



Volume **SIX** • Section **FIVE** • Chapter **ONE**

Findings and Recommendations
THE LEGAL FRAMEWORK WITHIN WHICH
THE COMMISSION MADE FINDINGS IN
THE CONTEXT OF INTERNATIONAL LAW

Legal Framework

THE LEGAL FRAMEWORK WITHIN WHICH THE COMMISSION MADE FINDINGS WITHIN THE CONTEXT OF CURRENT INTERNATIONAL LAW

■ INVESTIGATING GROSS HUMAN RIGHTS VIOLATIONS

1. The Truth and Reconciliation Commission (the Commission) was charged with the task of investigating and documenting gross violations of human rights committed during the period March 1960 to May 1994. In the course of doing so, it was required to compile as complete a picture as possible of the conflicts of the past.

DEFINING GROSS HUMAN RIGHTS VIOLATIONS

2. The Promotion of National Unity and Reconciliation Act No. 34 of 1995, (the Act) defined a gross human rights violation as:

the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date [10 May 1994] within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive;¹

3. The language used in the Act to describe gross human rights violations deliberately avoided the use of terms associated with the legal definitions of crimes in South African law. Thus 'killing' was used rather than 'murder' in order to allow the Commission to examine these violations without having to consider legal justifications or defences used by perpetrators for such conduct. The Commission could therefore make findings that those who had suffered these violations were victims. Chapter Four of Volume One sets this out more elaborately.

¹ Section 1(1)(ix).

Interpreting the definitions

Killing

4. 'Killing' was interpreted to include the following:
 - a the killing of civilians, irrespective of whether they were deliberately targeted or innocent bystanders caught in the crossfire, and
 - b those who were executed for *politically motivated* crimes, irrespective of whether the killing had the sanction of the state, tribunals set up by the liberation movements or 'people's courts' established by communities.²

5. The only exception that the Commission took into account was that of combatants who had died in the course of the armed conflict and were clearly identified as such. The Commission's position in this regard is further elaborated in Volume One, Chapter Four of the Final Report. In this the Commission was guided by the Geneva Conventions' distinction between 'combatants'³ and 'protected persons'⁴.

Torture

6. The Commission accepted the international definition of torture: that is, the intentional infliction of severe pain and suffering, whether physical or mental, on a person for any of the following purposes:
 - a obtaining from that or another person information or a confession;
 - b punishing a person for an act that s/he or a third party committed or is suspected of having committed;
 - c intimidating her, him or a third person; or
 - d any reason based on discrimination of any kind.

7. Pain or suffering that arises from, is inherent in, or is incidental to a lawful sanction does not qualify as torture.⁵

² These interpretations reflect the Commission's position on the death penalty and political killings, which is in line with international human rights law.

³ Geneva Conventions, Article 43 (Paragraphs 1 and 2) of Additional Protocol I of 1977.

⁴ Geneva Conventions, Common Article 3 of all four conventions of 1949. See Appendix 1.

⁵ Article 1(1), Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

Abductions

8. This term was defined as the ‘forcible and illegal removal or capturing of a person’. It was applied to those cases where people had ‘disappeared’ after having last been seen in the custody of the police or of other persons who were using force. It does not include those who were arrested or detained in terms of accepted human rights standards.

Severe ill-treatment

9. This term was defined by the Commission as:
acts or omissions that deliberately and directly inflict severe mental or physical suffering on a victim, taking into account the context and nature of the victim.
10. The Commission took a number of factors into account when determining on a case-by-case basis whether an act qualified as severe ill-treatment. These included the duration of the suffering or hardship, its physical or mental effects and the age, strength and state of health of the victim. Violations included rape, sexual abuse, severe assault, harassment, solitary confinement, detention without trial, arson and displacement. A fuller list of acts that constituted violations is included in the Commission’s Final Report.⁶

ESTABLISHING ACCOUNTABILITY

11. One of the main objectives of the Commission was to establish the identity of the individuals, authorities, institutions and organisations involved in the commission of gross violations of human rights. The Commission was also tasked with establishing accountability for the violations, and determining the role played by those who were involved in the conflicts of the past. In dealing with these complex issues, the Commission was guided by the provisions of section 4 of its enabling Act.
12. The Commission made findings of accountability in respect of the various role players in the conflict on the basis of the evidence it received. It should be noted that it did this in its capacity as a commission of inquiry and not as a court of law. The Commission’s findings are, therefore, made on the basis of probabilities and should not be interpreted as judicial findings of guilt, but rather as findings of accountability within the context of the Act.

⁶ Volume One.

13. The Commission based its conclusions on the evidence and submissions placed before it. It did not focus only on legal and political accountability, but also on establishing moral responsibility.

Moral responsibility

14. In its Final Report, the Commission stated:⁷

A responsible society is committed to the affirmation of human rights and, to addressing the consequences of past violations) which presupposes the acceptance of individual responsibility by all those who supported the system of apartheid or simply allowed it to continue to function and those who did not oppose violations during the political conflicts of the past.

