereignty of the member states.

[14] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at [168].

[15] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at [100] "Our Constitution deals with the limitation of rights through a general limitations clause. .....this calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter 3, and limitations have to be justified through the application of section 33." Woolman *supra* note 2 at 12-2. *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at 414; *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C) at [37] "Our Constitution clearly envisages a two-stage enquiry. The first stage of the enquiry is to ascertain whether a law by its intent or impact infringes a right guaranteed by the Constitution. If a law does infringe such right the second stage of the enquiry ensues, namely whether the infringement is protected by the limitations clause in section 36 of the Constitution."

actually impedes the full enjoyment and exercise of the fundamental human rights in question by demonstrating that the law or government action either expressly intend to restrict the right, or effectively restricts the exercise of the right. If the court finds that the government action[16] in question infringes the exercise of a fundamental human right, the analysis may move to the second stage. In the second stage, the government will be required to prove that the infringement is justifiable.[17] This last determination must be made within the context of the constitution.

In terms of the limitation of the state's domestic legal obligations to act positively to protect fundamental human rights, it is, therefore, important to establish:

- what specific legal duties the Constitution[18] places on the state;[19]
- whether the Constitution[20] allows for the protected right to be limited;
- how and when the state's delictual liability for violations that occurred can be limited;
- whether the Constitution[21] allows for the protected right to be suspended or derogated during a state of emergency.

7.3.1 Limitation of the right to be free from violence in terms of the Constitution

Generally it can be stated that fundamental human rights entrenched in the Bill of Rights of the South African Constitution may be limited pursuant to stipulations contained in section 36.[22] The limitation clause has a fourfold purpose. First, it serves as a reminder that the fundamental human rights enshrined in Chapter 2

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16 In this section the terms 'government action' or 'state action' are used loosely and include all laws, and exercise of state power. It specifically also includes inaction.
17 De Waal, Currie and Erasmus *supra* note 2 at 145 -147.
18 The *Constitution of the Republic of South Africa*, 1996.
19 *Supra* chapter 6 at 6.3 and 6.4.
20 The *Constitution of the Republic of South Africa*, 1996.
21 S 37 of the *Constitution of the Republic of South Africa*, 1996.
22 Davis Cheadle Hayson *Fundamental rights in the Constitution* at 317.

are not absolute, but subject to limitation where the restrictions can satisfy the test laid out in section 36. Secondly, section 36 (1) espouses that fundamental human rights may only be limited where and when the state objective behind the limitation is designed to reinforce the norms and values embodied in the Constitution. These values include openness, democracy, freedom and equality, as well as the specific norms reflected in the individual rights themselves.[23] Thirdly, the test set out in Section 36 allows for open consideration and weighing of competing state, private and constitutional interests. The limitation clause provides a mechanism for the balancing of competing fundamental values against one another.[24] Finally, the limitation clause provides a framework within which the democratically elected branches of government may limit constitutionally protected rights and the extent to which an unelected judiciary may override the general will and create new law through judgements that develop the law in line with the values embodied in the Constitution.[25]

Section 36 determines that:

36. (1) The rights in the Bill of Rights may be limited only **in terms of law of general application** to the extent that the limitation is **reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom**, taking into account all relevant factors, including:

a) The nature of the right;
b) The importance of the purpose of the limitation;

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23 Woolman *supra* note 2 at 12-1.

24 *S v Manamela* 2000 3 SA 1 (CC) at [33] "Although section 36(1) differs in various respects from section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable."

25 Woolman *supra* note 2 at 12-1; *S v Manamela* 2000 3 SA 1 (CC) at [34] "Section 36, ...The duty of a court is to decide whether or not the legislature has overreached itself in responding, as it must, to matters of great social concern."

c) The nature and extent of the limitation;
d) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[26]

If the government wishes to demonstrate that the restriction of the fundamental human right is constitutionally justifiable, section 36 (1) requires that the government must answer at least two questions satisfactorily. First, is the restriction taking place in terms of law of general application? Secondly, is the limitation reasonable and justifiable in an open and democratic society based upon human dignity equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation and whether there are less restrictive means to achieve the purpose? Section 36 does not prescribe that these factors must be considered in any particular order. All the factors relate to one another and may be considered in any order according to the courts predilections, convenience and insight.[27]

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[26] S 36 of the *Constitution of the Republic of South Africa*, 1996 (empasis added); The comparable provision in the Interim S. Afr. Const. (Act 200, 1993) ch. 3, § 33(1)(b)(bb) was section 33;[26] Regarding the wording of section 36 du Plessis 2001 *B.Y.U. L. Rev.* 439 at 447 asserts "the Constitutional Court's jurisprudence on the limitation of rights has sought to give content to the limitation clauses in two successive constitutional texts. Guidelines gleaned from jurisprudence on the construction of the limitation clause in the transitional Constitution have been written into the text of the limitation clause in the final Constitution. Paragraphs (a) through (e) of section 36(1) clearly derive from dicta of the President of the Constitutional Court, Arthur Chaskalson, in *S. v. Makwanyane*"; Steytler *Constitutional Criminal Procedure* at 18.

[27] *S v Manamela* 2000 3 SA 1 (CC) at [32] "It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."; Rautenbach *Bill of Rights compendium* at 1A-65.

7.3.1.1 Law of general application

If government action, legislation or a common law rule does not qualify as a "*law of general application*", then a violation of a fundamental human right cannot be saved, no matter how reasonable or justifiable. For a law to be recognized as "a law of general application" it must be general and apply to government and citizens alike. It must further also be accessible to the public. The last mentioned requirement also means that the law must be precise and not vague.[28] The law of general application test, therefore, requires generality, non-arbitrariness, publicity and precision.[29] In practice this four pronged test will be satisfied by the common law, most statutes and by most actions which flow from the implementation of statutes.[30]

In the case of *De Lille and Another v Speaker of the National Assembly*[31] the court dealt with the issue of whether an act, rule or law fails to meet the requirements of a law of general application. Parliament found that De Lille violated certain rules of parliamentary privilege and punished her by suspension. De Lille approached the court to set aside her suspension and to declare the resolution in terms of which she was suspended null and void. The Court found that the punishment violated section 57 (1) (a) of the Constitution and that it could not be justified under section 36 due to the fact that the rules of parliamentary privilege did not qualify as a law of general application. The court reasoned that :

The suspension of the first applicant fails the first leg of the limitations test because it did not take place in terms of law of general application. There is no

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[28] Woolman *supra* note 2 12-18.

[29] Woolman *supra* note 2 12-18; Also see Sunday Times v United Kingdom (1979) 2 EHRR 245 at 1 b) where the European commission held that the law should be accessible and that citizens should be able to ascertain the legal rules applicable in a given case. Citizens ought to be able to foresee the consequences of a given action.

[30] Woolman *supra* note 2 at 12-18; Dewaal, Currie and Erasmus supra note 2 at 148 " ...all forms of legislation (delegated or original) would qualify as "law", as would the common law...and the customary law".

[31] *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C).

law of general application which authorises such suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of parliamentary privilege does not qualify as a law of general application for purposes of section 36. It is not codified or capable of ascertainment. Nor is it based on a clear system of precedent. Therefore there is no guarantee of parity of treatment. It is essentially ad hoc jurisprudence which applies unequally to different parties. As O Hood Phillips and Paul Jackson Constitutional and Administrative Law 7th ed, point out "Offences against the authority or dignity of the House cannot be enumerated, the power to punish for contempt being discretionary. An act may be treated as a contempt even though there is no precedent of the offence". Accordingly the law of privilege fails the "law of general application" leg of the limitations test. [32]

The first and minimum requirement for the limitation of a fundamental human right is, therefore, that the limitation must be authorized by law and the law must be of general application.[33] The "*law of general application*" condition is also the expression of the basic principle of constitutional law known as the "rule of law". The rule of law principle determines that a) the state derives its power from the law and b) the law and rules of law, apply impersonally and not to particular people or groups of people.[34]

The case of *August v Electoral Commission* [35] is illustrative. The Constitutional Court considered the validity of the independent electoral commission's failure to take positive steps to allow prisoners to vote in South Africa's 1999 general election. The case arose from an appeal against the judgement of Els J of the Transvaal High Court which in effect held that the Electoral Commission had no obligation to ensure that awaiting trial prisoners and sentenced trial prisoners may register to vote.[36] Learned Judge Els stated that in his view there had neither been a commission or omission on the part of the Electoral Commission which resulted in the undue limitation to the constitutional right of prisoners to vote. [37] Bearing in mind the insurmountable logistical, financial and

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32 *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C) at [37].
33 De Waal, Currie and Erasmus *supra* note 2 at 147.
34 De Waal, Currie and Erasmus *supra* note 2 at 147 -149.
35 *August v Electoral Commission* 1999 (3) SA 1 (CC).
36 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [1].
37 *August v Electoral Commission* 1999 (3) SA (CC) at [8].

administrative difficulties and special measures to accommodate voters Judge Els dismissed the application with cost. Relying on the right to vote, the right to equality and the right to dignity, the applicants appealed to the Constitutional Court. The Constitutional Court did not agree with the High Court and *inter alia* found that *"the right to vote by its very nature imposes positive duties on the legislature and the executive"* and for this purpose the Constitution *"provides for the establishment of the Commission to manage elections"*.[38] The Constitutional Court stated that section 5 (1) (e) of the Electoral Commission Act [39] *"clearly imposes an affirmative obligation on the commission to take reasonable steps to ensure that eligible voters are registered."*[40] The Court held that the Commission's **inaction** had the effect of denying prisoners the right to vote as guaranteed by Section 19 (3) of the Constitution.[41] Due to the fact that the Commission's inaction was not authorised by *"the law of general application"*, the infringement of the fundamental human right to vote could not be justified in terms of section 36.[42]

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38 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [16].

39 The Electoral Commission Act 51 of 1996 section 5 (1) (e) determines that it is one of the functions of the Commission to " ...compile and maintain voters' rolls by means of a system of registering eligible voters by utilising data available from government sources and information furnished by voters".

40 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [16].

41 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [22] "The commission .... has not complied with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that. The applicants have accordingly established a breach of section 19 of the Constitution".

42 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [23]. There are obvious similarities between the state's positive duty to registered voters in August's case and the positive legal duty of the state to protect citizens against the violation of their right to be free from violence as guaranteed by section 12 (1) (c) of the Constitution: a) The right to be free from violence from either public or private sources also "*by its very nature imposes positive duties on the legislature and the executive". b) Section 2, 7, 12 (1) (c), and 205 of the Constitution*[42] *as well as* The Police Services Act [South African Police Service Act 68 of 1995.] also *"clearly imposes an affirmative obligation on the [state] to take reasonable steps to ensure that"* citizens are protected against the violent behaviour of non-state actors. c) Inaction by the state also has the effect of denying citizens the full enjoyment of the right to be free from all forms of violence. The question with regards to the state responsibility for human rights abuses committed by non-state actors is, therefore, whether inaction or an omission in the implementation of government internal security policy can ever be seen as 'law of general application". Due to the fact that the state's inaction or omission is not specifically authorised by any law, there is no possibility of ever justifying the infringement of the right to security as a result of the state's failure to act positively in terms of section 36, as it does not pass the

A law of general application must be accessible and precise so that those who are affected by it can ascertain the extent of their rights and obligations.[43] The law of general application requirement prevents state commissions, omissions and laws that are unequal or arbitrary in application from qualifying as valid and legitimate limitations of fundamental human rights.[44]

7.3.1.2 Reasonable and justifiable in an open and democratic society based on human dignity equality and freedom

Once the determination has been made that the law in question is a law of general application, then the court must consider whether the limitation is reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom, taking into account all the relevant factors including:

- the nature of the right;
- the importance of the purpose of the limitation;[45]

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law of general application test. Inaction or omissions in can never possess the qualities of generality, non-arbitrariness, publicity and precision as required to be acknowledged as a law of general application.

43 De Waal, Currie and Erasmus *supra* note 2 at 148.

44 *Id;* S v Makwanyane 1995 (3) SA 391 (CC) at [23] where Ackerman J explains why there can be no room for arbitrary laws in our new Constitutional state: "The idea of the constitutional state presupposes a system whose operation can be rationally tested against or terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor rules nor laws which are inherently arbitrary can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness, must also by its very nature, lead to unequal treatment of persons. Arbitrary action [or omissions] or decision making, is incapable of providing rational explanation as to why similar placed persons are in a substantially different way".

45 Woolman *supra* note 2 at 12-23 : " The first requirement of a reasonable restriction test is likely to be that the government restriction in question be a means for effecting a substantial and pressing government objective. This requirement involves a determination by the court as to whether the objective being pursued by government is sufficiently 'substantial and pressing' to justify a restriction of a fundamental right 'in an open and democratic society based on freedom and equality'. In effect the limitation clause is telling us that the rights enshrined in Chapter 3 may only be limited where and when the government objective behind the restriction is designed to reinforce the values which animate the constitutional project and

- the nature and extent of the limitation;[46]
- less restrictive means to achieve the purpose.[47]

To satisfy this part of the limitation test it must, therefore, be shown that the law or state action/omission in question serves a " *constitutionally-acceptable"* purpose and that there is sufficient proportionality between the harm done by the law, action or omission and the benefits it is designed to achieve.[48]

In *S v Makwanyane,*[49] the Constitutional Court adopted the following approach to the general limitation clause:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.....The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case to case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly why the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[50]

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our fundamental rights in the first place. At the most basic level those values include openness, democracy, freedom, and equality".

[46] Woolman *supra* note 2 at 12-24 asserts that "the government restriction must be designed to impair the right as little as possible .....since these rights protect values central to South Africa's constitutional enterprise restrictions on these rights should only be permitted if the government's interest is of overwhelming importance and if the sphere of activity protected by the right is disturbed as little as possible.

[47] S 36 of the *Constitution of the Republic of South Africa*, 1996.

[48] De Waal, Currie and Erasmus *supra* note 2 at 155.

[49] S v Makwanyane 1995 (3) SA 391 (CC).

[50] *S v Makwanyane* 1995 (3) SA 391 (CC) at [23]; *S v Manamela* 2000 3 SA 1 (CC) at [33].

The relevant factors mentioned in the *Makwanyane case*[51] and also in Section 36 are not an exhaustive list of what should be considered in the limitation enquiry. These factors are simply indications that must be used in the proportionality exercise.[52]

In *S v Bhulwana,*[53] the Constitutional Court held that :

....the Court places the purpose, effects and importance of the infringing legislation on one side of the scale and the nature and the effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the ground of justification must be. [54]

The reasonable restriction test should thus be driven by two primary concerns. On the one hand, for the rights enshrined in the Constitution to have real meaning the courts must be willing to defend them vigorously and subject restrictions to close scrutiny. On the other hand the state should be permitted sufficient room to craft legislation and undertake actions which serve pressing public interest.[55]

(i) Section 36 (1) (a): the nature of the right

Fundamental human rights differ in weight. Rights that are of particular importance to the constitution's ambition to create an open and democratic society based on human dignity, freedom and equality, will carry a great deal of

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[51] *S v Makwanyane* 1995 (3) SA 391 (CC).
[52] De Waal, Currie and Erasmus *supra* note 2 at 156.
[53] *S v Bhulwana* 1996 (1) SA 388 (CC).
[54] *S v Bhulwana* 1996 (1) SA 388 (CC) at [18].
[55] Woolman *supra* note 2 at 12-35; Davis Cheadle Hayson *supra* note 22 at 305 [the limitation clause] "provides for an express constitutional route to reconcile individual rights with a majoritarian imperative of parliamentary legislative programme. The legislature may prevail but not where it fails to justify on democratic grounds as specified within the constitution the reasons as to why it has encroached upon a guaranteed right. In this way the structure of the Constitution seeks to develop a form of democracy which reconciles the demands of majoritarian government with the preservation and promotion of certain fundamental values and commitments."

weight in the proportionality exercise.[56] It will, therefore, be more difficult to justify the limitation of such rights. The proportionality test requires that the harm done by the state's action, omission or law should be weighed against the benefits that the state's action, omission or law seeks to achieve. [57] The right to security and to be free from all forms of violence as guaranteed by section 12 (1) (c) is interlinked to all other human rights and central to the Constitution's ambition to create a society based on equality, freedom and human dignity and as such, significant weight must be attributed to this very important right.[58]

Although the 'nature of the right' mainly relate to the importance of the right in an open and democratic society based on human dignity equality and freedom it must be noted that this factor does not only involve the general importance of the right. It also involves the importance of the right for the particular victim and the way in wich the right has been violated in the particular set of circumstances.[59]

(ii) Section 36 (1) (b): the importance of the purpose of the limitation[60]

Reasonableness requires that the limitation of a fundamental right must serve a

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[56] Davis Cheadle Hayson *supra* note 22 at 319 "...the nature of the right and the closeness of its relationship to the objective of a democracy based on human dignity equality and freedom should influence the approach to the limitation of the right in question. Thus the closer the relationship the less generous should the court be in its decision to uphold a limitation of such right."

[57] De Waal, Currie and Erasmus *supra* note 2 at 156.

[58] A woman being raped or a child being abused, dignity and equality are seriously impaired. In applying the proportionality test and assessing the importance of the right to be free from all forms of violence in the overall constitutional scheme, it is inconceivable that any other right or societal benefit can outweigh the right to be free from violence.

[59] Rautenbach *supra note 27* at 1A-65; *First National Bank of SA Limited t/a Wesbank v CIR; Fisrt National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) at [100] "Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially."

