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Private Violence, Public Wrongs, and the Responsibility of States

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Dinah Shelton

Abstract

This Article will discuss the decisions of the Inter-American Court, comparing them with U.S. judicial decisions involving “state action” and private conduct. It will point out the evolution in international law from restraints on the exercise of state power, to the more generalized obligation of ensuring respect for human rights. This Article concludes that the American Convention provides guarantees for individual rights that are lacking in U.S. constitutional law.

ARTICLES

PRIVATE VIOLENCE, PUBLIC WRONGS, AND THE RESPONSIBILITY OF STATES

*Dinah Shelton**

INTRODUCTION

Between mid-1988 and early 1989, the Inter-American Court of Human Rights (the "Court") decided its first three contentious cases.¹ The cases were submitted to the Court by the Inter-American Commission on Human Rights (the "Commission"), based on individual petitions filed by the families of disappeared persons against the government of Honduras. In the cases of Angel Manfredo Velásquez Rodríguez ("*Velásquez Rodríguez*") and Saul Godínez Cruz ("*Godínez Cruz*"), the Court unanimously found that Honduras had violated the rights of personal liberty, humane treatment, and life guaranteed by the American Convention on Human Rights (the "American Convention" or the "Convention").² As a result, the Court decided that Honduras must pay fair compensation to the victims' next-of-kin.³ In the case of Fairen Garbi and Solís Cor-

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1. See *Velásquez Rodríguez Case*, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS [INTER-AM. CT. H.R.], OAS/ser. L./V./III.19, doc. 13 (1988); *Godínez Cruz Case*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS (ser. C) No. 5 (1989); *Fairen Garbi and Solís Corrales Case*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS (ser. C) No. 6 (1989). For a discussion of the procedural aspects of the Court's work, see Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989).

2. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 75-76, ¶ 194; *Godínez Cruz*, INTER-AM. CT. H.R. at 159-60, ¶ 203. See American Convention on Human Rights, Nov. 22, 1969, OEA/ser. K/XVI/1.1, doc. 65 rev. 1, corr. 2 (1970), reprinted in 9 I.L.M. 673 (1970) [hereinafter American Convention]. Nineteen states, members of the Organization of American States, have ratified the Convention: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. See ORG. OF AM. STATES HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser. L./V./II.65, doc. 6 (1985) [hereinafter HANDBOOK]. The United States is a signatory, but not a state party. See President's Message to the Senate Transmitting Human Rights Treaties, PUB. PAPERS, Feb. 23, 1978, at 395.

3. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 76, ¶ 194(5); *Godínez Cruz*, INTER-

rales (“*Fairen Garbi*”), the Court unanimously held that the evidence failed to establish Honduran responsibility for the disappearances.⁴

In interpreting and applying the American Convention, the Court drew upon its prior advisory opinions as well as decisions of other international tribunals⁵ and organizations.⁶ It also applied concepts and terminology from the traditional law of state responsibility for injury to aliens.⁷

The Court’s opinions detail three distinct obligations of States Parties to the Convention: (1) abstention from violating guaranteed human rights; (2) prevention of violations by state and non-state actors; and (3) investigation and punishment of both state and private human rights infringements.⁸ These obligations derive from the text of article 1 of the Convention, which binds states parties “to respect” the rights guaranteed by the Convention and “to ensure” to all persons their full and free exercise.⁹

AM. CT. H.R. at 160, ¶ 203(5). In *Velásquez Rodríguez*, the Court did not fix the amount of damages in its judgment because the parties submitted no evidence on the issue. *Velásquez Rodríguez*, INTER-AM. CT. H.R., at 75, ¶ 190. Instead, it decided that Honduras and the Commission should agree on the amount of damages and present their agreement to the Court for approval. *Id.* ¶ 191. Failing agreement, the Court retained jurisdiction to decide the issue. *Id.* at 76, ¶ 194(6). The parties failed to reach agreement and on July 21, 1989, the Court awarded damages totalling one and a half million lempiras to the family, spouse, and children of Velásquez Rodríguez. INTER-AM. CT. H.R. (Press Release) July 21, 1989. In *Godínez Cruz*, the Court retained jurisdiction to award damages. *Godínez Cruz*, INTER-AM. CT. H.R. at 160, ¶ 203(6). The amount was subsequently set at one million three hundred thousand lempiras. INTER-AM. CT. H.R. (Press Release) July 21, 1989.

4. *Fairen Garbi*, INTER-AM. CT. H.R. at 40, ¶ 163(2).

5. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 60, ¶ 127 (citing *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 1 (Judgment of Apr. 9); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 4 (Judgment of June 27)). The Court would have applied the concepts of article 1(1) of the Convention in any event under general principles of law. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 69, ¶ 163 (citing *The S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10; *The Handyside Case*, 24 EUR. CT. H.R. (ser. A) (1976)).

6. The Court makes particular use of the work of the United Nations and the Organization of American States (the “OAS”) bodies in combatting disappearances. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 66-67, ¶¶ 151-53.

7. For example, in *Velásquez Rodríguez*, the Court held that the American Convention imposes the requirement of “due diligence” upon states to prevent human rights violations. *Id.* at 71, ¶ 172. For a further discussion of due diligence, see *infra* notes 121-37 and accompanying text.

8. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 151, 155-56, ¶¶ 164, 174-77.

9. American Convention, *supra* note 2, art. 1(1) at 1, reprinted in 9 I.L.M. at 675.

The scope of the Convention's protection may be compared to the general lack of governmental responsibility under the U.S. Constitution for failure to act with respect to violence committed by private actors. The contrast is most pronounced in the recent Supreme Court decision of *DeShaney v. Winnebago County Department of Social Services*.¹⁰ Chief Justice Rehnquist, writing for a majority of six, held that the due process clause "forbids the State 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."¹¹

This Article will discuss the decisions of the Inter-American Court, comparing them with U.S. judicial decisions involving "state action" and private conduct. It will point out the evolution in international law from restraints on the exercise of state power, with limited affirmative duties for the protection of aliens, to the more generalized obligation of ensuring respect for human rights. This Article concludes that the American Convention provides guarantees for individual rights that are lacking in U.S. constitutional law.

I. INTER-AMERICAN INSTITUTIONS

Since 1948, the Inter-American system of the Organization of American States (the "OAS") has developed ambitious and effective mechanisms for promoting and protecting human rights. The legal documents of the system¹² recognize civil,

10. 109 S. Ct. 998 (1989).

11. *Id.* at 1003.

12. See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2416, T.I.A.S. No. 2361, 119 U.N.T.S. 3, amended Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 326 [hereinafter OAS Charter]. The Inter-American system has two legal bases, one of which is the OAS Charter. *Id.* The other is the American Convention. See *supra* note 2. In addition, certain subsidiary documents are legally binding. See American Declaration of the Rights and Duties of Man (1948) [hereinafter American Declaration], reprinted in HANDBOOK, *supra* note 2, at 17-25; Statute of the Inter-American Commission on Human Rights (1979) [hereinafter Commission Statute], reprinted in HANDBOOK, *supra* note 2, at 103-13; Regulations of the Inter-American Commission on Human Rights (1980, modified 1985) [hereinafter Commission Regulations], reprinted in HANDBOOK, *supra* note 2 at 115-42; Statute of the Inter-American Court of Human Rights (1979) [hereinafter Court Statute], reprinted in HANDBOOK, *supra* note 2, at 143-54; Rules of Procedure of the Inter-American Court of Human Rights (1980) [hereinafter Court Rules], reprinted in HANDBOOK,

political, economic, social, and cultural rights.¹³ The OAS established the Inter-American Commission on Human Rights¹⁴ and the Inter-American Court of Human Rights.¹⁵ The Commission may review complaints from individuals and groups or may itself initiate proceedings concerning human rights violations by any OAS Member State.¹⁶ The Commission may also undertake country-wide studies of human rights practices and

supra note 2, at 155-74. On the legal status of the American Declaration, see Interpretation of American Declaration of the Rights and Duties of Man within the Framework of article 64 of the American Convention on Human Rights, Advisory Opinion No. OC-10/89, INTER-AM. CT. H.R. (July 14, 1989); Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 833-36 (1975).

13. See American Declaration, *supra* note 12, arts. 1-XXVIII, reprinted in HANDBOOK, *supra* note 2, at 20-24; American Convention, *supra* note 2, arts. 3-26, at 2-9, reprinted in 9 I.L.M. at 676-83.