[60] Davis Cheadle Hayson *supra* note 22 a t 319 " At this stage, the court engages in an investigation of the limiting law, its purpose and the extent to which the purpose can be said to be congruent with the objectives of the constitutional state, namely an open and democratic society based on human dignity, equality and freedom. Depending on the courts interpretation of the purpose of the law, the limitation enquiry could end immediately. The application of the fundamental constitutional valuer to the limiting law ensures that the political order remains committed to these values..."

purpose. Justifiability requires that it must be important in a constitutional democracy. The limitation of rights that does not serve the purpose of and contribute to a society based on human dignity, equality and freedom cannot be justifiable. A limitation must serve a legitimate purpose that all reasonable citizens would agree to be of sufficient importance to infringe the fundamental human right question.[61] Any purpose of sufficient importance to limit the right to be free from all forms of violence is incomprehensible. [62]

(iii) Section 36 (1) (c): the nature and extent of the limitation

This consideration requires that the government restriction must impair the right as little as reasonably possible. [63] Government must, even prior to initiating a plan of action take cognisance of the fact that their actions or omission may deleteriously affect fundamental human rights.[64] To determine whether the limitation does more damage than is reasonable for achieving its purpose requires a factual assessment of the extent of the limitation.[65]

(iv) Section 36 (1) (d): the relation between the limitation and its purpose

There must be a good and legitimate reason for the infringement. There must also be proportionality between the harm done by the limitation and the beneficial purpose it is meant to achieve. If the state action, inaction or law does not serve the purpose it intends to serve, then it cannot be a reasonable limitation on the

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61 De Waal, Currie and Erasmus supra note 2 at 158; Steytler *supra* note 26 at 23.

62 The right of an elderly person not to be tortured and maimed by a criminal non-state actor can surely never be limited in a constitutional state where human dignity, equality and freedom are valued and protected. ; See De Waal, Currie and Erasmus supra note 2 at 159 for a list of what the Constitutional Court considers legitimate purposes.

63 Woolman *supra* note 2 at 12-24; Davis Cheadle Hayson *supra* note 22 at 319 -320 " The court investigates whether the measure could cause harm to an individual which is not proportional to the objective sought. It also considers whether there is an alternative measure which could be less restrictive of the constitutional right in question."

64 Woolman *supra* note 2 at 12-24.

65 De Waal, Currie and Erasmus *supra* note 2 at 160.

right.[66] Those who wish to limit fundamental human rights must present evidence on how the limitation serves the purpose.[67] If the state action, inaction or law only marginally contributes to achieving its purpose or fail to achieve its purpose, it will not be adequate to qualify as a legitimate limitation.[68]

(v) Section 36 (1) (e): less restrictive means to achieve the purpose

The limitation of fundamental human rights must achieve benefits that are proportional to the cost of the limitation. The infringement will not be considered proportional if there are less restrictive, but equally effective means, to achieve the same purpose.[69] In *S v Manamela* [70] the Constitutional Court emphasised that the legislative choice regarding the best means to limit the right is influenced by considerations of cost, implementation, priorities of social demands and the need to reconcile conflicting interests, and that giving effect to the factors of "less restrictive means", the court must not limit the range of legitimate legislative choices.[71]

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[66] De Waal, Currie and Erasmus *supra* note 2 at 161; Steytler *supra* note 26 at 23.

[67] Rautenbach *supra note 27* at 1A-69.

[68] *Minister for Welfare and Population Development v Fitspatrick* 2000 3 SA 422 (CC) at [20] – [22] ; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) at [59].

[69] De Waal, Currie and Erasmus *supra* note 2 at 162; Steytler *supra* note 26 at 24.

[70] *S v Manamela 200 3 SA 1 (CC)* [96] –[97] "The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area. The Legislature when it chooses a particular provision does so not only with regard to constitutional rights, but also in the light of concerns relating to cost, practical implementation, the prioritisation of certain social demands and needs and the need to reconcile conflicting interests. The Constitution entrusts the task of legislation to the Legislature because it is the appropriate institution to make these difficult policy choices. When a court seeks to attribute weight to the factor of "less restrictive means" it should take care to avoid a result that annihilates the range of choice available to the Legislature. In particular, it should take care not to dictate to the Legislature unless it is satisfied that the mechanism chosen by the Legislature is incompatible with the Constitution. In our view, the question whether the purpose of a specific legislative provision can be achieved through less restrictive means requires a careful analysis of the purpose of the provision."

[71] Rautenbach *supra note 27* at 1A-71.

When dealing with "the right to be free from all forms of violence" as guaranteed by section 12 (1) (c), it is at first difficult to conceptualise limitation of this absolutely phrased fundamental right in terms of the general limitation clause. The right of women not to be raped or the right of a child not to be molested can surely never be limited "*in an open and democratic society based on human dignity.*" No statute will pass the 'reasonable and justifiable in an open and democratic society' test. But what about the common law?

Pieterse asserts:

Similarly uncertain is the extent to which the s 12(I) (c) right is capable of limitation. Whereas logic dictates that the state (or, where applicable, private individuals) cannot in all circumstances be held responsible for preventing the violation of this right by third parties ..... the phrasing of s 12(I)(c) in absolute terms and the fundamental importance of the interests it aspires to protect, make it rather hard to imagine the existence of a law of general application attempting to limit this right, let alone instances where such a law would be considered reasonable and justifiable under s 36(1) of the Constitution.[72]

Taking into account the nature of the s 36 enquiry and specifically the 'law of general application' threshold, it seems to me that 'limitations' necessitated by common sense could only successfully be accommodated by restricting the ambit of the right through interpretation, rather than under the general limitation clause.

It would therefore seem....that a flexible and contextual approach to the right is necessary also where it is alleged that the state did not comply with the duties imposed by the right.[73]

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[72] Pieterse 2002 *SALJ* 30-31.

[73] Pieterse *supra* note 60 at 30-31 "This of course poses more questions than it answers. Section 8(2) of the Constitution acknowledges that the application of fundamental rights to private parties might depend on the context in which a right is relied upon, but does no such thing in relation to the state. Specifically in instances of private violence, violations of s 12(I) (c) are of such a diverse and often unpredictable nature that uniform application of the right in all circumstances might yield unfair results".

The common law which is also "*law of general application*" does, in certain circumstances, comply with the general limitation clause. The following example is illustrative. In self defence, A shot and seriously injured B to prevent B from raping and killing her. Although B's section 12 (1) (c) right to be free from all forms of violence from either public or private sources has been violated, the violation is justified by the delictual ground of justification applicable to private defence. In this instance the limitation of B's fundamental human rights passes all of the section 36 criteria as the limitation occurred in terms of a law of general application (the common law) and the limitation in the circumstances will be viewed as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Taking into account the nature of the right and the valuable interest that it protects, the right to be "*free from all forms of violence from both public and private services*" can further be limited by a flexible, contextual approach taking all the relevant factors in a certain set of circumstances into consideration and by applying a flexible proportionality exercise that must include the normal common law tests of reasonableness, negligence and causation as determined by the courts.[74] This approach is scrutinized in detail hereafter in 7.3.2.

In considering foreign law as allowed by Section 39 (1) (c) of the Constitution,[75] the Canadian Charter of Rights is probably the best comparable foreign law as the South African limitations clause bears close resemblance to the Canadian limitation clause.[76] The Canadian Charter of Rights and Freedoms guarantees

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[74] *Carmichele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C).

[75] S 39 of the *Constitution of the Republic of South Africa*, 1996.

[76] Davis Cheadle Hayson *supra* note 22 at 305 " The [South African] model was drawn from the Canadian Charter of Rights and Freedoms. Accordingly the most useful comparative sources for understanding the operation of the general limitation clause is to be found in Canadian jurisprudence." Chaskalson *et al*, *Constitutional Law of South Africa*, Juta, 1996, footnote 3 at 12-5. The generality of these two clauses distinguishes the Canadian Charter and the South African Constitution from those constitutions which have individualised limitation clauses within particular rights and freedoms clauses and those constitutions which have no limitation

the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [77] The Canadian courts developed a two stage approach to determine the constitutional validity of any law[78] As in terms of the South African Constitution, whilst the onus is on the person whose rights are being infringed to prove this during the first stage of the enquiry, the onus is on the government during the second stage of the enquiry to prove that the requirements for limiting a fundamental human right have been met. [79] In this regard the leading case in Canadian jurisprudence is undoubtedly the case of *R v Oakes,* [80] where the Canadian Supreme Court spelled out when a limitation would be reasonable and justifiable (in keeping with the values of) in an open and democratic society based on human dignity equality and freedom. The limitation of a fundamental human right will pass this test only if:

- It is of sufficient importance to outweigh the constitutionally protected right;[81] and
- The means are proportional to the object of the limitation. [82]

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clause at all. Secondly both clauses limit the guarantees to such reasonable limits as can be justified in a democratic society.

77 The Canadian limitations test was first set out in *R v Oakes* [1986] 1 S.C.R 103 HYPERLINK www.lexum.umontreal.ca/csc-scc/en/pub/1986/vol1/html/1986scr1_0103.html 9 Sept. The German constitution's Article 19 that deals with the Restriction of Basic Rights determines that: (1) Insofar as under this Basic Law a basic right may be restricted by or pursuant to a law, the law must apply generally and not solely to an individual case. Furthermore the law must name the basic right, indicating the Article. (2) **In no case may a basic right be infringed upon in its essential content.**

78 Davis Cheadle Hayson supra note 22 at 305.

79 *R v Oakes* [1986] 26 DLR (4th) 200; *Re Southam Inc and The* Queen [1986] 26 DLR (4th) 479; *R v Bryant* [1985] 11 DLR 219.

80 *R v Oakes* [1986] 1 S.C.R 103.

81 *R v Oakes* [1986] 1 S.C.R 105 "Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

82 Basson *supra* note 2 at 53.

The central issues are, therefore, weight and proportionality. [83] To be of sufficient importance and, therefore, reasonable in outweighing the right concerned, the objective of the limitation must be directed to the realisation of goals that are of fundamental importance and motivated by concerns which are pressing and substantial in an open and democratic society. [84] To pass the proportionality test the following is required of a limitation:

- It must be rationally connected to its objective;
- It must infringe upon the fundamental right as little as possible;
- There must be proportionality between its effects and its objectives.[85]

Following the ***Oakes case,*** the Canadian Supreme Court in ***R. v. Chaulk*** set out the limitations test as follows: [86]

....The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s. 1 was set out by this Court in Oakes, supra:

1. The objective of the impugned [action or omission] provision must be of sufficient importance to warrant overriding a constitutionally protected right or

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[83] Basson *supra* note 2 at 53; Davis Cheadle Hayson supra note 22 at 311- 312 ; *Edwards Books and Arts Limited et al v R* [1987] 35 DLR (4th) 1 "Two requirements must be satisfied to establish that a limit is reasonable and justifiable in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a 'pressing and substantial concern". Secondly, the means chosen to attain these objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights.....the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court has been carefull to avoid rigid and inflexible standards."

[84] Basson *supra* note 2 at 53.

[85] *R v Oakes* [1986] 1 S.C.R 103 at 106 "Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be". Basson *supra* note 2 at 53; Woolman *supra* note 2 at 12-5-12-8.

[86] *R. v. Chaulk* [1990] 3 S.C.R. 1303 HYPERLINK http://www.hrcr.org/safrica/limitations/r_chaulk.html 9 Sept. 2004.

freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right or freedom in question as "little as possible"; and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

With regards to the proportionality exercise, the Canadian case *of Andrews v. Law Society of British Columbia* found that:

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. **The matter must**, as earlier cases have held, **involve a test of proportionality.** In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focusing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest. [87]

Recognising that constitutional practices cannot simply be transplanted from one system to another lessons can never-the-less be learned from the enforcement efforts of foreign courts involved in the process of realizing and protecting fundamental human rights on the ground. The Andrews case gives the following practical guidelines to the limitation of a constitutional right:

- a test of proportionality involving a sensitive balancing of many factors must be applied;

[87] *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 198 HYPERLINK www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/1989scr1_0143.html 10 Sept. 2004 (emphasis added).

- the test must be approached in a flexible manner;
- the analysis should be functional and consider a) the character of the fundamental human right in question, b) the constitutional and societal importance of the interests adversely affected, c) the relative importance to the individuals affected of the benefit of which they are deprived, and d) the importance of the state interest.

The above guidelines regarding proportionality, flexibility and reasonableness can also be applied fruitfully in South African constitutional jurisprudence.

Section 36(2) of the 1996 Constitution further precludes the limitation of any right entrenched in the Bill of Rights, except as provided in section 36(1) *"or in any other provision of the Constitution."* Section 36(1) is, therefore, not the sole constitutional source of conditions pursuant to which constitutionally entrenched human rights can be limited. Fundamental human rights can also be demarcated by internal modifiers[88] or specific limiting provisions and the effect of other fundamental human rights entrenched in the Bill of Rights.[89] With regards to the right to be free from all forms of violence being limited by other rights in the Constitution, it is hard to imagine any other right limiting the right of an individual not to be assaulted, raped or murdered. For instance, the Constitution guarantees the right to freedom of movement in section 21. If A lives in an area where violent crime is occurring on a daily basis and the only way to afford some form of protection to A and her neighbours is to block off the entrance to the street at night, then surely A's right not to be beaten or raped by far outweighs X's right to freedom of movement.

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[88] Section 26 (2) and 27 (2) of the *Constitution of the Republic of South Africa*, 1996 determines that "The state must take reasonable legislative and other measures, **within its available resources**, to achieve the progressive realisation of each of these rights." (emphasis added).

[89] du Plessis *supra* note 24 at 446 and 447.

7.3.2 *Limitation of the state's delictual liability for failing in its positive legal duty to protect citizens*

In dealing with the limitation of fundamental human rights, one usually deals with a statute or governmental action that infringes a particular right. When dealing with the right to be free from all forms of private violence as guaranteed by section 12 (1) (c), it is not government action or a law that encroaches the right but inaction or an omission and ineffective policy. Commentators typically draw a distinction between positive rights and negative rights. Negative rights comprise defensive claims against invasion by the government. The citizen can assert a negative right against the government that bars the government from violating the individual's fundamental human right through state action. Positive rights on the other hand, are rights that compel the state to act to protect a certain right. Here inaction on the part of the state leads to the impairment of the fundamental human rights. It has been stated that negative rights provide a shield while positive rights extend a sword, entailing claims that can be used to compel the state to afford substantive goods or services as an aspect of a positive constitutional legal duty. [90] Some rights like section 12 (1) (c) are "mixed rights" that contain both negative and positive elements.[91] The right to be free from all forms of violence from either public and private sources is negative in the sense that the state must itself refrain from invading the right but also positive in the sense that the state must act positively to prevent the impairment of the protected interest. When scrutinising the limitation of the state's responsibility for human rights abuses by non-state actors, the issue is the fact that the state failed to act positively to protect the right. The limitation of the right is not brought about by state action or statute, but through omission and ineffective policy or lack of policy implementation.

The Constitutional Court and Supreme Court of Appeals recently held that when it comes to the state's responsibility or liability for human rights abuses by non-

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90 Hershkoff 2002 *33 Rutgers L. J 799* at 809.
91 Hershkoff *supra* note 90 at 810.

state actors, state responsibility can be sufficiently limited by applying the normal common law principles that include the tests for reasonableness, negligence and causation.[92] Obviously the normal grounds of justification such as private defence, necessity, provocation and consent will still apply and serve as an indication that there are special circumstances involved in which the conduct that appears to be wrongful (due to the fact that an actual violation of the interest is present) is rendered lawful (since there is no violation of the norm).[93] The violation of the interest is, therefore, with regard to all the relevant facts not unreasonable or *contra bonos mores.* The ground of justification, therefore, excludes wrongfulness by eliminating the apparent wrongfulness of the state's conduct. Therefore, although our Constitution determines in section 11 that: "*Everyone has the right to life*",[94] the state cannot be held liable if a private person kills another person in defence of another person. The following is illustrative:

X (a criminal) illegally enters the private residence of Y and Z (husband and wife). X is armed with a knife and attempts to kill Y. Just before X can stab Y in the chest, Z shoots and kills X in defence of Y.

Similarly although section 12(1) (c) determines that "*Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources*", the state cannot be held liable when a private person acts in private defence. Where A hits B with a fist in the face, A's conduct at first sight seems to be unlawful and wrongful. B's right to

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92 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [49]; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) [19]; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) [35]; *Osman v United Kingdom* 29 E.H.R.R. 245 (2000) at 305.

93 Neethling, Potgieter and Visser *Law of Delict* 75-76: "In reality grounds of justification are nothing more than practical expressions of the *boni mores* or reasonableness criterion with reference to typical factual circumstances which occur regularly in practice ... Because ground of justification ... are merely embodiments of the legal convictions of the community, the existing grounds of justification do not constitute a *numerus clausus* ... in future the weighing of the interests of legal subjects by means of the reasonableness criterion may result in new situations justifying a defendants apparently wrongful conduct".

94 S 11 of the *Constitution of the Republic of South Africa*, 1996.

be free from all forms of private violence has been violated. However, should closer scrutiny reveal that A hit B to prevent B from shooting him with a gun, it becomes clear that in light of all the relevant facts and circumstances, A's conduct was not unreasonable or *contra bonos mores*.[95] On the other hand, if criminals rape innocent women on a widespread and pervasive basis in a particular suburb or area and it is obvious that the state knew or ought to have known about the situation, yet negligently failed to act positively to prevent harm, then the state must be held legally liable for the actions of the criminal non-state actors.

In *Carmichele v Minister of Safety and Security*, the Constitutional Court referring a judgement of the European Court of Human Rights[96] held that:

...**the combined effect of the strict tests of proximity and foreseeability provided limitation enough** to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious harm through truly negligent actions.[97]

And further:

fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. **This exercise ... will establish limits to the delictual liability of public officials....** [E]xcusing the respondents [the state] from liability.....would be inconsistent with our constitution and its values.[98]

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95 Neethling. Potgieter and Visser *supra* note 93 at 76: "...grounds of justification are still concerned with the basic question whether the actor's violation of an individual interest was reasonable in the particular circumstances and therefore lawful. In other words, grounds of justification are simply stereotyped examples of circumstances indicating that an act which at first sight appears to be wrongful is in fact lawful".

96 *Osman v United Kingdom* 29 E.H.R.R. 245 (2000) at 37.

97 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [47]-[48]; *Osman v United Kingdom* 29 E.H.R.R. 245 (2000): dictum at 305 applied.

98 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [49] (emphasis added): "...fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise ... will establish limits to the delictual liability of public officials".

Similarly in the case of *Minister of Safety and Security v Hamilton, the* Supreme Court of Appeals held that:

[Regarding] the spectre of the opening the "floodgates of litigation" and the resultant "chilling effect" of potential limitless liability on the efficient and proper performance by the police of their primary functions – relied heavily on by the appellant as ground of denying the existence of a legal duty ... our courts do not confine liability for an omission to certain stereotypes but adopt an open ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. **In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.**[99]

In the case of *Minister of Safety and Security v Duivenboden,* the Supreme Court of Appeals held that:

The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability. **That last consideration should not unduly be exaggerated, however, bearing in mind that the requirements for establishing negligence and a legally causative link provide considerable practical scope for harnessing liability within acceptable bounds.**[100]

In the case of *Van Eeden v Minister of Safety and Security,* the Supreme Court of Appeals in the words of Vivier ADP again asserted:

Counsel for the respondent submitted that the imposition of a legal duty on the police in the present case could open the 'floodgates' of litigation and result in limitless liability on public authorities and functionaries. He submitted that it was for this reason necessary first to set the limits to delictual liability and then to determine in each case whether the facts of that case fell within those limits. I do not agree with counsel's submissions. As has been pointed out earlier, our Courts do not confine liability for an omission to certain stereotypes but adopt an open ended and flexible approach to the question whether a particular omission or act should be held unlawful or not. **In deciding that question the**

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99 *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) [35] (emphasis added).

100 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) [19] (emphasis added).

requirements for establishing negligence and causation provide sufficient practical scope for limiting liability. [101]

The Constitutional Court and Supreme Court of Appeals could not have made it any clearer. By applying the test of reasonableness judged against the norms applying to and emanating from the express provisions of the South African Constitution, together with the tests of negligence,[102] proximity and causation, will suffice to limit the liability of the state.

7.3.3 Limitation of the right to security during a state of emergency

The suspension of fundamental human rights during a declared state of emergency must be distinguished from the ordinary limitation of rights in terms of section 36 of the Constitution. The latter is continuously applicable while derogation in terms of section 37 applies only in times of public emergency. During a state of emergency the justification for the suspension and limitation of fundamental human rights is necessity.[103]In other words the state or nation is threatened by destruction from either natural or human forces and this provides a ground of justification for the suspension of human rights. However, despite the existence of such circumstances, any arbitrary or uncontrolled exercise of state power remains irreconcilable with the values and norms of a constitutional state and the rule of law.[104] Accordingly, state power must be exercised within strict limits during times of emergency. Judicial control is the only effective means to ensure that the state acts in line with the norms and values embodied in the

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101 *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) at [22] (emphasis added).

102 In *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) the Court found that although the police owed the plaintiff's husband a legal duty to protect him from assaults by co-detainees and that "...a failure to have protected the deceased against assaults by his co-detainees would be considered as wrongful with reference to the legal convictions of the community...", they did not act negligently taking all the relevant circumstances into consideration. The state could thus not be held liable; Neethling 2001 *THRHR* 489–495.

103 As contained in the Constitutional law *maxim salus reipublicae suprema lex.*

104 Basson supra note 2 at 56.

Constitution[105] and that the state does not transgress the limits of the ground of justification.[106]

Section 37 of South African Constitution provides for decidedly strict conditions on which constitutionally entrenched rights can be suspended during a state of emergency.

Section 37 [107]*(4) and (5)* is of particular relevance and determines that:

37. (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that:

a. the derogation is strictly required by the emergency; and
b. the legislation
    i. is consistent with the Republic's obligations under international law applicable to states of emergency;
    ii. conforms to subsection (5); and
    iii. .....

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise

a. indemnifying the state, or any person, in respect of any unlawful act;
b. any derogation from this section; or
c. any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

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[105] The *Constitution of the Republic of South Africa*, 1996.
[106] *Id.*
[107] S 37 of the *Constitution of the Republic of South Africa*, 1996.

Table of Non-Derogable Rights

1 **Section Number**	2 **Section Title**	3 **Extent to which the right is protected**
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1) (d) and (e) and (2) (c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: • subsection (1)(d) and (e); • the rights in subparagraphs (i) and (ii) of subsection (1)(g); and • subsection 1(i) in respect of children of 15 years and younger

Certain fundamental rights may therefor never be suspended, not even during a state of emergency.

As is clear from the above Table, the right to life, the right to human dignity and the right not to be tortured or treated in a cruel, inhumane and degrading way are non-derogable.[108] Importantly the right of a child not to be abused is also a non derogable right.[109] The right of elderly people not to be tortured on their

[108] S 37 of the *Constitution of the Republic of South Africa*; 1996.
[109] S 37 of the *Constitution of the Republic of South Africa*; 1996.

farms, of women not to be raped and violated and of children not to be abused is so basic that not even a state of emergency can absolve the state of its positive legal duty to protect.

Even though section 12 (1) (c) is not specifically included in the list of non-derogable rights, the fact that the right to human dignity, the right to life, the right not to be tortured or treated in a cruel or inhumane way and the right of children not to be abused have been included in the list, still places a positive legal duty on the state to protect its citizens from the violent actions of non-state actors. It is unthinkable that, even in a state of emergency, a women's right not to be raped by a private individual can ever be limited.

7.4 State responsibility v limited state resources

Both international and national law places a legal duty on the state to ensure a safe and secure environment and the full enjoyment of the various human rights espoused in the Constitution and International Conventions to all within its jurisdiction.[110] There is a duty on the state to use all appropriate measures and to marshal the full apparatus of the government to fulfil the basic human rights in the Constitution.[111]

What if the state has very few or inadequate resources to comply with its legal obligations? What is the relation between legal duty and what a state can actually afford? Must the Constitution be interpreted with an eye to financial realities? Does government have a legitimate interest in conserving scares resources and is this interest relevant in assessing the reasonableness of government action? Budgetary constraints can surely seriously limit the states ability to act?

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[110] *Supra* chapters 3-6 in general.
[111] S 7(2) of the *Constitution of the Republic of South Africa*, 1996.

The right to security as expressed by section 12 (1) (c) of the South African Constitution[112] falls into the category of civil and political or first generation rights. First generation rights are also described as negative rights in the sense that these rights comprise defensive claims against invasion by the state. The right to security is one of the civil and political rights that also have a positive element in the sense that it can be used to compel the state to afford substantive protection services as an aspect of a positive constitutional legal duty.[113] This positive aspect of the right to security may in certain circumstances result in instructions to government to take positive action; involving delicate policy and financial considerations that potentially have budgetary implications.

Socio economic or second generation rights are positive in nature and almost inevitably give rise to budgetary implications for the state.[114] The various principles laid down in international law and in South Africa's evolving constitutional jurisprudence regarding the enforcement of socio economic rights

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[112] The Constitution of the Republic of South Africa; 1996.

[113] This aspect of the right to security is not unique as there are many other civil and political rights that have both positive and negative elements; Erasmus 2004 *Int'l J. Legal Info* at 246 and 247:"It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when the court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the court so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers.....As we have stated in the previous paragraph, many of the civil and political rights entrenched in the new Constitution will give rise to similar budgetary implications without compromising their justiciability. "

[114] Erasmus 2004 *Int'l J. Legal Info* at 244: "In the case of the enforcement of socio-economic human rights the matter is more complicated. In order to provide people with shelter, education, medical treatment and other basic socio-economic rights the state is called upon to become involved in a "positive" manner. The judicial remedy now becomes quite difficult and frequently results in instructions to government to take positive action;...The availability of resources is crucial to the enforcement of socio-economic rights..... As we have stated in the previous paragraph, many of the civil and political rights entrenched in the new Constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights have almost inevitably given rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the New Constitution does not result in the breach of the Constitutional Principles".

could be useful for purposes of answering the question of whether lack of resources is a legitimate defence when it comes to the enforcement of positive rights and minimum constitutional standards.[115]

This section explores the role of budgetary constraints with regards to the enforcement of the state's positive constitutional duties and then assesses the validity of a "lack of resources" defence in a modern constitutional state.

7.4.1 Positive international legal obligations and limited state resources

Socio economic rights are those second generation human rights that aim to secure to all members of a particular society a basic quality of life in terms of food, water, housing, education and health care.[116] Socio-economic rights differ from traditional civil and political rights in that civil and political rights protect the individual against abuses of power and arbitrary action by government authorities. The remedy will usually consist of a judicial order to restore respect for the right in question and the action complained of will be characterized as a violation of the Constitution. In the case of the enforcement of socio-economic human rights, the matter is more complicated. In order to provide people with housing, education, medical care and other basic socio-economic rights, the state must become involved in a positive manner. In the enforcement of these positive rights, the judicial remedy may result in instructions to government to take positive action that has resource implications.[117]

Are resource constraints a legitimate defense for the failure of the state to give effect to these rights in terms of international law?

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[115] By analysing the principles relevant to the enforcement of socio economic rights and budgetary constraints, the writer does not equate socio economic rights to civil and political rights at all, but merely investigates the principles applicable to positive rights and the potential defence of budgetary constraints, which might or might not be relevant and applicable to the state's positive legal duty to protect citizens from human rights abuses committed by non-state actors.

[116] Erasmus *supra* note 114 at 243.

[117] Erasmus *supra* note 114at 244.

The UN Committee on Economic Social and Cultural Rights asserted that:

Even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low cost targeted programmes.[118]

The Maastricht Guidelines[119] on Violations of Economic, Social and Cultural Rights determines that: [120]

In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, **full realization of the rights may depend upon the**

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[118] *ICESCR General Comment 3: The Nature of State Parties' Obligations (Art. 2 par.1 of the Covenant)* U.N. ESCOR, 5th Sess., Supp. No. 3, at 83, U.N. Doc. E/1991/23 (1990) at para. 10.

[119] The Maastricht Guidelines on Violations of Economic, Social and Cultural rights, in *International comm'n of jurists, economic, social and cultural right : a compilation of essential documents* 79, 82-86 (1997) [hereinafter Maastricht Guidelines]. The Maastricht Guidelines were developed by experts, invited by the same institutions that supported the Limburg Principles, who convened in Maastricht on the tenth anniversary of the drafting of the Limburg Principles; Chapman R 1998 *Tenn. Law Review* at 404: "According to the Maastricht Guidelines, the obligation to protect requires states to affirmatively prevent violations of economic, social, and cultural rights by third parties. The failure of a state to formulate and implement legislative measures and public policies when appropriate and necessary to safeguard the right to health for persons within its jurisdiction therefore constitutes a violation of the duty to protect".

[120] Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004; Brand 1998 HYPERLINK http://www.communitylawcentre.org.za/ser/esr1998/1998March_maastrich.php 25 Aug. 2004. Brand asserts that: "An important recent addition to this international jurisprudence is "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" ('the Maastricht Guidelines'). The Maastricht Guidelines were drafted by a group of experts, including legal academics, lawyers and members of the UN Committee on Economic, Social and Cultural Rights, in Maastricht (Netherlands) during January 1997. The guidelines are an elaboration and updating of the so-called "Limburg Principles" (The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights) drafted by a similar group of experts at Limburg University in 1986. They do not have any legal force, but are an authoritative summary of the state of international human rights law on the subject of economic, social and cultural rights, drawing together the ideas and opinions of the leading experts in the field. The Maastricht Guidelines, like the Limburg Principles, provide a conceptual guide to the interpretation of the rights protected in the ICESCR. They are particularly relevant to the interpretation of the socio-economic rights in the South African Constitution. In many respects the socio-economic rights in the Constitution are similar in their formulation and structure to the rights in the ICESCR. The Guidelines can therefore be fruitfully applied to the interpretation of some of the more difficult phrases and concepts related to these rights that are echoed in the South African Constitution".

availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, **resource scarcity does not relieve states of certain minimum obligations in respect of the implementation of economic, social and cultural rights.**[121]

The Maastricht Guidelines further provide that *"minimum core obligations"* must be fulfilled irrespective of the availability of resources[122]:

Violations of the Covenant occur when a state fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant." Such minimum core obligations apply **irrespective of the availability of resources of the country concerned or any other factors and difficulties.**[123]

It is clear that violations of the minimum conditions that a government must fulfill to be in compliance with its obligations under the Covenant will be considered violations regardless of the availability of resources. [124]

The **minimum core obligation** of the right to be free from all forms of violence must surely entail that society as a whole must experience safety and security as the norm and not as the exception. The minimum core of the right to be free from all forms of violence can be conceptualized as follows:

- Explicit constitutional recognition of the right to be free from all forms of violence including violence from non-state actors;

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[121] Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004 at 10 (emphasis added).

[122] Melish *Protecting Economic, Social and Cultural Rights* 185 (emphasis added).

[123] Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004 at 9 (emphasis added); *ICESCR General Comment 3: The Nature of State Parties' Obligations (Art. 2 par.1 of the Covenant)* U.N. ESCOR, 5th Sess., Supp. No. 3, at 83, U.N. Doc. E/1991/23 (1990) at para. 10 quoted in *Minister of Health and v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) [26]-[30] determines that: "In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort to use all its resources that are at its disposition in an effort to satisfy , as a matter of priority, those minimum obligations".

[124] Chapman 1998 *R Tenn. Law Review* at 409.

- establishment of an appropriate institutional framework and set of policies to ensure basic safety and security standards;[125]
- allocation of appropriate levels of resources, invested in ways that will result in the greatest likelihood of improving security standards for the largest number of persons;[126]
- providing security measures on a basis of non discrimination, including measures that will result in the protection of the most vulnerable groups i.e. poor women and children, from violence;[127]
- institution of effective measures to prevent the violation of the right to security;[128]
- prioritisation of efforts to rectify existing inequities and imbalances in the distribution of resources and accepting responsibility for financing critical security services particularly for poor, vulnerable, under serviced population groups by utilizing least costly and most affordable approaches available;[129]
- adopting positive measures to identify, control and prevent widespread and pervasive violations of the right to be free from violence against certain segments of society;
- development of a detailed plan with specific goals on the progress of the realisation of the right to be free from all forms of violence, and
- monitoring performance and attainment of core goals based on adequate independent data gathering and analysis.[130]

Failures to implement the minimum core of the right to be free from all forms of violence include the following:

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[125] Chapman *supra* note 124 at 410 in the context of the right to health.
[126] *Id.*
[127] Chapman *supra* note 124 at 410 in the context of the right to health.
[128] *Id.*
[129] Chapman *supra* note 124 at 411 in the context of the right to health.
[130] *Id.*

- failure to recognise the right to be free from all forms of violence from private parties;[131]
- insufficient expenditure or misallocations of public money on safety and security;[132]
- failure to focus government initiatives on rectifying existing imbalances in the provision of security services;[133]
- failure to protect women against widespread violence,[134] and
- failure to monitor properly through independent and verifiable statistics.

Section 15 of the Maastricht Guidelines that deals with "*Violations through acts of omission*" determines that:

Violations of economic, social and cultural rights can also occur through the omission or failure of states to take necessary measures stemming from legal obligations. Examples of such violations include:

... The failure to utilize the maximum of available resources towards the full realization of the Covenant.[135]

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[131] Chapman *supra* note 124 at 411 in the context of the right to health.

[132] Chapman *supra* note at 411: "Insufficient Expenditure or Misallocations of Public Money--In virtually every country, the government determines or influences the pattern of health care expenditure. In 1990, the world spent about $1700 billion on health care, equating to eight percent of the world product. Moreover, government policies and priorities frequently shape expenditures in the private sector. WHO has set a global target of five percent of GNP for health expenditures covering funding for hospitals, maternity and dental centers, clinics with a major medical component, national health and medical insurance schemes, preventive care, and family planning. Many countries spend considerably less than this five percent minimum. "In the poorest countries total health expenditure may be as low as $2 per person a year," most of which comes from private sources. Government expenditures on health, as a percentage of total expenditure, appear particularly insufficient in both low income and middle income countries".

[133] Chapman *supra* note 124 at 412 and 413: "Because a human right is a universal entitlement, its implementation is measured particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and vulnerable and brings them up to mainstream standards. A human rights approach necessitates both nondiscrimination and affirmative action to eliminate historical inequities and patterns of discrimination in access to health services".

[134] *Id.* at 405.

[135] Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004 at 15(e).

The obligation of progressive achievement exists independently of the increase in resources and it requires effective use of resources available.[136] "Available resources" refers to both the resources within a state and those available from the international community through international cooperation and assistance.[137]

A good test for countries that are extremely poor and that assert that they cannot fulfil their legal obligations to prevent human rights abuses by non-state actors will be to ask whether that country has employed **every effort** to use **all its resources** that are at its disposal in an effort to fulfil, **as a matter of priority,** its positive legal obligations. If a certain country "country A" receives annual revenue that places it as the thirtieth richest country in the world, yet country A has the highest murder and rape rate in the world placing them at the top of more than one hundred and ninety nations, then surely that country cannot be seen to be fulfilling its international legal obligation to prevent violations from occurring. Simple mathematics show that country A is not "employing **every effort** to use **all the resources** that are at its disposal in an effort to fulfil, **as a matter of priority,** its positive legal obligations" as there are one hundred and sixty poorer nations that prevent murders and rapes with less resources than country A.