14. See OAS Charter, *supra* note 12, arts. 51(e), 112, 150, 21 U.S.T. at 673-74, 691, 701, T.I.A.S. No. 6847 at 67-68, 85, 95, 721 U.N.T.S. at 342, 364-66, 376; American Convention, *supra* note 2, arts. 33-51, at 11-15, reprinted in 9 I.L.M. at 685-89. The OAS General Assembly elects the seven members of the Commission to serve in their individual capacities for a term of four years. Commission Regulations, *supra* note 12, art. 1(3); American Convention, *supra* note 2, arts. 36-37, at 11, reprinted in 9 I.L.M. at 685. The Commission represents all Member States of the OAS as both an organ of the OAS and of the Convention. OAS Charter, *supra* note 12, art. 112, 21 U.S.T. at 691, T.I.A.S. No. 6847 at 85, 721 U.N.T.S. at 364-66. The Commission functions to promote the observance and protection of human rights. It also serves as a consultative organ of the OAS in human rights matters. See *id.*; see also American Convention, *supra* note 2, art. 41, at 12, reprinted in 9 I.L.M. at 686; Shelton, *Implementation Procedures of the American Convention on Human Rights*, 26 GER. Y.B. INT'L L. 238, 241 (1983).

15. See American Convention, *supra* note 2, art. 33, at 11, reprinted in 9 I.L.M. at 685. The Court consists of seven judges nominated from among nationals of the member states of the OAS. *Id.* art. 52, at 16, reprinted in 9 I.L.M. at 690. Judges are elected to the Court in an individual capacity by a vote of the states parties to the Convention. *Id.* The Judges of the Court are to be "of the highest moral authority, . . . of recognized competence in the field of human rights, . . . [and to] possess the qualifications required for the exercise of the highest judicial functions" in the state of nationality or of the state that nominates them. *Id.* The judges are elected for a term of six years and "may be re-elected only once." *Id.* art. 54, at 16, reprinted in 9 I.L.M. at 690; see Court Statute, *supra* note 12, arts. 4-7, reprinted in HANDBOOK, *supra*, note 2, at 144-46; Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982).

16. See American Convention, *supra* note 2, arts. 44-45, at 13, reprinted in 9 I.L.M. at 687. The Inter-American system is unique in making the right of individual petition automatic and inter-state proceedings optional. *Id.*; see Commission Statute, *supra* note 12, arts. 18-20, reprinted in HANDBOOK, *supra* note 2, at 109-11; Commission Regulations, *supra* note 12, art. 26, reprinted in HANDBOOK, *supra* note 2, at 125; Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 117 (H. Hannum ed. 1986); Norris, *Bringing Human Rights Petitions Before the Inter-American Commission*, 20 SANTA CLARA L. REV. 733, 738 (1980).

make on-site investigations.¹⁷

The Court may hear cases between states parties to the Convention or against a state at the request of the Commission if the state involved has accepted the Court's jurisdiction.¹⁸ The Court may award damages and take provisional measures when necessary.¹⁹

II. THE HONDURAN CASES

A. Facts

The facts of *Velásquez Rodríguez, Godínez Cruz, and Fairen Garbi* are similar. The first case concerned Angel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras who disappeared on September 12, 1981.²⁰ He was allegedly kidnapped and detained without a warrant for his arrest by members of the National Office of Investigations (the "DNI") and of the Armed Forces of Honduras.²¹ During his detention he was taken to various locations

17. See Commission Statute, *supra* note 12, arts. 18(c), 18(g), reprinted in HANDBOOK, *supra* note 2, at 109-10; Commission Regulations, *supra* note 12, arts. 44, 62, reprinted in HANDBOOK, *supra* note 2, at 131, 137-38. For a list of country reports published by the Commission, see Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361, 365 n.12 (1989).

18. See American Convention, *supra* note 2, arts. 61(1), 62(3), at 17-18, reprinted in 9 I.L.M. at 691-92. The Court also has the most extensive advisory jurisdiction of any international tribunal. Compare the American Convention, *supra* note 2, with the Statute of the International Court of Justice (I.C.J. Stat.) June 26, 1945, 59 Stat. 1055, T.S. No. 993. In the American Convention, both states and other bodies within the OAS and even states who have not ratified the Convention can call upon the Court's advisory jurisdiction. See American Convention, *supra* note 2, art. 64 at 18, reprinted in 9 I.L.M. at 692. However, the International Court of Justice is limited to acting upon requests formally presented by the United Nations; individual states cannot request an advisory opinion from the Court. See I.C.J. Stat., art. 65, 59 Stat. at 1063, T.S. No. 993 at 33. The European Convention initially provided for no advisory jurisdiction. However, article 1 of Protocol 2 added a limited advisory jurisdiction at the request of the Committee of Ministers. See Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 6, 1963, art. 1, reprinted in HUMAN RIGHTS IN INTERNATIONAL LAW 25, 26 (Council of Europe, 1979); see also Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

19. See American Convention, *supra* note 2, art. 63, at 18, reprinted in 9 I.L.M. at 692.

20. Velásquez Rodríguez Case, INTER-AM. CT. H.R. 35, 36, ¶ 3, OAS/ser. L./V./III.19, doc. 13 (1988).

21. *Id.*

where he was interrogated and tortured.²²

The second case questioned the December 1981 disappearances of Franciso Fairen Garbi and Yolanda Solis Corrales.²³ Their families petitioned the Commission one month after the two Costa Rican nationals were last seen. The petition alleged that they had been traveling together by car en route to Mexico to visit relatives.²⁴ When they failed to return to Costa Rica as planned, the families inquired after them at the Nicaraguan, Honduran, and Guatemalan Embassies. The Nicaraguan Embassy said that the two had left Nicaragua for Honduras on December 11, 1981.²⁵ The Guatemalan Embassy reported they had not entered Guatemala.²⁶ After some inconsistent statements, Honduras replied that both Fairen Garbi and Solis Corrales had left Honduras for Guatemala on December 12.²⁷ Guatemala then admitted this, saying that the pair had continued on to El Salvador.²⁸ El Salvador denied that they had entered the country.²⁹

The third case commenced one year after the opening of the *Velásquez Rodríguez* case, when the Commission received the *Godínez Cruz* petition. Saul Godínez Cruz, a schoolteacher, disappeared on July 22, 1982 on his way to work.³⁰ The petition alleged that an eyewitness saw a man in military uniform and two individuals in plain clothes arrest someone resembling Godínez, and place him and his motorcycle in a larger vehicle.³¹ Godínez's house had been under surveillance prior to his disappearance.³²

22. *Id.*

23. Case 7951, 1984-1985 ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS [INTER-AM. C.H.R.] 84, OEA/ser. L./V./II.66, doc. 10 rev. 1 (1985) (Resolution 16/84, Oct. 4, 1984).

24. *Id.* at 85.

25. *Id.*

26. *Id.* The government of Guatemala subsequently indicated that the two had entered Guatemala from Honduras on December 12, 1981 and departed for El Salvador on December 14, 1981. *Id.* at 90.

27. *Id.* at 87. Initially, Honduras claimed that only Solis Corrales had entered the country. *Id.* at 101-02.

28. *Id.* at 102.

29. *Id.* at 103.

30. *Godínez Cruz Case*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85, 86, ¶ 3 (ser. C) No. 5 (1989).

31. *Id.*

32. *Id.*

In accordance with its procedures, the Commission transmitted the relevant parts of the three petitions to the Honduran government for its response.³³ In *Fairen Garbi*, the government replied to Commission inquiries and submitted evidence denying its involvement.³⁴ After evaluating the evidence, the Commission held Honduras responsible for the disappearances.³⁵ In the other two cases, the Commission repeatedly and unsuccessfully sought to acquire information from the Honduran government. Receiving no reply, the Commission applied article 42 of its regulations and presumed the truth of the allegations contained in the petition.³⁶

Subsequently, the government requested reconsideration of the cases, claiming that domestic remedies had not been exhausted.³⁷ The Commission requested further information, finally concluding proceedings on April 18, 1986, nearly five years after the *Velásquez Rodríguez* petition was filed. In its resolution of *Velásquez Rodríguez*, the Commission found that the evidence showed the youth to be missing and that Honduras "ha[d] not offered convincing proof that would allow the Commission to determine that the allegations [were] not true."³⁸ Concerning *Godínez Cruz*, the Commission decided that the request for reconsideration was unfounded and "lack[ed] information other than that already examined by the Commis-

33. Commission Regulations, *supra* note 12, art. 34(c), reprinted in HANDBOOK, *supra* note 2, at 127-28.

34. Case 7951, 1984-1985 INTER-AM. C.H.R. 84, 87-88, OEA/ser. L./V./II. 66, doc. 10 rev. 1 (1985) (Resolution 16/84, Oct. 4, 1984).

35. *Id.* at 103.

36. *Velásquez Rodríguez* Case, INTER-AM. CT. H.R. 35, 36, ¶ 4, OAS/ser. L./V./III.19, doc. 13 (1988); *Godínez Cruz* Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85, 87, ¶ 4 (ser. C) No. 5 (1989). Article 42 states:

The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

Commission Regulations, *supra* note 12, art. 42, reprinted in HANDBOOK, *supra* note 2, at 131.

37. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 36, ¶ 5; *Godínez Cruz*, INTER-AM. CT. H.R. at 87, ¶ 5. The Commission Regulations require that domestic remedies be exhausted before a petition may be brought before the Commission. See Commission Regulations, *supra* note 12, art. 37(1), reprinted in HANDBOOK, *supra* note 2, at 129.

38. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 37, ¶ 10.

sion."³⁹ Finally, in *Fairen Garbi*, the Commission reaffirmed a 1984 decision finding Honduras responsible for the disappearances.⁴⁰

The Commission referred all three cases to the Court in resolutions adopted April 18, 1986.⁴¹ The Honduran government responded by entering preliminary objections to the Court's jurisdiction.⁴² The Court heard arguments on the objections on June 15 and 16, 1987.⁴³ On June 26, the Court unanimously rejected all Honduran objections except those relating to the issue of exhaustion of domestic remedies, which were joined to the merits of the cases.⁴⁴

Hearings on the merits took place between September 30 and October 7, 1987.⁴⁵ The Court heard arguments by agents for the Commission and the government. The Commission called a series of witnesses for three purposes. The first purpose was to have a group testify in all three cases about the

39. Case 8097, 1985-1986 ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS [INTER-AM. C.H.R.] 49, 50, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986) (Resolution No. 24/86, Apr. 18).

40. Case 7951, 1985-1986 INTER-AM. C.H.R. 47, 49, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986) (Resolution No. 23/86, Apr. 18). According to this resolution, the Commission's earlier decision was based upon the presumed truth of the facts alleged, pursuant to article 42 of the Commission's Regulations. However, the earlier resolution, 16/84 of October 4, 1984, makes no reference to article 42 and appears instead to constitute a decision on the merits, taking into account the replies of Honduras. See Case 7951, 1984-1985 INTER-AM. C.H.R. 84, 101-03, OEA/ser. L./V./II.66, doc. 10 rev. 1 (1985).

41. Case 7920, 1985-1986 INTER-AM. C.H.R. 40, 47, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986) (Resolution No. 22/86); Case 7951, 1985-1986 INTER-AM. C.H.R. 47, 49, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986) (Resolution No. 23/86); Case 8097, 1985-1986 INTER-AM. C.H.R. 49, 51, OEA/ser. L./V./II.68, doc. 8 rev. 1 (1986) (Resolution No. 24/86).

42. Velásquez Rodríguez Case, INTER-AM. CT. H.R. 35, 38, ¶ 16, OAS/ser. L./V./III.19, doc. 13 (1988); Godínez Cruz Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85, 90, ¶ 18 (ser. C) No. 5 (1989); Fairen Garbi and Solís Corrales Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 1, 5, ¶ 15 (ser. C) No. 6 (1989).

43. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 39, ¶ 22 (June 15); *Godínez Cruz*, INTER-AM CT. H.R. at 91, ¶ 24 (June 16); *Fairen Garbi*, INTER-AM. CT. H.R. at 6, ¶ 21 (June 16).

44. Velásquez Rodríguez Case, INTER-AM. CT. H.R. 55, ¶ 96, OEA/ser. L./V./III.17, doc. 13 (1987) (Preliminary Objections); Godínez Cruz Case, INTER-AM. CT. H.R. 81, 101, ¶ 98, OEA/ser. L./V./III.17, doc. 13 (1987) (Preliminary Objections); Fairen Garbi and Solís Corrales Case, INTER-AM. CT. H.R. 57, 78, ¶ 95, OEA/ser. L./V./III.17, doc. 13 (1987) (Preliminary Objections).

45. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 40, ¶ 28; *Godínez Cruz*, INTER-AM. CT. H.R. at 94, ¶ 30; *Fairen Garbi*, INTER-AM. CT. H.R. at 7, ¶ 28.

general situation in Honduras between 1981 and 1984 concerning disappearances and governmental complicity.⁴⁶ The second purpose was to have a group testify in all three cases about the existence of effective domestic remedies during this period.⁴⁷ Finally, the Commission called different sets of witnesses to testify on the specific facts relating to each of the disappeared.⁴⁸

While the cases were pending, the Court issued two interim orders. Both contained protective measures requested by the Commission as a result of threats made against certain witnesses and the murders of others.⁴⁹

The Court issued its judgment on the merits in *Velásquez Rodríguez* on July 29, 1988,⁵⁰ in *Godínez Cruz* on January 20, 1989,⁵¹ and in *Fairen Garbi* on March 15, 1989.⁵² In each case, the Court concluded that domestic remedies could not be ex-

46. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 41, ¶ 28(c); *Godínez Cruz*, INTER-AM. CT. H.R. at 94-95, ¶ 30(c); *Fairen Garbi*, INTER-AM. CT. H.R. at 8, ¶ 30(c).

47. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 41, ¶ 28(d); *Godínez Cruz*, INTER-AM. CT. H.R. at 95, ¶ 30(d); *Fairen Garbi*, INTER-AM. CT. H.R. at 8, ¶ 30(d).

48. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 41, ¶ 28(e); *Godínez Cruz*, INTER-AM. CT. H.R. at 95, ¶ 30(e); *Fairen Garbi*, INTER-AM. CT. H.R. at 8, ¶ 30(e).

49. The January 15 order, referring to attacks on witnesses as "savage, primitive, inhuman and reprehensible," demanded that the Honduran government adopt, without delay, such measures as are necessary to prevent further infringements on the basic rights of those who have appeared or have been summoned to do so before this Court . . . in strict compliance with the obligation of respect for and observance of human rights, under the terms of Article 1(1) of the Convention.

Velásquez Rodríguez, *Fairen Garbi* and *Solis Corrales*, and *Godínez Cruz* Cases, INTER-AM. CT. H.R. 25, 26, OEA/ser. L./V./III.19, doc. 13 (1988) (Interim Protection Order of Jan. 15). This same order required the government to investigate and punish the threats against and murders of witnesses. *Id.*

On January 18, 1988, following a public hearing, the Court decided on further measures, requiring the Honduran government report to the Court the specific steps taken to protect witnesses and investigate crimes against them. The Court included a demand for medical and forensic reports on those witnesses who had been killed. *Velásquez Rodríguez*, *Fairen Garbi* and *Solis Corrales*, and *Godínez Cruz* Cases, INTER-AM. CT. H.R. 27, 28, OEA/ser. L./V./III.19, doc. 13 (1988) (Interim Protection Order of Jan. 19). The government submitted autopsy and forensic reports to the Court within two weeks. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 45-46, ¶ 46. Further documentation, including autopsy and ballistic reports, was submitted by the government the following month. *Id.* at 46-47, ¶ 49.

50. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 35.

51. *Godínez Cruz* Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85 (ser. C) No. 5 (1989).

52. *Fairen Garbi* and *Solis Corrales* Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 1 (ser. C) No. 6 (1989).

hausted because existing remedies in Honduras during the period in question were ineffective.⁵³ It found that from 1981 to 1984 between 100 and 150 persons disappeared in Honduras under similar circumstances.⁵⁴ Concerning kidnappings, the Court found "[i]t was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders."⁵⁵

The Court determined that both Velásquez Rodríguez and Godínez Cruz were kidnapped under circumstances falling within the systematic practice of disappearances,⁵⁶ that persons connected with the army or under its direction carried out the kidnappings,⁵⁷ and that there was no evidence that either man had disappeared to join subversive groups.⁵⁸

Based on these findings, the Court held Honduras responsible for the disappearances. Moreover, the State was responsible even if the disappearances were not carried out by agents who acted under cover of public authority, because the State's apparatus failed to act to prevent the disappearances or to punish those responsible.⁵⁹ Therefore, because Honduran officials either carried out or acquiesced in the kidnappings, the Court concluded that the government "failed to guarantee the human rights affected by" disappearances.⁶⁰

In *Fairen Garbi*, the Court did not hold Honduras responsible because the evidence failed to establish where the two individuals had disappeared.⁶¹ The Court found that they left Nicaragua on December 11 and entered Guatemala on December

53. *Velásquez Rodríguez*, INTER-AM. CT. H.R. 35, 52, ¶¶ 80-81; *Godínez Cruz*, INTER-AM. CT. H.R. 85, 116, ¶¶ 87-88; *Fairen Garbi*, INTER-AM. CT. H.R. 1, 24-25, ¶¶ 96-102.

54. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 63, ¶ 147(a); *Godínez Cruz*, INTER-AM. CT. H.R. at 137, ¶ 153(a); *Fairen Garbi*, INTER-AM. CT. H.R. at 35, ¶ 153(a).

55. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 64, ¶ 147(c); *Godínez Cruz*, INTER-AM. CT. H.R. at 137, ¶ 153(c); *Fairen Garbi*, INTER-AM. CT. H.R. at 36, ¶ 153(c).

56. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 65, ¶ 147(g); *Godínez Cruz*, INTER-AM. CT. H.R. at 140, ¶ 154(b).

57. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 65, ¶ 147(f); *Godínez Cruz*, INTER-AM. CT. H.R. at 136-37, ¶ 153(c).

58. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 65, ¶ 147(h); *Godínez Cruz*, INTER-AM. CT. H.R. at 141, ¶ 154(b) (v)-(vi).

59. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 73, ¶ 182; *Godínez Cruz*, INTER-AM. CT. H.R. at 156, ¶ 192.

60. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 66, ¶ 148; *Godínez Cruz*, INTER-AM. CT. H.R. at 142, ¶ 156.

61. *Fairen Garbi and Solís Corrales Case*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 1, 38-39, ¶¶ 157-60 (ser. C) No. 6 (1989).

12.⁶² After this time, there was no clear proof of their movements. Under these circumstances, the Court, disagreeing with the conclusions of the Commission, found insufficient proof of Honduran responsibility.⁶³

B. *Analysis*

The issues and principles in all three cases centered on state responsibility for human rights violations. Petitioners alleged violations of articles 4, 5, and 7 of the Convention.⁶⁴ The Court found that infringements of the rights contained in these provisions inevitably involve violation of Convention article 1, which sets out the general obligations of states and contains the generic basis of liability.⁶⁵ The Court viewed article 1 as establishing the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to a state party, thereby establishing its international responsibility.⁶⁶

Article 1(1) of the Convention provides:

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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁶⁷

62. *Id.* at 28-30, ¶¶ 116, 117, 124(a), 124(c). It is noteworthy that the Court appointed a handwriting expert to analyze Fairen Garbi's signature on the border-crossing documents submitted by the government in the case. *Id.* at 12, 32, ¶¶ 45, 138.

63. *Id.* at 40, ¶ 163(2).

64. *Velásquez Rodríguez*, INTER-AM. CT. H.R. 35, 68, ¶ 159; *Godínez Cruz*, INTER-AM. CT. H.R. 85, 148, ¶ 168; *Fairen Garbi*, INTER-AM. CT. H.R. at 2, ¶ 2. Article 4 guarantees the right to life; article 5 protects the right to humane treatment, including the right to physical, mental, and moral integrity; article 7 ensures the right to personal liberty and security. American Convention, *supra* note 2, at 2-4, reprinted in 9 I.L.M. at 676-78.

65. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 68-69, ¶¶ 160, 162; *Godínez Cruz*, INTER-AM. CT. H.R. at 148, ¶¶ 169, 171; *Fairen Garbi*, INTER-AM. CT. H.R. at 39, ¶ 161.

66. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 68-69, ¶¶ 160, 162; *Godínez Cruz*, INTER-AM. CT. H.R. at 148, ¶¶ 169, 171; *Fairen Garbi*, INTER-AM. CT. H.R. at 39, ¶ 161.

67. American Convention, *supra* note 2, art. 1(1), at 1, reprinted in 9 I.L.M. at 675.

According to the Court, article 1 is implicated in every claim alleging a violation of one of the protected rights.⁶⁸ "In effect, that article charges the states parties with the fundamental duty to respect and guarantee the rights recognized in the Convention."⁶⁹ Thus, any human rights violation that can be attributed to the act or omission of any state agency, according to international law principles, constitutes an act imputable to the state.⁷⁰

As interpreted by the Court, article 1(1) contains several separate duties. First, a state shall respect the rights and freedoms recognized by the Convention. This "must necessarily comprise the concept of the restriction of the exercise of state power."⁷¹ The existence of a legal system designed to permit exercise of human rights does not alone ensure compliance with a state's obligations, because rights may be violated in spite of legal protections. Thus, the Court declares, whenever a state organ, official, or public entity violates a protected right, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention because public

68. Thus, even if the Commission does not allege a violation of article 1(1) of the Convention, the Court may nevertheless apply its provisions.

The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.

Velásquez Rodríguez, INTER-AM. CT. H.R. at 69, ¶ 163; *Godínez Cruz*, INTER-AM. CT. H.R. at 148-49, ¶ 172 (emphasis in original). The Inter-American Court of Human Rights approach may be contrasted with the European Court's approach, which does not recognize that article 1 of the European Convention is capable of independent violation. The European Convention states in part that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Convention for the Protection of Human Rights and Freedoms, Nov. 4, 1950, art. 1, 213 U.N.T.S. 221, 224. See *Ireland v. U.K.*, 25 EUR. CT. H.R. 1, 90-91, ¶ 239 (ser. A) (1978).

69. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 69, ¶ 164; *Godínez Cruz*, INTER-AM. CT. H.R. at 149, ¶ 173.

70. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 69, ¶ 164; *Godínez Cruz*, INTER-AM. CT. H.R. at 149, ¶ 173.

71. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 69-70, ¶ 165; *Godínez Cruz*, INTER-AM. CT. H.R. at 149-50, ¶ 174. Both cases quote from The Word "Laws" in article 30 of the American Convention on Human Rights, Advisory Opinion No. OC-6/86, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS 1, 29, ¶ 21 (ser. A) No. 6 (1986).

power is used to infringe the rights recognized.⁷² In general, then, a state is responsible for the acts and omissions of its agents undertaken in their official capacity, even if they are acting outside the scope of their authority or in violation of internal law.⁷³ Intent or motivation is irrelevant.⁷⁴

Second, the states must "ensure" the free and full exercise of the rights recognized by the Convention. This obligation requires states "to organize 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."⁷⁵ This implies, first, that states must prevent violations of the rights recognized by the Convention.⁷⁶ In addition, the state must attempt to investigate and punish violations of human rights, restore the right violated, and provide compensation as warranted for damages resulting from the violation.⁷⁷

The existence of affirmative duties to prevent and to remedy human rights violations implies, as a consequence, that state responsibility extends to omissions by state actors. The Court cites the example of a state that is not directly responsible for a human rights violation because the act is that of a private person, but that becomes responsible because of "the lack of due diligence to prevent the violation or to respond to

72. *Velásquez Rodríguez*, INTER-AM. CT. H.R. 35, 70, ¶ 169; *Godínez Cruz*, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85, 151, ¶ 178 (ser. C) No. 5 (1989).

73. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 70, ¶ 170; *Godínez Cruz*, INTER-AM. CT. H.R. at 151, ¶ 179.

74. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 71, ¶ 173; *Godínez Cruz*, INTER-AM. CT. H.R. at 152, ¶ 183.

75. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 70, ¶ 166; *Godínez Cruz*, INTER-AM. CT. H.R. at 150, ¶ 175. Compare the obligations of states parties to the European Convention on Human Rights, which

does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; . . . the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels.

Ireland v. U.K., 25 EUR. CT. H.R. 1, 91, ¶ 239 (ser. A) (1978).

76. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 70, ¶ 166; *Godínez Cruz*, INTER-AM. CT. H.R. at 150, ¶ 175.

77. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 70, ¶ 166; *Godínez Cruz*, INTER-AM. CT. H.R. at 150, ¶ 175.

it as required by the Convention.”⁷⁸ In addition, the Court declares that where human rights violations committed by private parties are not seriously investigated, “those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”⁷⁹

The Court concludes that the state is liable for disappearances such as those of Velásquez Rodríguez and Godínez Cruz, which were found to be “carried out by [agents] who acted under cover of public authority.”⁸⁰ Significantly, the Court adds that even if state complicity were not proven, the failure of the State “to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention”⁸¹ to ensure the full and free exercise of human rights.

In sum, under article 1,

[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.⁸²

III. STATE RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS

The Court acknowledges that article 1 does not impose liability for all human rights violations, only for those that can be attributed to the action or omission of any public authority

78. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 71, ¶ 172; *Godínez Cruz*, INTER-AM. CT. H.R. at 152, ¶ 182.

79. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 72, ¶ 177; *Godínez Cruz*, INTER-AM. CT. H.R. at 154, ¶ 188.

80. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 73, ¶ 182; *Godínez Cruz*, INTER-AM. CT. H.R. at 156, ¶ 192.

81. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 73, ¶ 182; *Godínez Cruz*, INTER-AM. CT. H.R. at 156, ¶ 192. The Court noted that the illegality of these acts under Honduran law and the fact that not all levels of the Government were aware of them are irrelevant for establishing state responsibility, as is the question of whether the acts were the result of official orders. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 73, ¶ 183; *Godínez Cruz*, INTER-AM. CT. H.R. at 156, ¶ 193.

82. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 71, ¶ 174; *Godínez Cruz*, INTER-AM. CT. H.R. at 152, ¶ 184.

under the rules of international law.⁸³ “[I]n principle, any violation of [Convention-guaranteed rights] carried out by an act of public authority or by persons who use their position of authority is imputable to the State.”⁸⁴ In addition, although the state may not bear initial responsibility for acts of private violence, responsibility may be imputed because of the “lack of due diligence”⁸⁵ to prevent or remedy violations committed by non-state actors.

In this analysis, the Court echoes the traditional law of state responsibility for injury to aliens. Prior to the establishment of international systems for the protection of human rights at the end of World War II, international law recognized a state’s right to bring a claim against another state because of breaches of international law causing injury to the person or property of its nationals.⁸⁶ In the *Mavrommatis Palestine Concessions*, the Permanent Court of International Justice states that “[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.”⁸⁷

Although international law during this period imposed an obligation on states to protect foreign nationals and to treat them according to recognized minimum standards,⁸⁸ in gen-

83. *Velásquez Rodríguez*, INTER-AM. CT. H.R. 35, 69, ¶ 164; *Godínez Cruz*, INTER-AM. CT. H.R. 85, 149, ¶ 173.

84. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 71, ¶ 172; *Godínez Cruz*, INTER-AM. CT. H.R. at 152, ¶ 181.

85. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 71, ¶ 172; *Godínez Cruz*, INTER-AM. CT. H.R. at 152, ¶ 182.

86. The law of responsibility for injury to aliens was largely developed by international claims practice over the past 100 years, notably the United States-Mexico General Claims’ Convention of 1923. Claims Convention, Sept. 8, 1923, United States-Mexico, 43 Stat. 1730, T.S. No. 678. For claims involving the United States, see 6 J. MOORE, DIGEST OF INTERNATIONAL LAW §§ 970-1063, at 605-1037 (1906); 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW §§ 520-46, at 471-851 (1943); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §§ 1-39, at 697-1291 (1967). For the earlier legal history of state responsibility, see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1-137 (1973). See generally F.V. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974) [hereinafter F.V. GARCIA-AMADOR].

87. The *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, 6, 12 (Aug. 30).

88. See generally A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW AP-

eral it imposed no similar obligation regarding the treatment of a state's own nationals.⁸⁹ The great innovation of international human rights law has been to extend the protections formerly afforded aliens, and to some extent, religious minorities,⁹⁰ to all individuals.⁹¹

Today, as the Honduran cases make clear, one of the international obligations imposed upon states by treaty and custom is to "respect and ensure" internationally recognized human rights.⁹² Because of this duty, a state's failure to act to prevent or remedy human rights violations committed by private entities, such as death squads, may give rise to liability in circumstances where, in earlier times, liability was found only under the law of state responsibility for injury to aliens.

A. *Acts and Omissions*

Acts contrary to international law involve a breach or non-performance of an international obligation.⁹³ Breach includes both "acts" and "omissions" according to the type of conduct

PLIED TO ALIENS (1949); A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938).

89. See T. BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 2-3 (1988); I. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* §§ 288-92, at 362-69 (2d ed. 1912).

90. See e.g., L. SOHN & T. BUERGENTHAL, *supra* note 86, at 137-211.

91. See T. BUERGENTHAL, *supra* note 89, at 14-16; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS, part VII introductory note, at 144-47 (1987) [hereinafter RESTATEMENT (THIRD)]. The Restatement notes that

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

Id.; F.V. GARCIA-AMADOR, *supra* note 86, at 5. On the general duty to protect, see Ramcharan, *The Concept of Protection in the International Law of Human Rights*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 593 (Y. Dinstein, 1989).

92. See Velásquez Rodríguez Case, INTER-AM. CT. H.R. 35, 69-70, ¶¶ 165-66, OAS/ser. L./V./111.19, doc. 13 (1988); Godínez Cruz Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85, 149-50, ¶¶ 174-75 (ser. C) No. 5 (1989); Fairen Garbí and Solís Corrales Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 1, 39, ¶ 161 (ser. C) No. 6 (1989).

93. State responsibility rests on the principle that breach of international law is a wrong for which there is a duty to make reparation. See I. G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 162 (4th ed. 1960); see also *The Factory at Chorzów (Claim for Indemnity)* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13 (Sept. 13). "Any breach of an engagement involves an obligation to make reparation." *Id.* at 29.

covered by the rule in question because both are included in the concept of non-performance of an international obligation.⁹⁴

International practice has long made clear that both acts and omissions may give rise to international liability, depending on the duty imposed under international law.⁹⁵ In fact, one United Nations report noted that "the cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State."⁹⁶ For example, in the *Russian Indemnity* case, the Permanent Court of Arbitration defined fault to include "an unlawful act or omission."⁹⁷ Similarly, in the *Corfu Channel* case, Albania was held responsible for its failure to act because it knew or should have known of the illegal conduct involved.⁹⁸ The International Court of Justice (the "ICJ") held that "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors."⁹⁹ However, once the evidence established that Albania knew or should have known of the illegal minelaying, its failure to act made the conduct imputable to it.¹⁰⁰

94. For example, in 1927, the Institute of International Law stated that "the State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations." *State Responsibility*, [1956] 2 Y.B. INT'L L. COMM'N 173, Annex 8, art. 1, at 227, U.N. Doc. A/CN.4/(ser. A)/1956/ and Add.1/(1956).

95. A state's legislative omissions can be the basis of liability. An early attempt at drafting an international code of state responsibility for injury to aliens included a provision that stated: "International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations." *Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.351(c) M. 145(c) 1930 V Annex IV, art. 6, at 236. *quoted in* F.V. GARCIA-AMADOR, *supra* note 86, at 21.

96. R. Ago, *Second Report on State Responsibility*, [1970] 2 Y.B. INT'L L. COMM'N 177, 188, U.N. Doc. A/CN.4/233/1970.

97. *The Russian Indemnity Case (Russia v. Turk.)*, Hague Ct. Rep. (Scott) 532, 543 (1912).

98. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 23 (Judgment of Apr. 9).

99. *Id.* at 18.

100. *Id.* at 22-23.

More recently, U.S. actions or inactions in regard to the *contras*¹⁰¹ gave rise to a Nicaraguan claim "attributing responsibility to the United States for activities of the *contras*," including the killing, wounding, or kidnapping of citizens of Nicaragua.¹⁰² The International Court of Justice had to decide

whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.¹⁰³

The ICJ found that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf."¹⁰⁴ The Court took the following view:

United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without

101. *Contras* is the term used to refer to the counter-revolutionary guerilla forces fighting the present Sandinista government of Nicaragua. The *contras* date their existence from 1979 when the Somoza regime collapsed. For a background discussion of the events leading up to the formation of the *contras* and subsequent U.S. support for the *contra* effort, see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 4, 20-22, ¶¶ 18-21 (Judgment of June 27). See also T. GILL, *LITIGATION STRATEGY AT THE INTERNATIONAL COURT: A CASE STUDY OF THE NICARAGUA V. UNITED STATES DISPUTE* 125-40 (1989).

102. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 4, 63-64, ¶ 113 (Judgment of June 27).

103. *Id.* at 62, ¶ 109.

104. *Id.*

the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.¹⁰⁵

The ICJ therefore found that acts of the *contras* could not be imputed to the United States. The only question left for the court was whether any acts of the United States directly engaged its responsibility.¹⁰⁶ In this regard, it was relevant whether the United States "was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras*."¹⁰⁷ In this context, the ICJ found the United States responsible for the publication of the manual on "Psychological Operations in Guerrilla Warfare," which could be seen to encourage violations of international humanitarian law.¹⁰⁸

Section 207 of the Restatement (Third) of the Foreign Relations Law of the United States (the "Restatement") also provides that a state is responsible for any violation of its obligations under international law whether these violations result from action or inaction.¹⁰⁹ The official comment to section 207 notes that "a state is responsible for injuries caused by . . . official failures, such as the failure to provide aliens reasonable police protection;"¹¹⁰ however, "the state is not responsible for injuries caused by private persons that result despite such police protection."¹¹¹

Similarly, the draft code of the law of state responsibility, under consideration by the International Law Commission since 1963, declares that the conduct of private individuals shall not be considered acts of state.¹¹² The Draft Code notes,

105. *Id.* at 64-65, ¶ 115.

106. *Id.* at 65, ¶ 116.

107. *Id.*

108. *Id.* at 129-30, ¶¶ 254-56.

109. RESTATEMENT (THIRD), *supra* note 91, § 207.

110. *Id.* comment c.

111. *Id.* There are specific instances of United States settlement of claims arising from private or mob violence. In one well known case the United States paid damages to Italy because of the failure of New Orleans authorities to prevent the lynching of a group of Italian nationals being held for trial. 6 J. MOORE, *supra* note 86, § 1026, at 837.