Section 7 of the Maastricht Guidelines that deals with *"Obligations of conduct and of result"* determines that

The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. **The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right.** In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. **The obligation of result requires states to achieve specific targets to satisfy a detailed substantive standard.** With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed to at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.[138]

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[136] Principle 23 of the *Limburg Principles on the Implementation of the International Covenant On Economic, Social and Cultural Rights* U.N. Human Rights Committee, U.N. GAOR, 43rd Sess., Annex, U.N. Doc. E/CN.4/1987/17 (1987).

[137] *Id.* at Principle 26.

[138] Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004 at 7 (emphasis added) ; Section 11 that deals with *State policies* determines that: "**A violation of economic, social and cultural rights occurs when a State** pursues,

Applied to the right to security and to be free from all forms of violence, the obligation of conduct *me iudice* could involve the implementation of a plan of action aimed at reducing the number of rapes in South Africa, while the obligation of result requires that the South African rape rate is at the very least in line with nations with more or less the same resources as South Africa.

With regard to the question of resource contingency (according to which the state is only obliged to pursue the realization of socio-economic rights within the limits of its available resources), the Maastricht Guidelines confirm that:

- resource scarcity does not relieve states of certain minimum obligations in respect of the implementation of economic, social and cultural rights;[139]
- regardless of the availability of resources, a state must ensure a minimum standard of achievement and that everyone at least enjoys basic subsistence rights;
- "available resources" refers both to resources within a state and resources available in the international community;
- available resources must be used equitably and effectively and the maximum of available resources towards the full realization human rights;

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by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or **fails to achieve the required standard of conduct or result**. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant" (emphasis added).

139 Chapman *supra* note 124 at 409: "According to the Maastricht Guidelines, violations of the Covenant occur when a state fails to satisfy "minimum essential levels of each of the rights." The Committee on Economic, Social and Cultural Rights declared itself to be "of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party". While recognizing that resource constraints impose limitations, the Committee emphasized that each state party has an obligation to strive to ensure the widest possible enjoyment of the relevant rights. The Committee stated that "the obligations to monitor the extent of the realization, or more especially of the non-realization of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints". Similarly, the Committee emphasized that "even in times of severe resources constraints, ... the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes".

- in the use of available resources, priority must be given to groups in vulnerable and disadvantaged circumstances and certain results must be achieved.[140]

There is obviously a difference between socio-economic rights and civil and political rights. To ensure a citizen's basic human right to life and to be free from violence is a much higher priority than to ensure that a citizen has a house to live in. Budget allocation must be done with the nature of the right and the interest it aspires to protect in mind.

The International Covenant on Civil and Political Rights[141] determines that each state party to the convention *"undertakes to ensure to all individuals within its territory"* the rights recognized in the convention.[142] If one looks at the ordinary meaning of the term "ensure" as the Vienna Convention on the Law of Treaties[143] determine that one should, "*ensure*" is defined as *"make certain that something will occur or be so"*.[144] It is important to note that Civil and political rights such as the right to life and the right to security and to be free from violence are phrased in absolute terms without any specific "resource limitation" provisions.

Even if a state has very few resources there is still a legal obligation to prioritize its obligations and allocate those resources on a basis of non-discrimination[145].

In this respect, Farrior asserts that:

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[140] Brand 1998 HYPERLINK http://www.communitylawcentre.org.za/ser/esr1998/1998march_maastrich.php 25 Aug. 2004 at 2.

[141] *International Covenant on Civil and Political Rights* Dec. 16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), reprinted in 6 I.L.M. 368 (1967) ("ICCPR")

[142] *Supra* chapter 3 at 3.3.1

[143] *Vienna Convention on the Law of Treaties* 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980), reprinted in 8 I.L.M. 679 (1969) at art. 31 (*supra* at 3.3.1)

[144] Pearsall (ed) *Concise Oxford English Dictionary* 384

[145] Farrior *supra* note 7 at 303.

Non-discrimination is a fundamental principle that undergirds almost all human rights law. If resources are not allocated to protecting women, for example, from a host of possible abuses, I would argue that the allocation of resources are biased, and therefore the state may be told that it has failed to meet its obligation under international law. Even if a particular state's resources might be so few and the problems it faces so great that it simply cannot address those problems, and that we must therefore refrain from criticizing the state for its inaction. Such a situation has not, however, prevented states from being held responsible for allowing torture to continue, even in the case of very poor states with few of the resources necessary to take the steps to stem torture committed directly by state agents. Similarly, such situations should not prevent states from being held responsible for inaction in the face of for example, abuses of physical and mental integrity committed by private individuals.[146]

Importantly in the case of *Lantsov v Russia,* the human rights committee held that *"The state party should take effective measures to ensure that similar violations do not recur in the future ....by taking immediate steps ..."* the committee further expressly determined that ***"Lack of financial means cannot reduce this responsibility of states"*** to prevent violations from occurring.[147]

Under international law, the poorest state is still under an international legal obligation to make every effort and to use all the resources that are at its disposal in an effort to prevent violations at the hand of non-state actors, as a matter of priority.[148] Lack of resources does not relieve a state of its positive international legal duties. The state still has a responsibility to do all within its power to prevent violations from occurring. Whether the state has done all in its power with due

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146 The Maastrich Guidelines (Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004) at 20 dealing with *Individuals and groups* : "As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless".

147 *Lantsov v The Russian Federation* Views adopted on 26 March 2002, Communication No. 763/1997 (22 July 1996), U.N. Doc. CCPR/C/74/D/763/1997 at 9.2 (emphasis added); Farrior *supra* note 7 at 302.

148 The Maastrich Guidelines (Anon. 1997 HYPERLINK http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html 23 Jun. 2004) at 20

consideration to its available resources must be determined objectively by looking at all the relevant circumstances.

7.4.2 Positive national legal obligations versus limited resources

7.4.2.1 Socio-Economic Rights

The drafters of the Constitution's, concern with the socio-economic well being of the citizens of South Africa is evident in the entrenchment of a wide range of justiciable socio-economic rights in the Bill of Rights.[149]

The South African Constitution is also very clear that "*the obligations imposed by it must be fulfilled*".[150] The South African Constitution has further also been carefully drafted and apart from the general limitation clause, [151] there are a number of socio-economic rights that contain specific resource limitation provisions.[152] **Section 26** for example, determines in subsection 1 that: "*Everyone has the right to have access to adequate housing*" and in subsection 2 that:

The state must take reasonable legislative and other measures, **within its available resources**, to achieve the progressive realization of the right.

It seems that where the framers of the constitution intended for a right to be limited by available resources and wanted the courts to attach significant weight to resource constraints, they explicitly provided for such a limitation within the relevant section.

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[149] Chapter 3 of the *Constitution of the Republic of South Africa*, 1996; ; Liebenberg 2002 *Law Democracy and Development* at 159.
[150] S 2 of the *Constitution of the Republic of South Africa*, 1996.
[151] S 36 of the *Constitution of the Republic of South Africa*, 1996.
[152] Ss 25, 26, 27 of the *Constitution of the Republic of South Africa*, 1996.

Since 1994, there have been three major Constitutional Court cases that dealt with the issue of the enforcement of positive socio-economic constitutional duties and the states limited resources.[153] How did the Constitutional Court interpret the positive obligations of the state with regards to socio-economic rights in light of the states limited resources?

7.4.2.1.1 *Soobramoney v Minister of Health, KwaZulu-Natal*[154]

Mr. Soobramoney was a 41 year old unemployed diabetic who suffered from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke during 1996. In 1996 his kidneys also failed. His condition was irreversible and he was in the final stages of chronic renal failure. His life could be prolonged by means of regular renal dialysis. Mr. Soobramoney sought such treatment from the renal unit of the Addington State hospital in Durban. The hospital could, however, only provide dialysis treatment to a limited number of patients. The renal unit only had 20 dialysis machines available. Because of the limited facilities that were available for kidney dialysis, the hospital was unable to provide Mr. Soobramoney with the treatment he requested.[155] The Addington Hospital asserted that they did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure. The hospital requested to have its budget increased but the provincial health department denied its request due to the fact that no funds were available for this purpose.[156] Due to the shortage of resources, the hospital follows a set policy in regard to the use of the dialysis machines. Only patients who suffer from acute renal failure, which can be treated and remedied by renal dialysis are given automatic access to renal dialysis at the hospital. Those patients who, like Mr. Soobramoney, suffer from chronic renal failure which is irreversible are not admitted automatically to the renal programme. A set of guidelines has been drawn up and adopted to determine which applicants who have chronic renal failure will be given dialysis

[153] Liebenberg *supra* note 149 at 160.
[154] *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).
[155] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [1].
[156] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [2].

treatment.[157] Due to the fact that Mr. Soobramoney suffered from ischaemic heart disease and cerebro-vascular disease, he was not eligible for a kidney transplant and as such, not entitled to the treatment he requested.

Mr. Soobramoney made an urgent application to the High Court for an order directing the Addington Hospital to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. Mr. Soobramoney claimed that, in terms of section 27(3) of the 1996 Constitution which provides: "*No one may be refused emergency medical treatment*",[158] the Addington Hospital is obliged to make dialysis treatment available to him. The High Court dismissed the application and Mr. Soobramoney applied for leave to appeal against the judgement of the High Court to the Constitutional Court.

The Constitutional Court *inter alia* held that:

- Section 27(3) must be construed within the context that:

  the positive obligations imposed on the state by sections 26 and 27 with regard to access to housing, health care, food, water and social security **are dependent upon the resources available for such purposes**, and that the corresponding rights themselves are limited by reason of the lack of resources.[159]

  An unqualified obligation to meet these needs would not presently be capable of being fulfilled.[160]

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[157] Soobramoney v Minister of Health, KwaZulu-Natal 1998 SA 765 (CC) at [4].
[158] Soobramoney v Minister of Health, KwaZulu-Natal 1998 SA 765 (CC) at [7].
[159] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [11] (emphasis added).
[160] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [11]: "Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed".

- The state **conclusively proved that there were no funds available** to provide patients such as Mr. Soobramoney with the necessary treatment.[161]

- Each case must be judged in line with the principle of equality and non-discrimination.

  The appellant's case must be seen in the context of the needs which the health services have to meet, for if treatment has to be provided to the appellant it would also have to be provided **to all other persons similarly placed**. [162]

  If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment – and many of them, as the appellant does, would require treatment three times a week – the cost of doing so would make substantial inroads into the health budget. If this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased **to the prejudice of other needs which the state has to meet.**[163]

- The state has a margin of appreciation to decide on priorities and how money should be best spent. The provincial administration that is responsible for health services in KwaZulu-Natal has to make decisions

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161 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [23]: "In the Court a quo Combrinck J held that "[i]n this case the respondent has conclusively proved that there are no funds available to provide patients such as the applicant with the necessary treatment". This finding was not disputed by the appellant, but it was argued that the State could make additional funds available to the renal clinic and that it was obliged to do so to enable the clinic to provide life saving treatment to the appellant and others suffering from chronic renal failure. [24] At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public. In 1996–1997 it overspent its budget by R152 million, and in the current year it is anticipated that the overspending will be R700 million rand unless a serious cutback is made in the services which it provides. The renal unit at the Addington Hospital has to serve the whole of KwaZulu-Natal and also takes patients from parts of the Eastern Cape. There are many more patients suffering from chronic renal failure than there are dialysis machines to treat such patients. This is a nation-wide problem and resources are stretched in all renal clinics throughout the land. Guidelines have therefore been established to assist the persons working in these clinics to make the agonising choices that have to be made in deciding who should receive treatment, and who not. These guidelines were applied in the present case.

162 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [28].

163 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [28] (emphasis added).

about the funding that should be made available for health care and how such funds should be spent.

These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[164]

- The state has to manage its limited resources in order to address all socio-economic claims. There will be times when this requires of the state to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.[165]

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[164] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [29] and at [30] the Court held that: Although the problem of scarce resources is particularly acute in South Africa this is not a peculiarly South African problem. It is a problem that hospital administrators and doctors have had to confront in other parts of the world, and in which they have had to take similar decisions. In his judgment in this case, Combrinck J refers to decisions of the English courts in which it has been held to be undesirable for a court to make an order as to how scarce medical resources should be applied, and to the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to other patients to whom they might more advantageously be devoted.12 The dilemma confronting health authorities faced with such cases was described by Sir Thomas Bingham MR in a passage cited by Combrinck J from the judgement in R v Cambridge Health Authority, ex parte B:13: "I have no doubt that in a perfect world any treatment which a patient, or a patient's family sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. **Difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgement which the court can make**" (emphasis added).

[165] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [31]: "The State's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to ". . . human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity". The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society".

The Constitutional Court concluded that although the State has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution *in casu* it has not been shown that the state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations. [166]

7.4.2.1.2 Government of the Republic of South Africa v Grootboom[167]

This case specifically grappled with the positive legal duty of the state to provide access to adequate housing "*within its available resources*" as determined by section 26 of the Constitution.

Mrs Irene Grootboom and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for low-cost housing. Mrs Grootboom and the other respondents previously lived in an informal squatter settlement called Wallacedene. The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all and more than two-thirds earned less than R500 per month. About half the population were children and everybody lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. Mrs Grootboom lived with her family and her sister's family in a shack about twenty metres square.[168] After being evicted Mrs Grootboom went and sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. Mrs Grootboom's attorney wrote to the municipality describing the intolerable conditions under which his clients were living and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to Mrs Grootboom. The respondents were not

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166 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [36].
167 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
168 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [7].

satisfied with the response of the municipality and launched an urgent application in the High Court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.[169] The state was ordered to provide the respondents who were children and their parents with shelter. The judgement provisionally concluded that *"tents, portable latrines and a regular supply of water would constitute the bare minimum"*. The state challenged the correctness of the order.[170]

Referring to the relevant Constitutional provisions and their justiciabillity, the Constitutional Court *inter alia* held that:

- Section 26 places a positive obligation on the state to devise a comprehensive and workable plan to meet its obligations in terms of the Constitution, but that the obligation imposed upon the state is not an absolute or unqualified one.

  The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources."[171]

- The Constitutional court made it very clear that section 26(1) and 26 (2) "*are related and must be read together.*"[172] Yacoob J said:

  The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and limits the scope of the positive obligation imposed upon the state.....[173]

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169 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [11].
170 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [4].
171 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [11].
172 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) [34].
173 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) [21]; *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC) [11]: "What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependant

Interpreting a right in its context requires the consideration of two types of context. On the one hand, **rights must be understood in their textual setting.** This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.[174]

- While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable in South Africa has been put beyond question by the text of the Constitution.[175]

- Section 7(2) of the Constitution requires the state *"to respect, protect, promote and fulfil the rights in the Bill of Rights"* and the Courts are constitutionally bound to ensure that they are protected and fulfilled. The enforcement of socio-economic rights that inevitably have an effect on the state's resources must be carefully explored on a case by case basis.[176]

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upon the resources available for such purposes, and that the corresponding rights are limited by reason of the lack of resources".

[174] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [22].

[175] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [20]: "During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held: "[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability". The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion".

[176] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [20]: "Socio-economic rights are expressly included in the Bill of Rights; **they cannot be said to exist on paper only.** Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis".

- The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.[177]

- The fact that all the rights in the Bill of Rights are inter-related and mutually supporting needs to be taken into account in interpreting the socio-economic rights and in particular, in determining whether the state has met its obligations in terms of them. [178]

- The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. Where the relevant principle of international law binds South Africa, it may be directly applicable.[179]

- The internationally accepted *"minimum core obligation"* principle can be taken into account to determine whether the state acted reasonably or to determine whether the measures to realise the fundamental rights were reasonable.[180] The Court asserted that :

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177 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [23].

178 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [24]: "Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them".

179 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [26].

180 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [30] –[31]: "It is clear from this extract that the committee considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.....the concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a "minimum essential level" that must be satisfied by the state's parties. ...Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law".

There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. [181]

- The real question in terms of the Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable.[182]

In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. **The question would be whether the measures that have been adopted are reasonable.** It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[183]

- What constitutes reasonable legislative and other measures must be determined in light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government.

A reasonable programme, therefore, must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[184]

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[181] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [33].

[182] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [33].

[183] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [41] (emphasis added).

[184] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [39] and at [68]: "Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in

- Legislative measures by themselves are not likely to constitute constitutional compliance. [185]

- Government policies and programmes must be reasonable, both in their conception and their implementation. [186]

- The state has a margin of appreciation with regards to the specific measures it takes to give effect to a constitutionally entrenched right.

  The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive.[187]

- The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. [188]

- To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.[189]

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need are afforded relief, though not all of them need to receive it immediately. Such planning too will require proper co-operation between the different spheres of government".

185 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [42].

186 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [42].

187 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [41].

188 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [43]: "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review".

189 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [63]: "Section 26 requires that the legislative and other measures adopted by the State are reasonable. To determine whether the nationwide housing programme as applied in the Cape Metro is

Those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[190]

- To be reasonable, human rights must be realised progressively. Retrogressive measures or a policy that results in retrogression will be viewed as unreasonable. [191]

- The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26.[192]

- Section 26 does not expect more of the state than is achievable within its available resources and that, as far as the rights of access to housing, health care, sufficient food and water and social security for those unable to support themselves are concerned, the state is not obliged beyond available resources or to realize these rights immediately. [193]

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. [194]

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reasonable within the meaning the section, one must consider whether the absence of a component catering for those in desperate need is reasonable in the circumstances. It is common cause that, except for the Cape Metro land programme, there is no provision in the nationwide housing programme as applied within the Cape Metro for people in desperate need".

190 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [43].
191 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [45].
192 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [66].
193 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [94].
194 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [46].

- Despite the above and the very specific resource limitation provision contained in section 26, the Constitutional Court was careful to point out that:

  I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution that expressly provides that the state is not obliged to go beyond available resources or to realize these rights immediately. **I stress however, that despite these qualifications, these are rights, and the constitution obliges the state to give effect to them. This is an obligation that the courts can, and in appropriate circumstances must enforce.**[195]

The Constitutional Court concluded that the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need. [196]

The Constitutional Court ordered the state to devise and implement within its available resources, a comprehensible and coordinated programme to realise the right to adequate housing progressively.[197]

7.2.1.3 Minister of Health and others v Treatment Action Campaign and others [198]

The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections.[199] Government, as part of an array of responses to the AIDS pandemic, devised a programme to deal with mother-to-child transmission of HIV

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[195] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) [93] –[94] (emphasis added).
[196] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [69].
[197] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [99].
[198] *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC).
[199] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [3].

at birth and identified Nevirapine as it's drug of choice for this purpose. The government programme imposed restrictions on the availability of Nevirapine in the public health sector. The state decided to confine the provision of Nevirapine in the public sector to the research sites and their outlets. An important reason for this decision was that the government wanted to develop and monitor its human and material resources nationwide for the delivery of a comprehensive package of testing, counselling and dispensing of Nevirapine and follow-up services to pregnant women attending public health institutions.[200]

The applicants contended that these restrictions were unreasonable when measured against the Constitution, which commands the state and all its organs to give effect to the rights guaranteed by the Bill of Rights. The second main issue also arose out of the provisions of sections 27 and 28 of the Constitution determines that:

27 (1) Everyone has the right to have access to – (a) health care services, including reproductive health care; (2) the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

28 (1) Every child has the right – . . . (c) to basic nutrition, shelter, basic health care services and social services. It is whether government is constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country. [201]

Regarding the enforcement of the state's positive legal duties in terms of the Constitution, the Constitutional Court held *inter alia* that:

- The question is whether the state has shown that the measures adopted by it to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.[202]

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200 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [14] – [15].

201 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [4] – [5].

202 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [25]: "The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are. The question is whether the applicants have shown that the measures

- The Constitution does not expect more of the state than is achievable within its available resources.[203]
- The international concept of "minimum core obligation" or "minimum core service" does not mean access to a core service immediately. The "minimum core" is only one of several factors that may be taken into account in determining the main question of whether the measures taken by the state to realise the constitutional right are reasonable.[204]
- The main issue is that the State is obliged to take reasonable measures to eliminate or reduce the large areas of severe deprivation that afflict our society progressively. [205]
- The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the state to take measures to meet its

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adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution".

203 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [32]: "It is also made clear that "[s]ection 26 does not expect more of the State than is achievable within its available resources" and does not confer an entitlement to "claim shelter or housing immediately upon demand" and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, the State is not obliged to go beyond available resources or to realise these rights immediately".

204 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [34] and [35]: "Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1). A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis".

205 *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [36]: "The State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the State are reasonable. As this Court said in Grootboom, "[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations" and at [93]: "In the present case this Court has the duty to determine whether the measures taken in respect of the prevention of mother-to-child transmission of HIV are reasonable".

constitutional obligations and to subject the reasonableness of these measures to evaluation.

Such determinations of reasonableness may, in fact, have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[206]

- The applicants' contentions raise two questions, namely, is the policy of confining the supply of Nevirapine reasonable in the circumstances and does government have a comprehensive policy for the prevention of mother-to-child transmission of HIV.[207]
- A programme for the realisation of socio-economic rights must be balanced and flexible and make appropriate provision for attention to crises and to short, medium and long term needs. [208]
- A programme that excludes a significant segment of society cannot be said to be reasonable.[209]

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[206] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [38] and at [37]: "It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in Soobramoney: The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society".

[207] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [47].

[208] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [68] and at [80] – [81]: "Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of Nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government in so far as it confines the use of Nevirapine to hospitals and clinics which are research and training sites, constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution. Implicit in this finding is that a policy of waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites is also not reasonable within the meaning of section 27(2) of the Constitution".

[209] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [67] – [70]: "The policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission

- The state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of all of the socio-economic rights entrenched in the Constitution.[210]

The constitutional Court concluded that the rigidity of the government's approach affected its policy as a whole and that it was not reasonable to restrict the use of Nevirapine to the research and training sites and further, that the policy as a whole will have to be reviewed. The Court ruled that the government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.[211]

From the above it is clear that even with regards to socio-economic rights where there are express resource limitation provisions, the state is still obligated to give effect to them. Because of the judiciaries knowledge and understanding of the Constitution, it is important that in line with the principle of separation of powers ,the judiciary must enforce and uphold the values embodied in our Constitution, even if they are in contradiction with the policy of the other two branches of

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and the need to provide access to health care services required by those who do not have access to the sites.....In Grootboom (supra) this Court held that: "[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right." .....A programme for the realisation of socio-economic rights must "be balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable." .....In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences".

[210] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [94]: "... And besides the pandemic, the State faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the State is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the State by the Constitution".

[211] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [95].

government or even if it has the effect that the executive and legislative branches of government must act positively to implement the judiciaries rulings.[212]

7.4.2.2 Civil and political rights

The judicial enforcement of many first generation human rights or civil and political rights included in the South African Constitution will give rise to similar budgetary implications for the State as in the three cases that dealt with socio-economic rights discussed above. [213]

One recent example where the issue of budgetary constraints arose with regards to the enforcement of civil and political rights is the case *of August and Another v Electoral Commission and Others.*[214]

7.4.2.2.1 *August and Another v Electoral Commission and Others.*[215]

The case dealt with the constitutionally entrenched voting rights of prisoners. [216] The 1996 Constitution provides that one of the values on which the Republic of South Africa is founded is *"[u]niversal adult suffrage"* and *"a national common voters roll".* [217] Section 19 (3) of the Constitution further guarantees that *"[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; . . ."* . Accordingly, if Parliament seeks to limit the unqualified right of adult suffrage entrenched in

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[212] Barak 2002 *116 Harv. L Rev. 16* at 116 -145; In the Canadian case of *McKinney v Univ of Guelph* [1990] 3 SCR 229 at 305 it was held that: "This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system **where the courts' knowledge and understanding affords it a much higher degree of certainty."** (emphasis added).

[213] Erasmus *supra* note 114 at 246: "It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when the court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits".

[214] *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC).

[215] *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC).

[216] *August v Electoral Commission* 1999 (3) SA 1 (CC) at [1].

[217] Section 1 (d) of the founding provisions.

the Constitution, it will be obliged to do so in terms of a law of general application which meets the requirements of reasonableness and justifiability as set out in section 36.[218] No act was promulgated to limit the rights of prisoners to vote. The applicants approached the Commission to ensure that as prisoners they would indeed be enabled to register and vote. [219] The Commission undertook *"to do everything within its capacity to enable prisoners to register and to vote should the Court's decision be to that effect."*[220] Learned Judge Els of the High Court stated that in his view there had been neither a commission nor an omission on the part of first and second respondents which resulted in undue limitation to the constitutional right of prisoners to vote. Bearing in mind what he regarded as insurmountable logistical, financial and administrative difficulties and on the basis that special measures to accommodate voters should be reserved for those voters whose predicament was not of their own making, Els J dismissed the application.

The High Court, therefore, effectively held that the Electoral Commission had no obligation to ensure that awaiting trial and sentenced prisoners may register and vote in the general elections.

On appeal the Constitutional Court *inter alia* held that:

- The right to vote by its very nature imposes positive obligations upon the legislature and the executive. This affirmative obligation on the Commission requires that the commission must take reasonable steps to ensure that eligible voters are registered.[221]

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218 *August v Electoral Commission* 1999 (3) SA 1 (CC).at [3].
219 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [6].
220 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [7].
221 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [16]: "A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process. For this purpose the Constitution provides for the establishment of the Commission to manage elections and ensure that they are free and fair.15 The Constitution requires the Commission to be an independent and impartial body, 16 with such additional powers as are given to it by legislation. Section 5(1)(e) of the Electoral Commission Act17 (the Commission Act) therefore provides that it is one of the functions of the Commission to

- Legal limitations on constitutional guarantees should be interpreted **in favour of enfranchisement rather than disenfranchisement.**[222]

- The state breaches its positive legal duty when it fails to take reasonable practical steps to ensure that Constitutional rights are given effect.

  In reality no provision has been made either in the 1998 Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote. **The Commission accordingly has not complied with its obligation to take reasonable steps** to create the opportunity to enable eligible prisoners to register and vote **..... The applicants have accordingly established a threatened breach of section 19 of the Constitution.**[223]

- Actual claims timeously asserted cannot be denied on the basis of hypothetical potential future resource implications.

  It was also contended that if special arrangements were to be made for prisoners, then the resources of the Commission would be strained to bursting point by the need to make equivalent arrangements for citizens abroad, pilots, long-distance truck drivers, and poor persons living in remote areas without public transport.....We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.[224]

- the task of the Constitutional Court is to ensure that fundamental rights and democratic processes are protected.[225]

"(e}...compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters".

222 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [17]: "Universal adult suffrage on a common voters roll is **one of the foundational values** of our entire constitutional order. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement".

223 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [22]: "The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that."

224 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [30].

225 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [33].

- To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the Constitution to nothing.[226]

- The state has a margin of appreciation regarding what exact steps are appropriate to give effect to a fundamental human right in a specific set of circumstances. [227]

The Constitutional Court concluded that Mr. August and other prisoners have been deprived of their constitutionally entrenched right to vote and despite the financial implications, ordered the commission to make the necessary arrangements to enable them to vote.[228]

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[226] *August v Electoral Commission* 1999 (3) SA 1 (CC) at [34]: "That a right requires an appropriate remedy was trenchantly affirmed by Centlivres CJ in *Minister of the Interior and Another v Harris and Others*: "As I understand Mr Beyers' argument the substantive right would, in the event of such an Act having been passed, remain intact but there would be no adjective or procedural law whereby it could be enforced: in other words the individual concerned whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in sec. 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*".

[227] *August v Electoral Commission* 1999 (3) SA 1 (CC) at [39]: "This Court does not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected..... The determination of what arrangements should be made remains a matter pre-eminently for the Commission. It is important that there should be certainty as to what these arrangements will be. In light of the fact that this Court is not in a position in the circumstances of the present case to give specific direction as to what is to be done, it is appropriate that the Commission be required to indicate how it will comply with the order that has been made".

[228] *August v Electoral Commission* 1999 (3) SA 1 (CC) at [37].

7.4.2.2.2 *Rail Commuter Action Group v Transnet* [229]

On Friday, 8 June 2001 at approximately 19h00, Juan van Minnen, then a final year electronic engineering student at the Cape Technikon, was a passenger in a first-class carriage of a suburban commuter train on the Cape Town-Simon's Town line, travelling from Rondebosch to Fish Hoek, where he resided. Somewhere between Kenilworth and Wynberg stations, Juan was repeatedly stabbed by an unknown person. As a direct consequence of the injuries sustained by him, he died the following day. It is common cause that this incident occurred during the so-called "evening off-peak period", after 18h00 when numbers of security staff on commuter trains in the Western Cape are significantly reduced and ticket sales and checks not generally carried out.[230] The Rail Commuter Action Group was established after Juans death at a public meeting with the objective of taking Transnet Limited and some of its business divisions to task about the crime on trains and to impress on them that the public had had enough of violent crime on trains and wanted immediate action. The applicants brought an application asking for both declaratory and mandatory relief against the respondents, based on the legal duty owed by the respondents to the rail commuters in the Western Cape to protect the lives and property against the criminal activities of third parties on commuter trains and stations. The respondents *inter alia* raised a resource constraints defence and averred that courts should be reluctant to grant relief that could have hidden financial consequences. [231]

The Court inter alia held that:

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229 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C).

230 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 526 and 527.

231 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 575: "In summary, the defence raised by the first and second respondent against the relief sought by applicants (on the assumption that the latter had discharged the onus of showing that there was a legal duty imposed upon respondents) turned on the reasonableness of the Service Agreement. Significant amounts of money had been employed for security purposes and a court should be reluctant to impose its conception of safety upon first and second respondents and grant relief which could have hidden financial consequences".

- There is a positive legal duty on the state to ensure that commuters are free from all forms of violence.[232]

  In the context of the present dispute, commuters enjoy a constitutional right to life (section 11), as well as a constitutional right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources (section 12(1)(c)).[233]

- The main issue is whether the measures taken by the state to give effect to its constitutional obligations are reasonable.

  A legal duty imposed upon first and second respondents should be adjudicated thus: In the light of all the circumstances of the particular case, have these respondents infringed the interest of the applicants in an unreasonable manner? Reasonableness, therefore, becomes the critical concept.[234]

- The state has a margin of appreciation to adopt reasonable measures to comply with its statutory and constitutional duties.[235]

  This Court is not required to prefer a particular plan above another. It is enjoined to test whether the manner in which first and second respondents have conducted the operation of the commuter rail service in the Western Cape is reasonable when viewed within the context of the evidence which has been placed before it. In this process of adjudication, the Court applies a concept of reasonableness. If the conduct of the respondents fails the test of reasonableness, a remedy must be fashioned.[236]

- Polycentricity cannot be elevated to a jurisprudential mantra that will have the effect of rendering courts impotent to enforce legal duties that have unpredictable financial consequences [237]

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232 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 572 – 573.

233 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 573.

234 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 579.

235 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 579.

236 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 579.

237 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 575: "The problems of polycentricity must clearly act as important constraints upon the adjudication process, particularly when the dispute has distributional consequences. But polycentricity cannot be elevated to a jurisprudential mantra, the articulation of which serves, without further analysis, to render courts impotent to enforce legal duties which have unpredictable consequences".

- Resource constraints on their own are not a sufficient defence against failing to comply with Constitutional duties.[238]

7.4.2.2.3 Section 12 (1) (c) v limited state resources

The Constitutional Court held that, when determining whether the state breached its positive constitutional duty to protect, a proportionality exercise must be applied to determine whether the state was under a ***legal duty to act positively to prevent harm to the plaintiff and if it was reasonable to expect of the State to have taken positive measures to prevent the harm***. The Court's finding of what is reasonable depended on the Court's perception of the legal convictions of the community.[239] The Constitutional Court and Supreme Court of Appeals held in essence that the test is one of reasonableness to determine whether there was a legal duty on the state to act to prevent harm in terms of section 12 (1) (c).[240]

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[238] *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 583: "In summary, despite the respondents' contentions to the contrary, the financial evidence placed before this Court provides, in our view, no support for the argument that affordability alone is an obstacle to the granting of prayer 5 in respect of the first, second and third respondents".

[239] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [54]–[55]; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) [9]: "Our common law employs the element of wrongfulness ... to determine liability for delictual damages caused by an omission. ... The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgement based, *inter alia*, upon its perceptions of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of many factors".

[240] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [54]–[55]; *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) 579H–I; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) [9]–[11] at 395I–396E/F; at para. C9: "the court asserted: "The South African Police Service owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing harm and that they negligently failed in that duty"; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) [12] at 441E-442A; *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T) at 585A–J and 586A–J; Neethling and Potgieter 2002 *THRHR* at 272.

In the cases that dealt with the judicial enforcement of socio-economic rights, and where the Court sought to find answers to the question whether lack of resources is a legitimate defence, the Constitutional Court also held that in essence the main issue is one of reasonableness.[241] Were the measures adopted by the government to fulfil its constitutional obligations reasonable in the specific set of circumstances?

The validity of a "cost defence" is a matter of great significance when it comes to civil rights litigation, especially with regards to the state's positive constitutional duties as in the case of section 12 (1) (c).[242] To determine whether the state's actions are reasonable in the context of the state raising a "resource constraints" defence when accused of not fulfilling its positive constitutional obligations, the Constitutional Court laid down a number of principles which can be fruitfully applied with regards to the section 12 (1) (c) proportionality exercise to ascertain reasonableness.

The principles to be considered in determining reasonableness when faced with a state resource constraints defence *inter alia* are:

- there is a balance between goal and means.

  The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.[243]

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241 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at 33; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [36] – [38]; Erasmus *supra* note 114 at 248 –249: "According to the Court the key to justiciability of socio-economic rights is the standard of reasonableness. Though a considerable margin of discretion must be allowed to the State in deciding how to fulfill its socio-economic obligations, the reasonableness of the measures that it adopts can be evaluated by a court..... Reasonableness will be determined by the facts of each case and the onus will be on the government department involved to provide the necessary evidence and to argue the reasonableness of its legislative or executive measures under the conditions prevailing in the particular instance. This approach adds considerably to the notion of justiciability of socio-economic rights and drawing appropriate boundaries".

242 Kritchefsky *Rutgers L.J* 485: "The validity and form of a cost defense is a matter of great significance in civil rights litigation".

243 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [46].

- reasonableness must be understood in the context of the Bill of Rights as a whole.[244] The Constitutional Court asserted that:

  [The] Proportionality [exercise to determine reasonableness] is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the spirit, purport and objects of the Bill of Rights and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality, and freedom and in which the government has positive duties to promote and uphold such values.[245]

- the text of the Constitution must be understood in plain language in its constitutional setting.[246]

  Section 12(1) (c) is phrased in absolute terms without any textual resource constraint limitation provision as in the case of the socio-economic rights discussed above. It must be assumed that the framers of the Constitution intended that the right can only be limited in terms of the general limitation clause and that resource constraints with regards to the right *"to be free from all forms of violence from either public or private sources"* were not to be given any special weight as in the case of socio-economic rights.