112. *State Responsibility*, [1980] 2 Y.B. INT'L L. COMM'N 107, 111-13, ¶¶ 20, 24, 31, U.N. Doc. A/CN.4/330 (Part 2).

however, that the state is responsible for inaction when it fails to carry out an international obligation to act.¹¹³

B. *Fault*

The issue of standard of care necessarily arose when a state's liability for the safety of foreign nationals was considered. It similarly arises in the context of human rights protections. Neither doctrine nor case law has arrived at a definitive determination of the limits of state responsibility, especially where the acts of private individuals are concerned. It has been questioned whether the state is strictly liable for human rights violations or whether there must be a basis in fault for attributing the violation to the state.¹¹⁴

With regard to most international law violations, writers and tribunals, including the Inter-American Court of Human Rights, have generally adopted the principle of fault. Accordingly, Grotius noted that "[t]he liability of one for the acts of his servants without fault of his own does not belong to the law of nations . . . but to municipal law; and that [is] not a universal rule."¹¹⁵

In practice, it appears that strict liability is generally avoided and responsibility is not imposed for the acts of private persons unless fault on the part of state organs or officials is established. However,

whenever there is a rule providing for the international responsibility of the State for certain acts, it is necessary to ascertain whether such rule, tacitly or expressly, makes its imputation dependent on the fault or *dolus* on the part of the organ, or, on the contrary, points only to the existence of a fact objectively contrary to international law.¹¹⁶

With regard to aliens, a state was and is not held to guarantee the safety of an alien, but is responsible for injury when police protection falls below a minimum standard of reasonableness.¹¹⁷ What constitutes reasonable police protection de-

113. *Id.* at 112, ¶ 22.

114. See F.V. GARCIA-AMADOR, *supra* note 86, at 11.

115. H. GROTIUS, 2 DE JURÉ BELLI AC PACIS LIBRI TRES 437 (Kelsey trans. 1925).

116. D. ANZILOTTI, CORSO DE DIRITTO INTERNAZIONALE 443-44 (3d ed. 1928).

117. See RESTATEMENT (THIRD), *supra* note 91, § 207 comment c.

depends on all the circumstances. Of course, the state is also responsible for injuries resulting from private violence encouraged by government officials. The Honduran cases make clear that these same obligations of states are assured to all with regard to human rights guaranteed under the American Convention.¹¹⁸

In order for the state to be liable, however, there must be a harmful act committed by an individual or group. In addition, it must also be possible to attribute to the state some conduct with respect to the act that implies the non-performance of an international duty.¹¹⁹ As early as 1598, Gentili wrote that

[o]ne who knows of a wrong is free from guilt only if he is not able to prevent it. Therefore the state, which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime if it does not do so.¹²⁰

C. *Due Diligence*

The duty of states has traditionally been formulated in terms of the concept of due diligence with regard to the protection of aliens. The Harvard Law School Draft on State Responsibility (the "Harvard Draft")¹²¹ provides that, where

118. See *supra* notes 64-82 and accompanying text. Other human rights instruments impose comparable state obligations. See, e.g., International Covenant on Political and Civil Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171. "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 . . ." *Id.* art. 2, at 173. "State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races . . ." International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 2, 660 U.N.T.S. 195, 216-18.

119. See RESTATEMENT (THIRD), *supra* note 91, § 207 comment c.

120. 2 A. GENTILI, *DE JURE BELLI LIBRI TRES* 100 (J. Rolfe trans. 1933). In addition, Grotius found two aspects of a state's conduct toward private injuries involved breach of a duty. In the first, the state is aware of an individual's intention to perpetrate a wrongful act against a foreign state or sovereign, but fails to take the proper steps to thwart his designs. See H. GROTIUS, *supra* note 115, at 523-26. In the second situation, the state receives an offender and, by refusing either to extradite or to punish him, assumes complicity in the offense. *Id.* at 526-29. By such conduct, which constitutes tacit approval of the offense, the state tends to identify itself with the offender and this tacit approval gives rise to the responsibility of the state.

121. Draft Convention on the International Responsibility of States for Injuries

criminal conduct is concerned, "failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully committed by any person"¹²² gives rise to state responsibility, as does failure to exercise due diligence to apprehend and to hold any person committing such an act.¹²³

The due diligence standard establishes that a state is not responsible for purely private harm.¹²⁴ Tribunals also have made this clear, as, for example, in the *Noyes* case.¹²⁵ This claim was brought after Noyes, a U.S. citizen driving through a village in Panama, was assaulted by participants in a political gathering that became violent.¹²⁶ Noyes was assisted by a policeman who tried to prevent further violence. In rejecting Noyes' claim that Panama was responsible for his injuries, the Commission stated that

[t]he mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to . . . punish criminals.¹²⁷

Liability for lack of due diligence results from more than mere negligence on the part of state officials and, of course,

to Aliens [hereinafter Harvard Draft] (L. Sohn & R. Baxter, reporters), *reprinted in* F.V. GARCIA-AMADOR, *supra* note 86, at 133.

122. *Id.* art. 13(1), at 234.

123. *Id.* art. 13(2), at 234-35. Compare *id.* with *Responsibility of States for Damage Caused in Their Territory to the Person or Party of Foreigners*, League of Nations Doc. C.75 M.69 1929 V (1929). The draft of the Preparatory Commission of the Hague Conference on State Responsibility, provides that

[a] State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the person concerned, could be expected from a civilized State.

Id. at 67.

124. F.V. GARCIA-AMADOR, *supra* note 86, at 28.

125. W. A. Noyes Case (Pan.-U.S.), General Claims Commission, 6 R. Int'l Arb. Awards 308 (1933).

126. *Id.* at 311.

127. *Id.*

from wilful conduct. Due diligence consists of the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances. In U.S. tort law terms, "the [danger] reasonably to be perceived defines the duty to be obeyed."¹²⁸

It is not lightly assumed that a state is responsible. "In other words, a State is not responsible unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts."¹²⁹ Thus, a state's responsibility is not engaged by the private injurious act, but as a consequence of the response of its authorities to the act.

Tribunals have applied the due diligence standard to a variety of claims. In the *Alabama Claims* case¹³⁰ the arbitral tribunal held that the British Government "failed to use due diligence in the performance of its neutral obligations"¹³¹ and "omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction [of the ship], to take in due time any effective measures of prevention."¹³²

In the Iranian Hostage case,¹³³ the International Court of Justice held Iran responsible for the acts of the militants who seized the U.S. Embassy. While the acts were not initially "directly imputable to the Iranian State,"¹³⁴ the Iranian Government's subsequent approval of the militants' actions made them so.¹³⁵ Moreover, Iran's failure "to take appropriate steps"¹³⁶ to protect the Embassy "by itself constituted a clear and serious violation"¹³⁷ of international law.

128. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

129. F.V. GARCIA-AMADOR, *supra* note 86, at 27.

130. *Alabama Claims* (U.S. v. Gr. Brit.), 1 Malloy 717 (1872), *reprinted in* C. FENWICK, *CASES ON INTERNATIONAL LAW* 706 (2d ed. 1951).

131. *Id.* at 719, *reprinted in* C. FENWICK, *supra* note 130, at 708.

132. *Id.*, *reprinted in* C. FENWICK, *supra* note 130, at 708.

133. *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24).

134. *Id.* at 29, ¶ 58.

135. *Id.* at 35, ¶ 74.

136. *Id.* at 30, ¶ 61.

137. *Id.* at 32, ¶ 67.

D. Arrest and Prosecution

A state's additional obligation operates after an impermissible act has been committed. The state cannot ignore a wrong even where it has no initial responsibility. It must undertake all reasonable measures to pursue, arrest, and bring the criminal to justice.¹³⁸ The Harvard Draft provides that

[f]ailure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful, to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act.¹³⁹

Neither immediate arrest nor conviction are required. However, the prosecution, trial, and verdict must follow ordinary standards of justice.

In the *Neer* case,¹⁴⁰ the Claims Commissioners held that international standards obligated governmental authorities to take affirmative actions to investigate and apprehend a wrongdoer and that failure to do so would be a breach of a legal duty, giving rise to international responsibility.¹⁴¹

E. Rationale

It may prove difficult to draw the line between direct responsibility for complicity in wrongful acts and failure to exercise due diligence to protect against private violence. It is sometimes stated that the rationale for imposing liability on a state for failure to act to prevent or to remedy wrongful private conduct derives from a sense of the state's complicity in the wrongful acts.¹⁴²

138. See generally C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 77-78, (1928).

139. Harvard Draft, *supra* note 121, art. 13(2), reprinted in F.V. GARCIA-AMADOR, *supra* note 86, at 234-35.

140. L.F.H. Neer Case (U.S. v. Mex.) United States and United Mexican States Claims Commission, Op. of Comm'rs 71 (1927).

141. *Id.* at 73.

142. Both *Velasquez Rodriguez* and *Godinez Cruz* contain language to this effect. See *Velasquez Rodriguez* Case, INTER-AM. CT. H.R. 35, 72, ¶ 177, OEA/ser. L./V./111.19, doc. 13 (1988); *Godinez Cruz* Case, INTER-AM. CT. H.R. DECISIONS AND JUDGMENTS 85, 154, ¶ 188 (ser. C) No. 5 (1989).