- The fact that all the rights in the Bill of Rights are inter-related and mutually supporting needs to be taken into account in interpreting

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244 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [22].

245 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) [43] ; Van der Walt *supra* note 128 at 152. It was pointed out within the parameters of the common law in *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318E-H.

246 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [11] ; [22] and [44]; *S v Zuma* 1995 (2) SA 642 (CC) at [18] " ...a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to "values" the result is not interpretation but devination."; Meyerson *Rights limited at xxvi;* Steytler *supra* note 26 at 8.

fundamental human rights, and in particular, in determining whether the state has met its obligations in terms of them. [247]

- the state has a margin of appreciation with regards to the specific measures it takes to give effect to the constitutionally entrenched right to be free from all forms of violence and to decide on priorities and how resources should be best allocated.[248] The Constitutional Court held that:

> The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive.[249]
>
> Government has a right to provide security services as it sees fit and to allocate resources in a way that best serves its constituents. The Constitution does not empower the courts to second-guess state officials charged with the difficult task of allocating limited public funds.[250] A court should be reluctant to intervene in the determination of whether the measures adopted by the state to comply with constitutional standards were reasonable, as a wide range of measures could be reasonably adopted by such respondents. When seeking to analyse whether the state

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247 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [24]: "Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them.

248 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [29] and [30]; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [41]; *August v Electoral Commission* 1999 (3) SA 1 (CC) at [39].

249 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [41].

250 Kritchefsky *supra* note 242 *at 487 and accompanying footnote 26;* Dandridge v. Williams, 397 U.S. 471, 487 (1970); Doe v. Milwaukee County, 903 F.2d 499, 505 (7th Cir. 1990) (holding that a defendant county's decisions regarding the allocation of funds to investigate abuse complaints was rational, and finding that the State must take considerations such as budgetary constraints into account); Westbrook v. City of Jackson, 772 F. Supp. 932, 942-43 (S.D. Miss. 1991) (holding that evidence suggested that "economic realities and practicalities . . . in light of budgetary constraints faced by the City", and not discrimination, governed the differential provision of city services; while the city may have found money by cutting other programmes, the determination of how to spend funds was in the city's discretion; N.Y. State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973) finding that allocation of resources among conflicting needs is a matter for the State legislature as long as there is a rational basis for the legislature's decision and other constitutional rights are not violated.

complied with its constitutional obligations, a court should not seek to prefer one set of possible (reasonable) measures above another.[251]

There are, however, limits to government's discretion. Some interests outweigh finances. Budgetary concerns cannot justify invidious discrimination that violates fundamental constitutional norms pertaining to safety and security.[252]

- the state has a duty to devise and implement a *"comprehensive and workable plan"* aimed at eliminating or at least substantially reducing high levels of violent crime to ensure the right to security and to meet its obligations in terms of the Section 12 (1) (c) of the Constitution.[253]

  Thus, a co-ordinated state ..... programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chapter 3 of the Constitution.[254]

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[251] *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 579.

[252] Kritchefsky *supra* note 242 at 487 and accompanying footnote 27; West v. Va. Dep't of Corr., 847 F. Supp. 402, 407 (W.D. Va. 1994) ruling that limited resources did not permit a State to deny female offenders the opportunity to participate in a "boot camp" programme because that argument would justify denying any educational opportunities to female inmates; *Bukhari v. Hutto, 487 F. Supp. 1162, 1172 (E.D. Va. 1980)* sympathizing with the State's defense of limited resources in response to female inmates' equal protection claim, but finding that "such seemingly practical considerations" cannot justify operating a prison system in an unconstitutional manner; Glover v. Johnson, 478 F. Supp. 1075, 1078 n.2 (E.D. Mich. 1979) (holding, in response to female inmates' equal protection claim, that cost considerations cannot justify unwillingness to operate a prison system in a constitutional manner because the "state has constitutional obligations to its individual prisoners which override other, economic considerations).

[253] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [11] ; [39]; [40]; [42] ; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [47].

[254] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [40]: "Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the State's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met".

Government policies and programmes must be reasonable both in their conception and their implementation.

The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.[255]

The test must be whether the state has employed every effort to use all the resources that are at its disposition in an effort to fulfil, as a matter of priority, its positive legal obligations.[256] The burden of proof is on the state to show that the measures to fulfill its positive legal obligations are reasonable.

- to be reasonable the state is obliged to act to achieve an intended result, legislative measures in themselves do not constitute reasonableness or constitutional compliance [257]

  Mere legislation is not enough. **The state is obliged to act to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.**[258]

- the measures taken to ensure the right *"to be free from all forms of violence from either public or private sources"* must be balanced and flexible and make appropriate provision for short, medium and long term needs [259]

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255 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [42].
256 *Supra* at 7.4.1.
257 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [42]; *August v Electoral Commission* 1999 (3) SA 1 (CC) at [22].
258 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [42] (emphasis added).
259 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [41] and [43] ; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [68] and [80] - [81].

This requirement entails that performance must be monitored through adequate independent data gathering and analysis to ascertain whether the goals set have in fact been achieved and to change course or adapt the measures if necessary.[260] Key target indicators might be crime rate and the incidence of specific types of crimes compared on a quarterly and yearly basis.

- measures that exclude a significant segment of society i.e. women or the poor, violate the principles of equality and non-discrimination and can, therefore, not be seen to be reasonable.[261]

There is a legal duty on government to prioritize its obligations and allocate resources on a basis of non-discrimination.[262] If a certain segment of the population suffers from violent attacks disproportionately when compared to other segments of the community, they are not being treated equally. South African's living in townships are being murdered and assaulted at a much higher rate than other segments of the South African society. If this trend is not reversed to at least be in line with the murder

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260 Chapman *supra* note 124 at 411 in the context of the right to health.

261 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [41] and [43]; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [67] – [68] and [70]; Hunt Nowak Osmani *Draft Guidelines: A human rights approach to poverty reduction strategies*, 10 September 2002 at 57-58: "The right to equality and the principle of non-discrimination are among the most fundamental elements of international human rights law. The right to equality guarantees, first and foremost, that all persons are equal before the law, which means that the law shall be formulated in general terms applicable to every human being and enforced in an equal manner. Secondly, all persons are entitled to equal protection of the law against arbitrary and discriminatory treatment by private actors. In this regard, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability and health status, including HIV/AIDS, age, sexual orientation or other status. 58. The poor are usually victims of discrimination on various grounds such as birth, property, national and social origin, race, colour, gender and religion. Depending on the particular circumstances of each society, poverty may primarily affect members of certain socially disadvantaged classes, or of certain ethnic or religious groups, women, elderly people or indigenous persons, but in most cases poverty is aggravated by some sort of discrimination".

262 Erasmus *supra* note 114 at 247 and 248: "It is obvious that the legitimacy of the new dispensation, including the Bill of Rights and the constitutional compromise underpinning the new Constitution, will require that the concerns of the majority of the population with respect to basic human needs must be addressed. If the Constitutional Court and the judiciary would generally only be available to those with the means to enforce their civil and political rights; the legitimacy of the Bill of Rights and the constitutional order will be undermined".

rate of the general population, then the government did not allocate resources on a basis of non-discrimination and as such could be liable.[263]

Key target indicators in the monitoring of the provision of security services on a basis of non-discrimination might include: the crime rate segregated between poor and non-poor segments of society; ratio of murders, rapes and violent attacks against the poor to the overall crime rate; proportion of poor people subjected to violent crime; the rate of specific crimes against women disaggregated between poor and non-poor segments of society; proportion of police actions aimed at preventing violence against the poor compared to preventative police action in general and ratio of police actions aimed at investigating crime in poor segments of society to overall criminal investigations. [264]

- to be reasonable, security measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.[265] The Constitutional Court held :

  Those whose needs are the most urgent and whose ability to enjoy all rights ...are most in peril ...must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[266]

- to be reasonable, security measures aimed at ensuring the fundamental human right *"to be free from all forms of violence from either public or*

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263 Farrior *supra* note 7 at 303; Limburg Principle 27 (*Limburg Principles on the Implementation of the International Covenant On Economic, Social and Cultural Rights* U.N. Human Rights Committee, U.N. GAOR, 43rd Sess., Annex, U.N. Doc. E/CN.4/1987/17 (1987)) states: "In determining adequate measures have been taken for the realization of the rights recognized in the covenant, attention shall be paid to equitable and effective use of and access to available resources".

264 Hunt Nowak Osmani 2002 HYPERLINK http://heiwww.unige.ch.humanrts/instree/povertyreductionguidelines.html 20 October 2004.

265 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [43]

266 *Id.*

private sources" in terms of section 12 (1) (c) must be realised progressively.[267] Retrogressive measures or a policy that practically results in retrogression will be viewed as unreasonable. [268]

The idea of progressive realization has two major implications. Firstly, it allows for a time dimension in the strategy for fulfilment by recognizing that full realization of the right *"to be free from all forms of violence from*

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[267] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [36]; Erasmus *supra* note 114 at 249: "The implementation of these rights can usually only be realized over time. The availability of resources and progressive realization are elements of these rights and are reflected in the manner in which they are formulated. This is another important distinction when compared to civil and political rights. The lack of resources will limit the extent to which they can be given effect to and the time frame that will be involved. There are many demands on socio-economic benefits and the government of the day will have to take difficult policy decisions when allocating scarce resources. It is obvious that a court of law cannot intervene and impose a ruling that will only benefit a particular applicant or small group of people. But again the burden will be on the State to show that it is making progress towards the full realization of such rights. The State will have to justify its use of public resources at its disposal".

[268] *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [36] and [94]; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [45]: "The extent and content of the obligation consists in what must be achieved, that is, "the progressive realisation of this right". It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular. The committee has helpfully analysed this requirement in the context of housing as follows: "Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for State's parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources". Although the committee's analysis is intended to explain the scope of States' parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of the Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in the Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.

either public or private sources" may have to occur in a progressive manner over a period of time.[269] Secondly, it allows for setting priorities between different rights at any point in time since the constraint of resources may not permit a strategy to pursue all rights simultaneously and with equal vigour.[270] Taking into account the nature of the right to be

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269 Hunt Nowak Osmani 2002 HYPERLINK http://heiwww.unige.ch.humanrts/instree/povertyreductionguidelines.html 20 October 2004at 63 and 64 – 69: "The recognition of a time dimension and the need for prioritization are common features of all approaches to policy-making. The distinctiveness of the human rights approach is that it imposes certain conditions on these features, so that the pursuit of human rights is not reduced to mere rhetoric in the name of progressive realization. The recognition of a time dimension is accompanied by certain conditions aimed at ensuring that the State does not take it as a licence either to defer or to relax the efforts needed to realize human rights. In particular, the State is required to do the following: First, the State must acknowledge that with a serious commitment to poverty reduction it may be possible to make rapid progress towards the realization of many human rights even within the existing resource constraint. This will often be true of "respect" obligations with regard to most rights, which require political will more than economic resources (see Introduction, para. 6). Even for "protect" and "fulfil" obligations, which would typically be more dependent on resources, it may be possible to make rapid progress by improving the efficiency of resource use – for example, by scaling down expenditure on unproductive activities, and by reducing spending on activities whose benefit goes disproportionately to the rich. Second, to the extent that the realization of human rights may be contingent on a gradual expansion in the availability of resources, the State must begin immediately to take steps to fulfil the rights as expeditiously as possible by developing and implementing a time-bound plan of action. The plan must spell out when and how the State hopes to arrive at the realization of rights. Third, the plan must include a series of intermediate – preferably annual – targets. As the realization of human rights may take some considerable time, possibly extending well beyond the immediate term of a Government in power, it is with regard to these intermediate targets (or benchmarks) rather than the final target of full realization that the State will have to be held accountable. Fourth, as a prerequisite of setting targets, the State will have to identify some indicators in terms of which targets will be set. In practice, a bundle of indicators will be needed for each human right, and they should be specified separately, at levels that are as disaggregated as possible, for each subgroup of the poor population. Realistic time-bound targets will have to be set in relation to each indicator so as to serve as benchmarks".

270 Hunt Nowak Osmani 2002 HYPERLINK http://heiwww.unige.ch.humanrts/instree/povertyreductionguidelines.html 20 October 2004 at 70 – 74: "70. With regard to prioritization, the human rights approach does not in itself offer any hard and fast rule, but it does impose certain conditions on the process and substance of prioritization. The *process* of setting priorities must involve effective participation of all stakeholders, including the poor. Value judgements will inevitably enter the process of setting priorities, but the rights-based approach demands that they should do so in an inclusive and equitable manner. This implies that the process of resource allocation must permit all segments of society, especially the poor, to express their value judgements with regard to priorities. It also implies that just institutional mechanisms must be put in place so that potentially conflicting value judgements can be reconciled in a fair and equitable manner.....The *substance* of prioritization must be guided by the following principles. First, no human right can be given precedence over others on the ground of intrinsic merit, because from the human rights perspective all rights are equally valuable. However, different rights can still be given priority at different stages of progressive realization on practical grounds. For example, a country may decide to give priority to a right that has remained

free from all forms of violence and the valuable interest that it seeks to protect ,significant weight and priority must be attached to the realisation of section 12 (1) (c).

- with regards to the limitation of the right *"to be free from all forms of violence from either public or private sources"* by resource constraints, each case should be carefully explored and dealt with on a case-by-case basis.[271]

- relevant international law can be a guide in interpretation but the weight to be attached to any particular principle will vary. Where the relevant principle binds South Africa in terms of treaty or convention, it may be directly applicable.[272]

- the internationally accepted "minimum core obligation" may be taken into account to determine whether the state acted reasonably.[273]

- the Constitution does not expect more of the state than is achievable within its resources.[274]

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especially under-realized compared with others, to a right whose fulfilment is expected to act as a catalyst towards the fulfilment of other rights, or to a right which a country may feel especially well equipped to deal with first in view of its tradition, experience and so on. Second, while allocating more resources to the rights that have been accorded priority at any given point in time, care must be taken to ensure that the rest of the rights maintain at least their initial level of realization. This restriction follows from the principle of non-retrogression of rights – no right can be deliberately allowed to suffer an absolute decline in its level of realization. Third, notwithstanding the recognition of resource constraint, the international human rights system specifies some core obligations that require States to ensure, with immediate effect, certain minimum levels of enjoyment of various human rights".

271 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [20].

272 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [26].

273 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at 30 and 33; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [34].

274 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [93] – [94]; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [32]; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [11].

Whether there really are no funds available to comply with constitutional standards is, of course, a factual question. The state can often find ways to cure constitutional deficiencies without increasing spending and there is also the possibility that asserted budgetary constraints may not be the result of genuine poverty as much as a lack of political will.[275]

- legal limitations should be interpreted in favour of enfranchisement rather than disenfranchisement.[276]

- Actual claims timeously asserted cannot be denied on the basis of hypothetical potential future resource implications.[277]

  Polycentricity cannot be elevated to a jurisprudential mantra that will have the effect of rendering courts impotent to enforce legal duties that have unpredictable financial consequences.[278]

- resource constraints **on their own** are not sufficient defence for failing to comply with positive Constitutional duties.[279]

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275 Kritchefsky *supra* note 242 at 519.

276 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [17]; *S v Makwanyane* 1995 (3) SA 391 (CC) at [100] "Our Constitution deals with the limitation of rights through a general limitations clause...in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter 3."

277 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [30]: "We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups".

278 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 575.

279 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No1) 2003 5 SA 518 (C) at 583: "In summary, despite the respondents' contentions to the contrary, the financial evidence placed before this Court provides, in our view, no support for the argument that affordability alone is an obstacle to the granting of prayer 5 in respect of the first, second and third respondents"; Kritchefsky *supra* note 242 at 487: "Financial concerns play a.....role in determining constitutional obligations. Courts assume that saving money and responding to budgetary constraints are legitimate government objectives. Government has a right to provide services as it sees fit and to allocate resources in a way that best serves its constituents. When the Constitution imposes an obligation on government, however, **financial constraints will not justify noncompliance"** (emphasis added).

From the above it is clear that that "resource constraints" is only one of many factors that must be taken into consideration when answering the main question of whether the state acted reasonably in a specific set of circumstances. As shown above, there is no such thing as a blanket "resource constraints defence" in South African law. Each case should be dealt with on a case-by-case basis and resource constraints might weigh more heavily in one set of circumstances than in another.

Due to the following reasons the Courts can never allow a blanket "resource constraints" defence:

- the Constitution ceases to establish minimum standards for government conduct if the state can justify non-compliance with constitutional standards by lack of funds. [280] Kritchefsky argues that :

  > Government entities should never be able to excuse their failings by raising a budgetary constraints defense. The Constitution sets minimum standards for governmental conduct. As courts have long recognized, a government that runs a school system or punishes by incarceration must do so constitutionally. Entities that choose to engage in activities that the Constitution regulates must obtain or divert funding to enable them to comply with constitutional standards. Courts enforce constitutional standards only by enforcing this requirement.[281]

- Allowing the state to plead budgetary constraints allows it to second-guess the Court's determination of what the law requires and to argue, in essence, that it is exempt from complying with constitutional standards.[282]

- Budgetary constraints rarely justify inaction. The state can almost always do something to stop or prevent constitutional violations by reallocating

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[280] Kritchefsky *supra* note 242 *at 485*: "The Constitution ceases to establish minimum standards for official conduct if government can justify noncompliance by failing to allocate funds. The Eighth Amendment means nothing if a State can excuse a failure to feed prisoners by claiming that it lacks the money to purchase food".

[281] Kritchefsky *supra* note 242 *at 486.*

[282] Kritchefsky *supra* note 242 *at 566.*

spending priorities or adjusting internal policies.[283]

- A claim of budgetary constraints is really a claim that the state's spending priorities do not include the subject of litigation.[284]

- A government entity that does not comply with constitutional standards is not saving money; rather, it is choosing to spend money on litigation.[285]

- If the state could escape its positive constitutional obligations by a blanket "resource constraints" defence, the state can justify almost anything

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[283] Kritchefsky *supra* note 242 at 566: "If funding is truly not available to meet constitutional obligations, the entity must secure additional funding, by taxation if necessary. The Supreme Court has recognized that federal courts may order local entities to secure funding to remedy constitutional violations by ordering property tax increases and by enjoining state laws that would prevent the local entity from so doing. As the Court explained in Missouri v. Jenkins, a school desegregation case, "(a)uthorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems". The principles that Jenkins establish should apply in prison litigation and other cases in which a government claims financial inability to meet minimum constitutional standards".

[284] Kritchefsky *supra* note 242 at 559: "When looking at an entity as a whole, a claim of budgetary constraints is really a claim that the entity's spending priorities do not include the subject of litigation. The entity is undoubtedly spending money somewhere, and the true question is whether that money must be allocated to the prisons or police training, as opposed to uses that are more politically popular. The District Court for the Eastern District of California remarked that "the notion of budgetary constraints is, of course, highly protean." When "money is lavished" on programmes that administrators favour, "it is diverted from the identification and treatment of ill patients." The Supreme Court emphasized in Owen that it is fair to require a municipality's taxpayers to pay damages for a constitutional violation because the public at large is ultimately responsible for, and benefits from, the municipality's administration".

[285] Kritchefsky *supra* note 242 at 561: "The court in *Winton v. Board of Commissioners 88 F. Supp. 2d 1247 (N.D. Okla. 2000)* emphasized this point in holding that Tulsa County could be held liable for unreasonable violence in its jail despite budgetary constraints. The court said that it was not determinative that the County supported a jail tax that County voters rejected. The court noted that "the County's support of a new jail tax did nothing to improve the conditions Mr. Winton experienced while he was incarcerated". The court recognized that evidence could support a conclusion that the only way to abate the risk of violence was to build a new facility and that voters' actions hampered the County's efforts to build a new jail. Despite this, the court concluded: The voters of Tulsa County had a choice. The County could pay on the front end to protect the constitutional rights of inmates by building a new jail, or the County could pay on the back end by satisfying judgements in meritorious civil rights actions based on unconstitutional conditions at the jail. Until a new jail was built in 1999, the voters in Tulsa County had necessarily chosen the second of these options as the County's response to violence at the Jail".

including depriving prisoners of food to the point of starving them.[286]

- Budgetary constraints that truly limit state action to the effect that constitutional violation is widespread, pervasive and an everyday occurrence, in nature point to an institutional failing.[287]

7.4.3 *Resource constraints: conclusion*

The Constitutional Court held that when it comes to the enforcement of positive constitutional duties, the main issue is whether the state acted reasonably.[288]

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[286] Kritcefsky *supra* note 242 at 545 and 513- 518: "Courts have long rejected arguments that the cost of complying with the Constitution justifies continuing an unconstitutional practice. As early as 1963, in *Watson v. City of Memphis* 373 U.S. 526 (1963), the Supreme Court rejected a defendant's suggestion that financial constraints justified its failure to desegregate city parks. Recognizing that the vindication of rights could not hinge on whether "it is less expensive to deny than to afford them," the Court stated that it would not assume "that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens". Lower court decisions in the years between Watson and the Supreme Court's 1991 decision in Wilson v. Seiter, mostly cases challenging jail conditions, repeatedly rejected arguments that budgetary limitations were a defense in civil rights actions. In 1968, for example, then Judge Blackmun rejected Arkansas prison officials' argument that they needed to punish prisoners by whipping them because they were "too poor" to use other disciplinary tools. The court explained that "(h)umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations". Decisions in other cases challenging Arkansas prison conditions emphasized that lack of funding could not excuse unconstitutional actions. In an influential statement, the District Court for the Eastern District of Arkansas in Holt v. Sarver announced: Let there be no mistake in the matter; the obligation of the respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the Governor may do, or, indeed, upon what respondents may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States. Numerous cases echoed Holt, emphasizing that "lack of funds or authority over funds does not justify operating a prison in an unconstitutional manner". Other cases during the same time period rejected budgetary constraints defenses in cases challenging the treatment of juvenile detainees and the mentally ill.....The cases all recognized that budgetary considerations could not justify permitting ongoing constitutional violations, although several noted that financial concerns were relevant in fashioning equitable relief.

[287] Kritchefsky *supra* note 242 at 567: "Budgetary constraints that truly limit individual action point to an institutional failing. A government that does not provide the funding necessary for humane prisons and other constitutional dictates has caused the resulting constitutional violations and should be held liable".

[288] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) at [33]; *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC) at [36] – [38].

This reasonable analysis looks at matters objectively. The Constitutional Court recognised that practical considerations including financial concerns play a role in determining reasonableness and that the choice among reasonable alternatives for combating a problem should lie with the state that has a unique understanding and responsibility for limited public resources. The Constitutional Court further held that budgetary constraints are only one of the aspects to be taken into consideration in the reasonableness analysis and not a blanket defence for not complying with constitutional obligations.[289]

Courts dealing with the budgetary constraints defence in essence struggle to reconcile two basic values: Firstly, the state has limited resources and has a right to spend it as it sees fit and secondly, the state must fulfil its constitutional obligations. Viewing budgetary constraints as an aspect of the reasonableness analysis leads to little tension in these basic values.

Certain rights, due to their nature and the interest they protect, are so basic that they will seldom and only in very extraordinary circumstances be limited by resource constraints. These rights, like the right to life and the right to be free from all forms of violence are inherent and inalienable, attached to the individual as part the individual's well being and inseparable therefrom.[290] To provide internal security and protect citizens from the violent physical attacks, rapes and murders is the first and main duty of the state. Budget allocation and policy must reflect this priority. A state where violent human rights violations are widespread and pervasive cannot be seen to fulfilling its legal obligations. In a country like South Africa with a sound fiscal position,[291] the government must see to it that enough resources are allocated to the various national, provincial and local government departments responsible for safety and security to ensure that fundamental rights are fulfilled as a matter of priority.

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[289] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 765 (CC) at [29]; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC), *August v Electoral Commission* 1999 (3) SA 1 (CC) at [39] ; Kritcefsky *supra* note 242 at 491-492.

[290] *Contra* Smith (ed) *Making Rights Work* 88.

[291] Manual *Business Day* 19 Feb. 2004 22-24.

The South African Constitution has been drafted very carefully to expressly provide that available resources must be taken into consideration with regards to certain socio-economic rights such as the right to housing, health care, food, water and social security.[292] Given the nature of the section 12 (1) (c) right and the valuable interest that it protects on the one hand and the fact that section 12 (1) (c) are textually unqualified, budgetary constraints will rarely justify inaction and only in extraordinary circumstances save the state from delictual liability. Budgetary constraints on its own will never justify non-compliance with constitutional standards.[293]

7.5 Conclusion

The protection of fundamental human rights is central to South Africa's new democracy. The limitation of these rights should take place with the utmost judicial solicitude.

It is the duty of the judiciary to protect fundamental human rights in South Africa and to uphold the rule of law. If one wishes to preserve the constitutional democracy, one cannot take its existence for granted. This is certainly the case for new democracies like in South Africa, but also true of well established democracies. If democracy was perverted and destroyed in a civilized nation like Germany it can happen anywhere. A key historical lesson of the Second World War is that people, through their representatives can destroy democracy and the protection of human rights. Over the last few decades, humanity has learned that human rights are the core of substantive democracy and without the protection of human rights there can be no democracy and no justification for democracy. [294]

Former President Nelson Mandela said that:

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[292] Ss 25, 26, 27 of the *Constitution of the Republic of South Africa*, 1996.
[293] Kritcefsky supra note 242 at 487.
[294] Barak *supra* note 212 at 20 -21 and 36 – 37.

Respect for human life, liberty and wellbeing must be enshrined as rights beyond the power of any force to diminish.[295]

South Africa's own tragic constitutional history with regards to the protection of fundamental human rights taught that:

- In the public law relationship between the individual and the state, the individual is a subject with certain inalienable fundamental human rights that must be protected at all times.

- The individual should never be degraded to being a mere object of state power[296]

- The individual as the weaker subject in the public law relationship must be protected consciously and deliberately against all state actions and omissions.[297]

The need to watch over the rule of law exists at all times. The protection of human rights and decisions regarding its limitation can never be left in the hands of the legislative and executive branches of government alone. South African Courts have the constitutional jurisdiction and duty to protect the fundamental human rights contained in Chapter 3 of the Constitution[298] and to guard over their limitation. The courts must decide the question of when a limitation on a fundamental right is legitimate and valid in line with section 36 of the Constitution.

The limitation on the state's responsibility for human rights abuses committed by non-state actors will be determined by applying the test of reasonableness

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295 Cwrys-Williams 2004 *In the words of Nelson Mandela* at 28.
296 *Basson supra note 2 at 18.*
297 *Id.*
298 The *Constitution of the Republic of South Africa*, 1996.

judged against the norms applying to and emanating from the express provisions of the South African Constitution, together with the tests of negligence, proximity and causation.

Resource constraints are not an acceptable state defence for failing in its legal duty to protect citizens against the violent behaviour of non-state actors in terms of both international and national constitutional law.

8. CONCLUSION

8.1	***Introduction***
8.2	***Proper role of the state***
8.3	***International legal obligations***
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8.1 Introduction

While writing this last chapter, human rights abuses committed by criminal non-state actor's remains a quotidian event in South African society. Violence is widespread, pervasive and part of everyday life.[1]

South Africa recently celebrated 10 years of democracy and freedom from the tyranny of apartheid. What does the future hold for the young 10-year-old democracy? Will it die a violent legal, economical and moral death at the age of 20 and become yet another African statistic like the sister country Zimbabwe? Or will South Africa take up its rightful place among the leading nations of the world as the African country that caused the great African renaissance that placed Africa on an equal footing with the rich countries of the world through respecting, protecting and promoting fundamental human rights? The latter will only materialize if fundamental human rights are fastidiously protected by the rule of law. The history of humanity teaches that it is only where human dignity and the human spirit are valued and protected by the rule of law, that there is prosperity

[1] Supra 6.1- 6.2.

and progress. Without exception, all the most powerful and successful nations of the world have a tradition and value system that protect and respect fundamental human rights through the rule of law[2] and without exception disregard for human rights, lawlessness and disrespect for the rule of law lead to a penury existence and a non existent economy.[3]

Human rights can only be enjoyed in safety and security.

As Keith D Nunes asserts:

> The human race is a family. This family of the human race is of infinite value. Demands, expectations, and identities flow from this single family. Well-being, wealth, and skill are shaped and shared in security. Affection, respect, rectitude and enlightenment are shaped and shared in sorority and fraternity. Power is shaped and shared widely in the community in democracy. Wealth is shaped and shared in the international market economy. In short, the human race is preoccupied with objects of desire that are not tangible, but rather conditions of life. The prominence and subtlety of these conditions of life are expressed by the short hand term "human dignity."[4]

International human rights standards are manifold and proliferating rapidly. States are eager to articulate such norms and are anxious to be perceived as playing a leading role in the protection of fundamental human rights. Unfortunately such eagerness dissipates when the issue of actual accountability for the state's own actions and for the actions of the states with whom they wish to maintain good relations arises.[5] Despite broad recognition of human rights abuses attributable to states for the actions of non-state actors, international human rights law is scrambling to keep up with the changing context of repression, persecution and brutality throughout the world.[6] To a still-significant degree, the state through both action and omission is the abuser par excellence of fundamental human rights. Defining human rights and dignity solely in terms

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[2] Supra chapters 3- 5.
[3] Guest *The Shackled Continent* at 13.
[4] Nunes 1994 *Pace Int'l L. Rev.* 41-54 at 42 and accompanying footnote 3.
[5] Bayefsky *International Human Rights Law* at 1.
[6] *Supra* 3.1.

of freedom from state-sponsored violence and abuses acts as a barrier to the full promotion, enforcement and enjoyment of human rights.[7] Whether the state commits the abuse itself or tolerates it through ineffective policies or incompetence, the state must be held accountable.[8]

The whole notion of human rights and the right to security and to be free from violence will be a tragic farce without human rights actually being enjoyed in a safe and secure environment.

It is believed that the South African government can rise to the challenge of effectively preventing human rights violations from occurring. The national and international legal framework and the peremptory universal norms are in place and part of the South African legal system. What is needed is effective action.

8.2 Proper role of the state

This study has shown that the first and most basic obligation of government is the protection of its citizens against violence.[9]

As early as 322 BC, Aristotle taught that, the main object of all the citizens of a state must necessarily be the safety of their association. Aristotle pointed out that everything must be sacrificed to the maintenance of the constitution which is the basis of that safety and that any action on the part of any citizen outside the bounds of the constitution (whether an unconstitutional act carried out by the government of the day on the one hand or human rights abuses by non-state actors on the other), should not be tolerated for a moment. This argument has even greater force in a modern world (where crime syndicates operate and

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[7] Moore 1999 *Colum. Hum. Rts. L. Rev.* 81-121 at 4.
[8] *Supra* 3.3 and 6.4 and 6.5.
[9] *Supra* chapters 2,3,4,5 and 6.

where innocent people suffer gross violations of their fundamental human rights at the hands of criminals) than it had in Aristotle's ancient polity.[10]

Salus populi suprema lex esto ![11] Every citizen is entitled to the protection by government from violent crime. The relationship between government and citizen can be described in terms of a mutual bond and obligation. While the citizens owe obedience to obey the law and pay their taxes, the state owes a duty to govern and to protect. These reciprocal obligations are best defined by the maxim *"protectio trahit subjectionem, et subjectio protectionem":* protection implies subjection and subjection protection. These reciprocal obligations and duties are inherent in the very nature of the relationship between the government and the citizen. The sovereign's duty of protection includes the duty to protect citizens from the violence of other citizens.[12]

The *"original contract doctrine"* further emphasizes this principle. The original contract determines that the subject owes obedience in return for the ruler's protection. Under this constitutional conception, the subject owes no duty to obey if the sovereign fails in its duty to protect fundamental human rights.[13]

The study has shown that the *"social contract theory"* determines that it is a maxim of law that protection and subjection are reciprocal. This doctrine of reciprocal allegiance and protection provides **that the whole should protect all its parts, and that every part should pay obedience to the will of the whole,** or, in modern terms, the community or government appointed by the community should guard the basic human rights of each individual member and, in return for this protection, each individual will submit to the laws of the state.[14]

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[10] *Supra* 2.2.1.
[11] The safety of the people is the highest law; Hiemstra and Gonin *Trilingual legal dictionary* at 282.
[12] *Supra* 2.2.2.
[13] *Supra* 2.3.1 – 2.3.3.
[14] *Supra* 2.3- 2.4.

It is the duty of the state to protect its citizens from human rights abuses at the hands of criminal non-state actors.

When the government does not provide protection from criminals who rape and murder women and children, from crime syndicates who kill people for their cars, from murderers who torture, rape and butcher the elderly on their farms, from traffickers who prey on girls, from people who are enslaving other people, from companies that subject workers to degrading conditions, then what indeed remains of the role that the government is to play?

In terms of the proper role that governments should play in the modern world, it is right that the government should be held responsible and liable for human rights abuses committed by non-state actors.