In the *Janes* arbitration,¹⁴³ the Commissioners cautioned against too great a reliance on this factor in explaining why the Mexican government should be held liable for failing to apprehend and punish the killers of a United States national:

At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor

The reasons upon which such a finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty. A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. . . . [T]he Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender Even if the nonpunishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if non-punishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands.¹⁴⁴

Although certain governmental actions will give rise to a sense of complicity in the private violations that occur, the *Janes* Commissioners and the Inter-American Court properly note that the state's responsibility actually derives from the breach of independent legal obligations. In the case of the American Convention, those obligations are articulated in arti-

143. Laura M.B. Janes (U.S. v. Mex.) United States and United Mexican States Claims Commission, Op. of Comm'rs 108 (1927).

144. *Id.* at 114-15, ¶¶ 19-20 (emphasis in original).

cle 1 and applied by the Inter-American Court in the three Honduran cases. The resulting opinions have led to the convergence of the traditional law of state responsibility for injury to aliens and the more recently elaborated state obligations to respect and ensure fundamental human rights, thereby ensuring greater protection for all.

IV. "STATE ACTION" IN U.S. LAW

The Honduran decisions take on added significance when compared with U.S. judicial decisions limiting government responsibility for constitutional violations. The restrictive framework of national protections is especially revealed in *DeShaney v. Winnebago County Department of Social Services*.¹⁴⁵

Joshua DeShaney was repeatedly subjected to brutal child abuse by his divorced, custodial father. County workers knew of the abuse and intervened several times on Joshua's behalf.¹⁴⁶ Each time, the county returned Joshua to his father. Finally, when Joshua was four years old, his father beat him into a life-threatening coma.¹⁴⁷ Joshua emerged from the coma so severely brain damaged that he will spend the rest of his life institutionalized.¹⁴⁸ Joshua's mother sued under section 1983 of the 1871 Civil Rights Act¹⁴⁹ for violation of her son's fourteenth amendment rights,¹⁵⁰ seeking to hold the

145. 109 S. Ct. 998 (1989).

146. *Id.* at 1001.

147. *Id.* at 1002.

148. *Id.*

149. *Id.* Section 1983 provides for a civil cause of action for state deprivation of a constitutional right. 42 U.S.C. § 1983 (1982). In *Martinez v. California*, 444 U.S. 277 (1980), the U.S. Supreme Court indicated that three questions should be answered in presenting a claim under this section: First, was a constitutionally protected liberty infringed? *See id.* at 284 (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979)). Second, did the state deprive the citizen of the right? *See id.* Third, did the state meet due process requirements? *See id.* n.9 (citing *Baker*, 443 U.S. at 140). *Martinez* involved the question of whether state officials could be held liable under the due process clause of the fourteenth amendment for the death of a private citizen at the hands of a parolee. The Court affirmed dismissal of the claim on the ground that the causal connection between the state officials' decision to grant parole and the murder was too attenuated to establish a "deprivation" for purposes of section 1983. *Id.* at 285.

150. The due process clause of the fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This provision protects against "unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

county responsible for failing adequately to protect Joshua.¹⁵¹

Both the Court of Appeals for the Seventh Circuit and the United States Supreme Court held that the county was not responsible for Joshua's injuries because the state's omissions did not amount to "state action."¹⁵² The opinion of the Supreme Court, however, extends beyond the facts of the case to discuss expansively when, if ever, the failure of a state or local government entity or its agents to provide an individual with adequate protective services violates the individual's due process rights under the U.S. Constitution. The *DeShaney* Court concluded that state responsibility for omissions exists only when an individual is in actual physical custody of the government.¹⁵³ The state is responsible in such custodial situations, the Court reasoned, because it has rendered the individual unable to provide for his own basic needs, including physical safety.¹⁵⁴

The *DeShaney* opinion noted that "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."¹⁵⁵ Rather, the clause is written to limit the state's power to act, and "not as a guarantee of certain minimal levels of safety and security."¹⁵⁶ Indeed, "[i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other."¹⁵⁷ Because of this, "the Due Process Clauses generally confer no affirmative right to [provide] governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the gov-

151. *DeShaney*, 109 S. Ct. at 1002.

152. *DeShaney*, 812 F.2d 298, 302-03 (1987), *aff'd*, 109 S. Ct. 998, 1003-04 (1989). Both section 1983 and the fourteenth amendment require state action. In *United States v. Price*, 383 U.S. 787 (1966), the Court explicitly stated that the section 1983 requirement of constitutional deprivation "under color of law" is identical to the requirement of "state action" under the fourteenth amendment. *See id.* at 794 n.7; *see also* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 ("[I]t is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical.").

153. *DeShaney*, 109 S. Ct. at 1005.

154. *Id.* at 1005-06.

155. *Id.* at 1003.

156. *Id.*

157. *Id.*

ernment itself may not deprive the individual.”¹⁵⁸ Therefore, there being no duty to provide any protective services, “it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.”¹⁵⁹ In general, then, “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”¹⁶⁰

Liability may be imposed only where there is a special relationship¹⁶¹ or where existing protective services are selectively denied in violation of the equal protection clause.¹⁶² The Court rejected the “notion” that knowledge of actual danger and undertakings to protect, create “special relationships” thereby imposing affirmative duties.¹⁶³ Even the return of an individual after temporary custody to a clearly known danger—such as occurred with Joshua—creates no liability, because the individual is in no worse position than if the state had failed to act at all.¹⁶⁴ As Chief Justice Rehnquist noted, “the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter.”¹⁶⁵ In the end, the Court dismissed the claim against the state by saying that the most that can be said of the state actors “is that they stood by and did nothing.”¹⁶⁶

In his dissent, Justice Brennan, did not take issue with the majority’s holding that the due process clause creates no general right to basic governmental protection.¹⁶⁷ Instead, he found sufficient state action to hold the state actors liable, while questioning whether prior cases establish the existence

158. *Id.*

159. *Id.* at 1004.

160. *Id.*

161. *Id.*

162. *Id.* n.3.

163. *Id.* at 1004.

164. *Id.* at 1006.

165. *Id.*

166. *Id.* at 1007. The Court noted that statutory duties may be imposed by states and these could be enforced once enacted. *Id.* Such duties could also arise upon ratification of the American Convention. See *supra* notes 64-82 and accompanying text (discussing Inter-American Court’s interpretation of affirmative duties of states parties to prevent and remedy human rights violations and that as a consequence, these duties apply to either omissions of state actors or lack of due diligence).

167. *DeShaney*, 109 S. Ct. at 1007-08 (Brennan, J., dissenting).

of a "neat and decisive divide between action and inaction."¹⁶⁸ More broadly, Justice Brennan would hold that "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."¹⁶⁹ The question is whether the government has engaged in an arbitrary exercise of power. In this regard, Justice Brennan stated, "inaction can be every bit as abusive of power as action [, and] . . . oppression can result when a State undertakes a vital duty and then ignores it."¹⁷⁰

Prior case law indicates that there is no affirmative constitutional obligation of the government to provide protective services. In *Turner v. United States*,¹⁷¹ for example, the U.S. Supreme Court denied a claim for compensation for damage caused by mob violence, noting the "lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace."¹⁷² Similarly, in *National Board of Y.M.C.A. v. United States*,¹⁷³ the Court denied recovery for damage done to buildings under protective occupation during a riot in the Panama Canal Zone.¹⁷⁴ In *Bowers v. De Vito*,¹⁷⁵ the court stated that there is "no constitutional right to be protected by the state against . . . criminals or madmen"¹⁷⁶ and, therefore, the failure to provide such protection "is not actionable under Section 1983."¹⁷⁷

168. *Id.* at 1009.

169. *Id.*

170. *Id.* at 1012. In a separate dissent, Justice Blackmun found that the facts involved active state intervention, rather than passivity, and therefore gave rise to a fundamental duty to aid Joshua. *Id.* (Blackmun, J., dissenting). Justice Blackmun rejected "a sharp and rigid line between action and inaction" calling it "formalistic reasoning" that has "no place in the interpretation of the broad and stirring clauses of the Fourteenth Amendment." *Id.*

171. 248 U.S. 354 (1919).

172. *Id.* at 358.

173. 395 U.S. 85 (1969).

174. *Id.* at 93.

175. 686 F.2d 616 (7th Cir. 1982).

176. *Id.* at 618.

177. *Id.*; see *Archie v. City of Racine*, 847 F.2d 1211 (en banc) (7th Cir. 1988) (negligence of fire department dispatcher not to send rescue squad after telephone request resulting in the death of woman did not amount to § 1983 violation or due process deprivation), *cert. denied*, 109 S. Ct. 1338 (1989); *Ketchum v. County of Alameda*, 811 F.2d 1243 (9th Cir. 1987) (§ 1983 action brought by woman raped by an escaped inmate against county officials on grounds of gross negligence for failure to maintain security at prison could not be supported since rape did not amount to "state action"); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986) (failure of

A broad reading of these cases shows that the government will not be held responsible for private violence, whether committed by individuals, by mobs, or by organized groups. Thus, if this society were ever to deteriorate into the kind of political violence that terrorizes many countries throughout the world with disappearances, summary executions, and torture, the government would be immune from responsibility unless the private conduct "ha[d] sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment."¹⁷⁸ In this regard, neither state regulation, nor mere approval of, nor acquiescence to, the initiatives of a private party is sufficient to hold the state responsible. Instead, it must be shown that "there is a sufficiently close nexus between the State and the challenged action,"¹⁷⁹ the use of "coercive power" or "significant encouragement" such that the action "may be fairly treated as that of the State itself."¹⁸⁰

These judicial decisions may be questioned on several grounds. First, the duties to prevent violence and protect public safety seem inherent in the functions of government. The Declaration of Independence states that "to secure" the unalienable rights of individuals "Governments are instituted among Men."¹⁸¹ The U.S. Constitution calls for establishing a government "to insure domestic Tranquility, provide for the common defence . . . and secure the Blessings of Liberty"¹⁸² to all.

Second, the fourteenth amendment and subsequent civil rights legislation were enacted to remedy both state and private acts of violence. The Civil Rights Act of 1871,¹⁸³ which included what is now section 1983, "was passed by a Congress

state employees in protecting victim from fatal attack by inmate held not actionable under § 1983), *cert. denied*, 479 U.S. 882 (1986). *But see* *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988) (although in general there is no constitutional duty of state officials to protect members of public from crime, a special relationship may be created where state affirmatively placed the person in position of danger or undertook duty to protect knowing of specific danger).

178. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982).

179. *Id.* at 1004 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

180. *Id.*

181. The Declaration of Independence para. 2 (U.S. 1776).

182. U.S. CONST. preamble.

183. *Ku Klux Act § 1*, 42 U.S.C. 1983 (1982) (original version at 17 Stat. 13 (1871)).

that had the [Ku Klux] Klan 'particularly in mind.'"¹⁸⁴ As enacted, the bill specifically addressed the problem of the private acts of violence perpetrated by groups like the Ku Klux Klan.¹⁸⁵ A 600-page report to Congress detailed the activities of the Klan and the inability of the state governments to cope with it.¹⁸⁶ In language reminiscent of the Honduran decisions, one senator stated:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.¹⁸⁷

The *Civil Rights Cases*,¹⁸⁸ consistently cited as first enunciating the "state action" requirement for establishing a fourteenth amendment violation, is not inconsistent with this view. The Court noted that the Constitution guarantees rights against state aggression and not against the wrongful acts of individuals "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."¹⁸⁹ The issue is whether the private acts are "sanctioned in some way by the State"¹⁹⁰ or done under state authority, or protected by

184. *Monroe v. Pape*, 365 U.S. 167, 174 (1960) (quoting J. RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* 857 (1937)). Introducing the bill, the House sponsor stressed that "the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution." Cong. Globe, 42nd Cong., 1st Sess., App., at 69 (1871). Other parts of the section 1981 legislation clearly extend beyond "state action" to regulate private conduct or remedy failures to act on the part of the states. See Ku Klux Act § 6, 42 U.S.C. § 1986 (original version of § 1981 at 17 Stat. 15 (1871)); see also 42 U.S.C. § 1985(3) (1982). Section 3 of the 1871 Act provided for military action at the command of the President should massive private lawlessness render state authorities powerless to protect the federal rights of classes of citizens. See Ku Klux Act § 3, 17 Stat. 14.

185. *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2715-16 (1989).

186. See *Monroe*, 365 U.S. at 174 (citing S. REP. No. 1, 42nd Cong., 1st Sess. (1871)).

187. Cong. Globe, 42nd Cong., 1st Sess. 374 (1871).

188. 109 U.S. 3 (1883).

189. *Id.* at 17.

190. *Id.*

some shield of state law or authority.¹⁹¹ No language in the case limits such sanctioning or protection to affirmative state conduct; “deliberate indifference” to private violence can equally shield acts of misconduct.

In *Monroe v. Pape*,¹⁹² the Court acknowledged that the “main scourge of the evil”¹⁹³ sought to be remedied by the 1871 legislation was the Ku Klux Klan, which was free to act due to the omissions of state authorities either unable or unwilling to enforce the law.¹⁹⁴ The lack of enforcement of existing state laws created the problem. The misdeeds of state officers acting “under color of law” thus seem clearly to include nonfeasance. Moreover, “[i]t is no answer that the State has a law which if enforced would give relief.”¹⁹⁵

Finally, as the *DeShaney* dissent pointed out, the constitutional restraints on abuse of state power may be infringed just as surely from inaction as from action.¹⁹⁶ There is no logical reason to impose liability for one and not the other. Underlying the Court’s decision seems to be a confusion between the separate issues of duty and standard of care or breach. There may be valid policy reasons for limiting the liability of states for actions or omissions based on mere negligence. Indeed, in situations where the duty to act is clear, the U.S. Supreme Court has established a standard of deliberate indifference rather than mere negligence.¹⁹⁷ However, this does not obviate the finding that a duty to act exists. Imposition of affirma-

191. *Id.*

192. 365 U.S. 167 (1960).

193. *Id.* at 175.

194. *Id.* at 175-76; see *Jones v. Mayer Co.*, 392 U.S. 409, 422-29 (1968) (discussing the legislative history of the Civil Rights Act of 1866). According to the *Jones* Court, the 1866 legislation “plainly meant to secure [the right to own and lease property] against interference from any source whatever, whether governmental or private.” *Id.* at 424.

195. *Monroe*, 365 U.S. at 183.

196. *DeShaney v. Winnebago County Dep’t of Social Servs.*, 109 S. Ct. 998, 1012 (1989) (Brennan, J., dissenting).

197. See *City of Canton v. Harris*, 109 S. Ct. 1197 (1989) (deliberate indifference necessary to establish liability for city’s failure to train police officers); *Daniels v. Williams*, 474 U.S. 327 (1986) (no liability for mere negligence); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (no state liability unless substantial departure from accepted professional practice); *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference violates prisoner’s rights), *reh’g denied*, 429 U.S. 1066 (1977); *Wood v. Osterlander*, 879 F.2d 583 (9th Cir. 1989) (deliberate indifference will establish liability for failing to secure personal security); *Doe v. New York City Dep’t of Social Servs.*,

tive duties inevitably increases governmental power and thus creates attendant dangers. However, rather than denying all governmental obligations to restrict private abuses of power, current restraints on governmental power should be balanced with a recognized need for public action to restrain significant, known private abuses of power. Constitutional freedoms cannot be protected unless one looks at significant governmental inaction as well as action.

The Court's decision in *DeShaney* seems to be a dangerous call to arms issued to the public at large. Its emphasis on self-help to ensure safety as well as food and shelter can only encourage vigilante action and an increasing spiral of violence in already embattled communities. Implicit in the decision is the majority's faith that such a spiral cannot, and will not, lead this society into becoming another Guatemala, Colombia, or Lebanon, where "the perpetrators of the acts of human rights violations enjoy complete impunity"¹⁹⁸ and violence "spring[s] from armed terrorist groups on both the right and the left."¹⁹⁹

Because the Inter-American Court of Human Rights found actual Honduran government participation in the disappearances, the result holding Honduras responsible probably would not have been different if tested under the U.S. Constitution. However, the Inter-American Court's extensive discussion of liability for failure to prevent or remedy private violations has no support in U.S. constitutional law as interpreted by the Court in *DeShaney*. *DeShaney*, on the other hand, might very well have come out differently under the American Convention, with its imposition of affirmative duties on states. At least there would have been a triable issue of whether the duty was breached. Similarly, under the traditional law of state responsibility for injury to aliens, had Joshua been a foreign national, the United States might have been held responsible to his state of nationality for the failure of the state to exercise due diligence to protect him.

649 F.2d 134 (2d Cir. 1981) (deliberate indifference can be inferred from repeated negligent acts amounting to gross negligence), *cert. denied*, 464 U.S. 864 (1983).

198. INTER-AM. C.H.R. REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATEMALA 22, OEA/ser. L./V./II.53, doc. 21 rev. 2, ¶ 9 (1981).

199. *Id.* ¶ 10.

V. *CONCLUSION*

Whether correctly decided or not, *DeShaney* limits the protections of the U.S. Constitution to human rights violations actually committed by state agents or omissions resulting in harm to those in state custody. In contrast to the Honduran cases, the U.S. Supreme Court finds no responsibility under the Constitution to prevent or remedy violent infringement of basic rights committed by private actors. In such a situation, the U.S. Supreme Court has invited states to legislate. As an alternative, however, ratification of the American Convention would provide national standards of due diligence on the part of government bodies to ensure as well as respect human rights. The Honduran cases and *DeShaney* indicate both the need for and the value of such protections.