8.3 International legal obligations

8.2.1 New international norms

This study has shown that international law is designed to make each state responsible for the human rights protection of its own population. This thesis posits that under international law, state responsibility for human rights abuses committed by non-state actors is not only desirable and feasible, but necessary.[15]

For centuries the notion of state sovereignty was used as a shield by corrupt and oppressive governments. Events taking place within the territorial jurisdiction of a particular state were seen and treated as "internal affairs" and the state was answerable to no one. Since World War II, this conception of sovereignty and national hegemony has changed significantly. The manner in which a state treats

[15] *Supra* 3.1- 3.3.

its own citizens is no longer seen as a purely domestic affair but as matters of consequence for the international community.[16]

International human rights law redefines the meaning of international security by substituting the long-standing understanding of protection of state borders with a transformed construction grounded in the discourse of human rights.[17]

Human rights norms constitute the emerging global legal order. More and more legalist language of right and wrong, duties and obligations is supplanting the dominant political language based on state interests. An expanded human rights discourse offers an alternative basis for global governance, one in which the rule of law plays a distinctly constructive role. It enables a redefining of the interests at stake in international relations. No state is above the law.[18]

8.2.2 Action under international law

The very notion of human rights implies, in addition to a substantive claim, a procedural claim to an effective remedy. If one feels that any of one's human rights have been violated, one should have the right to submit a formal complaint to an independent body at the domestic level and if this does not provide redress, to an equally independent body at the international level. [19]

Once the individual has exhausted all the available remedies under domestic law, he or she may then file a petition against the state. The availability of individual petitions against governments in a broad range of international conventions is an important measure of the status accorded individuals under international law, in both pragmatic and philosophical terms. In applying the rule of exhaustion of local remedies, the interests of state sovereignty are balanced

[16] *Supra* 3.1 – 3.2.
[17] *Supra* 3.1.
[18] *Supra* 3.3.
[19] *Supra* 3.3.3.

with those of the effective protection of human dignity. [20]

South Africa has ratified all major human rights conventions currently in operation without any reservations. South Africa is, therefore, legally bound by International Law to ***respect and ensure*** [21] to all within its territory *inter alia* the right to life, the right to security (which includes the right to be free from violence committed by non-state actors) and the right to be free from all forms of torture as expressed in the various conventions.[22] Rights under the Covenants are "negative", in that states must not obstruct individuals' exercise of them, but also "positive", in that states must take affirmative measures to prevent violation of the human rights, also from private actors.[23]

Human rights as expressed in international law by custom and convention are not merely seen as limitations on government action but are deemed to impose positive legal obligations on states to prevent, investigate and punish human rights violations that occur in their jurisdiction. In determining whether states are fulfilling their international obligations, states are measured against the principle of effectiveness and the due diligence standard. [24] The due diligence standard *inter alia* entails the:

duty of States Parties to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of ensuring the free and full enjoyment of human rights[25]

International human rights conventions assign responsibility to the signatory state for all human rights violations that occur within its jurisdiction, whether the state commits the abuses, tolerates the abuses or fails to put in place measures to prevent and respond to the abuses effectively. Moreover, the positive legal duty

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[20] *Supra* 3.3.
[21] *Supra* 3.3.1.1.
[22] *Supra* 3.3.1.5.
[23] *Ibid.*
[24] *Supra* 3.3.1.4.
[25] *Velasquez Rodriguez Case* Judgment of 29 July 1988, *Inter-Am. Ct. Hr.* (Ser. C) No. 4 (1988) at 166; *supra* note 3.3.1.4.

to provide effective protection flows directly from specific provisions contained in the conventions that require states to "*ensure*," "*guarantee*," or "*secure*" the rights enumerated therein. The obligation to ensure the free and full exercise of human rights is not fulfilled by the mere existence of a legal system or policy designed to make it possible to comply with this international legal obligation, it requires of the government to conduct itself so as to ensure the free and full exercise of human rights effectively and specifically the right to be free from all forms of violence. If a state fails to organise its governmental machinery in a way that ensures the observance of its conventional human rights obligations, the state would be responsible for the breach.[26]

Where states fail to prevent and investigate, bring the perpetrators to justice and provide remedies for the victims, it is the international human rights machinery that must step in and provide for the redress that the state either cannot or will not provide. Such redress can be provided through individual or inter-state complaints to various human rights treaty bodies or outside the treaty machinery through the concept of *erga omnes*. Essentially the failure of a state to protect its citizens against violent crimes is in breach of the positive obligation to protect and ensure human rights, an obligation that, as has been discussed in this thesis, can be found in all major general human rights treaties. This obligation has been reaffirmed and clarified by the bodies monitoring the compliance of these treaties.[27]

If a state has inadequate legislation or policy with regards to violent crime, it can be seen as failing in its duty to prevent the violation of the right to be free from all forms of violence, or if it can be shown that a state knew or ought to have known about a real risk of violent crime and failed to take measures which might reasonably have been expected to avoid that risk, that state could be held liable. The obligation to prevent also requires measures beyond the criminal justice

[26] *Supra* 3.3.1 – 3.3.2.
[27] *Supra* 3.3.1.

system, such as public information and education programmes to counter race, cultural, social and gender bias. The root cause for violence often lies in cultural norms, customs, socio-economic conditions and attitudes that must be altered in order to protect the right to security against abuses by private persons.

This study has further shown that international law requires that the state must provide at least the minimum core content of a right to meet its international legal obligations.[28] Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties. In terms of international law, a state party fails to fulfil its legal obligations when it pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of a Covenant, or fails to achieve the required standard of conduct or result.[29] While recognizing that resource constraints impose limitations, each state party has an obligation to strive to ensure the widest possible enjoyment of the right to be free from all forms of violence. The obligations to monitor the extent of the realization, or more especially of the non-realization, of the right to security, and to devise effective strategies and programmes for their fulfilment, are not in any way eliminated by resource constraints. Vulnerable members of society such as women, children and the elderly must be protected by the adoption of relatively low-cost targeted programmes even in times of severe resources constraints. [30]

The ICC Statute through the codification of crimes against humanity added significant value to the international human rights regime. Perpetrators of human rights violations can now be held criminally responsible for their actions. One of the major benefits of the new permanent International Criminal Court is that it is a tool against impunity. Corrupt demagogue leaders that have no regard for human dignity and life or for international norms can now be brought to justice for their crimes against the human family. Heads of state are not above the law and can

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[28] *Supra* 7.4.1.
[29] *Id* ; Chapman 1998 *R Tenn. Law Review* at 404.
[30] *Supra* 7.4.2 ; Chapman 1998 *R Tenn. Law Review* at 409.

no longer hide behind state sovereignty but are legally accountable for their actions and omissions. [31]

States are obligated both under treaty law and customary international law to take reasonable measures to ensure and protect the right to security against abuses by private actors. [32]

8.4 Domestic legal obligations

8.4.1 Delictual liability

The research undertaken in this thesis has revealed that Section 12 (1) (c) of the South African Constitution places a definite legal obligation on the state to act positively to prevent human rights abuses, also at the hands of non-state actors.[33] Within the context of a liberal constitutional state, there is a positive legal duty on the state to protect citizens against violence.

In determining state responsibility and delictual liability for human rights abuses committed by non-state actors, the Courts found that an applicant will have to prove that:

- The State owed a legal duty to protect;
- The State acted in breach of such duty and did so negligently;
- There was a causal connection between such negligent breach of the duty and the damage suffered.[34]

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[31] *Supra* 3.4.4
[32] *Supra* 3.2 – 3.3.
[33] *Supra* 6.3 – 6.5.
[34] *Supra* 6.5.

In the era of the new constitutional dispensation, courts must take the express provisions in the Bill of Rights, placing a positive duty on the state to protect into serious consideration when applying the various common law delictual principles. In this regard the constitutional imperatives as set out in section 2, section 7(2) , section 8 (1) section 12 (1) (c) section 41 (1) (a) - (e) and section 205 (3) are of principal importance to state responsibility for human rights abuses committed by non-state actors.[35] A further factor that may play an important role in determining whether a duty to protect is present, is whether the police knew or ought to have known of the impending harm. Prior conduct, control of a dangerous object, rules of law, special relationship, contractual undertaking for the safety of a third party creating the impression that the interest of a third party will be protected and the breach of a statutory duty still serves as a *prima facie* indication of wrongfulness. These factors must now be applied in the light of the spirit, purport and objects of the Bill of Rights. Lack of recourse is not an excuse for not fulfilling positive state duties.[36]

Illud observare debet iudex, ne aliter iudicet, quam legibus aut constitutionibus aut moribus poditum est.[37]

The Interim Constitution brought into operation a completely new and different set of legal norms. The Courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. Section 39(2) of the Constitution places an obligation on all courts in South Africa to develop the common law through a process which will promote the spirit, purport and objects of the Bill of Rights. Where the common law deviates from the spirit, purport and objects of the Bill of Rights the Courts have an obligation to develop it by removing the deviation. It needs to be stressed that the obligation of courts to develop the common law in the context of

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35 *Supra* 6.3 – 6.4.

36 *Supra* 6.5; 7.4.

37 The judge must take care that he does not judge otherwise than in accordance with what has been determined by the laws, constitutions and customs; Hiemsra and Gonin *supra* note 11 at 200.

the section 39 (2) objectives is not discretionary. It is implicit in section 39 (2) read with section 173 that where the common law as it stands is deficient in promoting the constitutional objectives, the Courts are under an obligation to develop it appropriately. The Constitution is not merely a formal document regulating public power, it also embodies an objective normative value system. It is within the matrix of his objective normative value system that the common law must be developed.[38]

In further developing the common law, academics, lawyers and judges of international human rights law and the law of state responsibility can find a veritable treasure of important material concerning the law of state responsibility in the decisions of human rights judicial organs, quasi-judicial organs and other bodies involved in the supervision and implementation of international human rights, such as the Human Rights Committee. This material is critical for a proper understanding, as well as for the uniform universal development, of the law of state responsibility. [39]

Section 12 (1) (c) read together with Section 7 (2) imposes a clear legal obligation on the state to act positively to prevent human rights abuses from occurring also at the hands of private parties. The state must, therefore, not only refrain from human rights abuses itself but must proactively act positively to prevent private parties from the violent behaviour of other individuals. This constitutional imperative is further underscored and accentuated by both general statutory duties pertaining to the police to prevent crime and protect citizens and specific statutory duties that may be present in a specific case.[40]

This study has shown that the state has a duty to devise and implement a comprehensive and workable plan aimed at eliminating or at least substantially reducing high levels of violent crime to ensure the right to security and to meet its

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[38] *Supra* 6.4.1.
[39] *Supra* 3.3.1; 6.4 and 6.5.
[40] *Supra* 6.3 – 6.4.

obligations in terms of the Section 12 (1) (c) of the Constitution.[41] In determining whether the state has met its positive obligations in terms of the Constitution the standard of reasonableness is of crucial importance. Th ough a considerable margin of discretion must be allowed to the state in deciding on priorities and how resources should be best allocated to fulfil its obligations, the reasonableness of the measures that it adopts can be evaluated by the judiciary.[42] A Court considering reasonableness will thus not inquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The main question would be whether measures that have been adopted by the state are reasonable. Reasonableness will be determined by the facts of each particular case and the onus will be on the government department involved to provide the necessary evidence and to argue the reasonableness of its legislative or executive measures under the conditions prevailing in the particular instance.[43] To be reasonable:

- the state is obliged to act to achieve an intended result , legislative measures in themselves do not constitute reasonableness or constitutional compliance.

- the measures taken to ensure the right must be balanced and flexible and make appropriate provision for short, medium and long term needs

- measures cannot exclude a significant segment of society i.e women or the poor as this will violate the principles of equality and non discrimination

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41 *Supra* note 7.4.2.
42 *Id.*
43 *Supra* 7.4.2; Erasmus 2004 *Int'l J. Legal Info* at 248-249.

- the measures must be realized progressively . Retrogressive measures or a policy that practically results in retrogression will be viewed as unreasonable.[44]

Fears expressed that delictual liability for omissions by the state to prevent harm might have the effect that the floodgates of litigation will be opened can be sufficiently addressed by the proportionality exercises.[45] A proper execution of the proportionality exercises and due consideration of the reasonableness, foreseeability and proximity requirements will establish reasonable limits to delictual liability in cases where public authorities failed to prevent harm.[46]

The concept of state responsibility for human rights abuses committed by non-state actors goes beyond liability for crude outrages and addresses passive state failures to meet positive legal obligations. In terms of South African Constitutional Law and the Law of Delict, the state is responsible and delictualy liable for human rights abuses committed by non-state actors if it negligently failed in its positive constitutional duty to prevent the violation from occurring and there was a causal connection between the negligent breach of the duty and the damages suffered.[47]

The state has a positive obligation to establish and maintain the necessary legal and other institutions and remedies through which fundamental human rights can be guaranteed. The state must employ **every effort** and use **all the resources** that are at its disposal in an effort to fulfill, **as a matter of priority** its positive legal obligations in terms of the Constitution.[48]

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[44] *Supra* 7.4.2.
[45] *Supra* 7.3- 7.4.
[46] *Id.*
[47] *Supra* 6.3 – 6.5.
[48] *Supra* 7.4.

If one looks at the full ambit of the duties to protect, investigate, punish, and compensate, pervasive legislative and other measures are required to alleviate current shortcomings in the South African criminal justice system.

8.4.2 Appropriate relief

This study has shown that our Courts possess a broad power under the Constitution to fashion appropriate , just and equitable remedies designed to provide effective relief when the constitutionally entrenched right to be free from all forms of violence are infringed.[49] It was also shown that the purpose of a constitutional remedy is to vindicate the Constitution and to deter future infringements.

The victim of violent crime committed by a non state actor's claim, is in essence based in delict. After a finding that in the particular set of circumstances there a) was a legal duty to protect b) the state breached this duty and did so negligently and c) there was a causal connection between the negligent breach of the duty and the damages suffered the state will be delictualy liable. When the state failed in its positive legal duty to protect as guaranteed by section 12 (1) (c) of the Constitution the victim is thus entitled to delictual damages.[50] One of the main reasons for this is the fact that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and mandamus or interdict do not afford the victim of crime any relief at all. The only effective remedy and way to vindicate the Constitution is through a private law delictual action for damages.[51] The delictual action for damages will also act as a deterrent for future violations for as long as the costs of protection are less than the potential liability, the rational government will act decisively to protect its citizens against violent crime.[52]

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[49] *Supra* 6.6.1; 6.6.2; 6.6.3.
[50] *Supra* 6.6.1.
[51] *Id.*
[52] *Supra* 6.6 and 6.7.

This study has further revealed that interdicts can be used to further improve the realization the right to be free from all forms of violence. Apart from awards of delictual damages for breaches of section 12 (1) (c), Courts can also direct the state through mandatory and structural interdicts to bring unreasonable security policies in line with constitutionally entrenched standards or to perform certain positive actions to remedy unconstitutionality.[53] The power of the Courts to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented. The Courts may thus direct the state to devise, fund, implement and supervise measures to provide security services to those in desperate need.[54]

8.5 Conclusion

The right to security and to be free from violence is a fundamental human right, indispensable for the exercise of all other human rights. Former President Nelson Mendala asserted that "*to deny any person their human rights is to challenge their very humanity*".[55] Every human being is entitled to the enjoyment of the highest attainable standard of safety conducive to living a life in dignity.

Imperfecta lex quae vetat aliquid fieri, et si factum sit, nec rescindit nec poenam inuingit ei, qui contra legem fecit.[56] For national and international human rights to be properly enforced and to not be an *imperfect law,* the state must protect individuals in a practical manner; in word and deed by both preventative and punitive measures.

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[53] *Supra* note 6.6.3.
[54] *Supra* note 6.6.3.
[55] Cwrys-Williams 2004 *In the words of Nelson Mandela* at 50.
[56] Law is imperfect which forbids something to be done, but if it has been done it neither declares it invalid nor provides any penalty for him who has acted against the law ; Hiemstra and Gonin *supra* note 11 at 201.

Impossibilium nulla obligatio est [57] but to protect the majority of citizens from human rights abuses committed by non-state actors is not an impossible task, in fact with the political will, proper allocation of resources and the correct focus, effective protection can be provided .

The historical analysis regarding the history and origin of state responsibility conducted in this study showed that every citizen is entitled to the protection by government from violent crime. While citizens owe a duty to obey the law and pay their taxes, the state owes a duty to govern and to protect. These reciprocal obligations and duties are inherent in the very nature of the relationship between the government and the citizen. The sovereign's duty of protection includes the duty to protect citizens from the violence of other citizens.[58]

The investigation of relevant International Human Rights Law conducted in this study clearly established state responsibility for human rights abuses committed by non state actors under both international custom and convention. The state is still the primary bearer of international legal rights and obligations, be they derived from custom or convention, and the state is still in the best position to protect those who live within their jurisdiction from all forms of human rights abuses, also those committed by non-state actors. Under International Human Rights Law, states have a legal duty to respect, protect and fulfil the human rights of all the people who live within their territory. If a government fails in this obligation to protect citizens against murderers who maim elderly people on their farms, or rapists who rape vulnerable women or paedophiles who abuse children, then the state is responsible and liable for the actions of the criminals because it neglected to fulfil its positive obligation of protection. The actions of the private actors are not considered as an act of state but the state is responsible because it failed to carry out its legal obligation to act positively to prevent the abusive

[57] There is no obligation to do the impossible; Hiemstra and Gonin *supra* note 11 at 201; *supra* 7.4.
[58] *Supra* 2.2.2.

actions of private actors. But can one hope to affect through international law and institutions, the way governments behave toward their own citizens? Or do the roots of repression, discrimination and other denials of human rights lie in deeper and more complex value systems and cultural, political, social and economic problems? It is neither realistic nor useful to pretend that human rights law can produce an immediate change in the way human beings and their governments behave. The principles and norms are already in place. What has largely been missing is the willingness of states to recognize that compliance with the norms serves their own interests as well as the interests of their citizens and to be ready to pay the price.

States that refuse or consistently fail to meet their international legal commitments cast doubt on the legitimacy of their membership of the community of nations.

Despite a lot of crime fighting rhetoric, the state of criminal anarchy remains the *de facto status quo.* The research undertaken in this thesis clearly established that under Section 12 (1) (c) of the South African Constitution the state is responsible for private acts of violence against citizens under the South African Constitution and recent constitutional jurisprudence if it failed to act [59]

The aim of this research has been to provide an overview and assessment of legal means for asserting responsibility for human rights violations committed by non-state actors. Although Section 12 1 (1) (c) expressly guarantees the right to security and to be free from violence, u nfortunately to most ordinary South Africans, the guarantee means no more than an empty paper guarantee. when rights are not only rhetorically asserted but pressed seriously as legal entitlements, will human rights law and specifically the right to security and to be free from violence as enunciated in Section 12 (1) (c) of the South African Constitution become truly effective for the protection of fundamental human

[59] *Supra* 6.3 – 6.5.

rights and dignity. The recent recognition of the state's positive legal duty to protect individuals from abuses by non-state actors by the Constitutional Court is extremely significant. The positive right to be free from all forms of violence, as an enforceable delictual claim, afford pre-eminence and importance to this right and as such, offer a guideline to policy makers.

In conclusion it must be stressed that the practical realization of the right to be free from all forms of violence does not and will not solely depend on the judiciary. The inculcation of a culture and value system to protect fundamental human rights in South Africa by all role players is of crucial importance. The object of this thesis is to help move South African society in that direction.

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