15. In the Final Report, the Commission defines not only legal and political accountability, but also boldly asserts the notion of moral responsibility. The Commission finds that all South Africans are required to examine their own conduct in upholding and supporting the apartheid system. The abdication of responsibility, the unquestioning obeying of commands, submitting to fear of punishment, moral indifference, the closing of one's eyes to events or permitting oneself to be intoxicated, seduced or bought with personal advantages are all part of the multi-layered spiral of responsibility that lays the path for the large-scale and systematic human rights violations committed in modern states.
16. There were those who were responsible for creating and maintaining the brutal system of apartheid; those who supported this brutal system and benefited from it, and those who benefited from the system simply by being born white and enjoying the privileges that flowed from that. Others occupied positions of power and status and enjoyed great influence in the apartheid system, even though they had no direct control over the security establishment and were not directly responsible for the commission of gross human rights violations. It is only by acknowledging this benefit and accepting this moral responsibility that a new South African society can be built. What is required is a moral and spiritual renaissance capable of transforming moral indifference, denial, paralysing guilt and unacknowledged shame into personal and social responsibility. This acceptance of moral responsibility will allow all those who benefited from apartheid – including the business community and ordinary South Africans – to share in the commitment of ensuring that it never happens again.

⁷ Volume One, Chapter Five, para 101.

17. Those who must come under special scrutiny are those who held high office, those who occupied positions of executive authority and those cabinet ministers whose portfolios did not place them in a direct supervisory capacity over the security forces. While the Commission's findings are not judicial findings, the Commission finds them to be morally and politically responsible for the gross human rights violations committed under the apartheid system, given:
 - a the specific responsibilities of cabinet ministers who oversaw aspects of the apartheid structure in areas that formed key aspects of apartheid's inhumane social fabric (education, land removals, job reservation, the creation of the Bantustans, for example);
 - b the knowledge they had (given the extensive information regarding apartheid crimes in the public domain), or the knowledge that they are presumed to have had, given their access to classified information – at the highest level – about gross violations of human rights, and
 - c their power to act, given their official leadership positions.

LEGAL ACCOUNTABILITY

18. In deliberating on its findings, the Commission was guided by international humanitarian law and the Geneva Conventions.

Apartheid as a crime against humanity

19. The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations (UN) General Assembly in 1973, states in Article 1 that apartheid is a crime against humanity. The Convention is one of a series of General Assembly and Security Council resolutions condemning apartheid as a crime against humanity. This legal categorisation has been echoed in the jurisprudence of the International Court of Justice and the International Law Commission's Draft Articles on State Responsibility and Crimes against the Peace and Security of Mankind. The classification of apartheid as a crime against humanity has been confirmed, and apartheid has been treated as similar to other egregious crimes such as genocide, slavery and colonialism in international sources as wide-ranging as the African Charter on Human and People's Rights and the International Criminal Tribunal for the former Yugoslavia.

20. The International Law Commission's description of a crime against humanity⁸ has been interpreted to suggest that such a charge can be brought against a single individual for a single act if that act is on a large scale, and/or if that act can be situated in a systemic pattern of violations⁹

Implications of this classification for the prosecution of human rights crimes under apartheid

21. While executing its mandate, the Commission gained a deep understanding of the apartheid system as a whole and its systematic discrimination and de-humanisation of those who were not white. Moreover, the Commission received a number of submissions from various institutions and structures, requesting that it interpret its mandate more broadly than was defined in the founding Act. Whilst taking these submissions very seriously, the Commission was bound by its legislative mandate to give attention to human rights violations committed as specific acts, resulting in killing, abduction and severe physical and/or mental injury, in the course of the past conflict. Although the Commission endorsed the internationally accepted position that apartheid was a crime against humanity, the focus of its work was not on the effects of the laws and policies passed by the apartheid government. The Commission has been criticised in some quarters for this approach.
22. It could be argued that the new government has an obligation, in terms of international law, to deal with those who were responsible for crimes committed under apartheid, even though their acts were considered legitimate by the South African government at the time. On the other hand, the international community declared apartheid to be a crime against humanity and saw the apartheid government as illegitimate. It can therefore be argued that crimes under apartheid have international implications and demand an appropriate response from the new state.
23. However, the Commission acknowledged in its Final Report that the urgent need to promote reconciliation in South Africa demanded a different response, and that large-scale prosecution of apartheid criminals was not the route the country had chosen. This does not mean, however, that those who were in power during the apartheid years should not acknowledge that the crimes committed in the name of apartheid were grave and heinous. Had there been no such

⁸ ILC, 1886 Draft Code of Crimes against the Peace and Security of Mankind.

⁹ Judgment of Tadic case, 7 May 1997, para 649.

settlement, had the negotiating parties not decided to put reconciliation first, there would have been serious consequences for members of the former Cabinet and Tricameral Parliament, for those who held high office in the security forces, intelligence and the judiciary, and for others who were responsible by virtue of their positions of authority and responsibility.

24. The liberation movements were cognisant of this at the time of negotiations. They were, however, also sharply aware of the fact that prosecutions could endanger the peace process; hence the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law.

Importance of this classification for reparation

25. The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid. Their right to reparation is acknowledged and can be enforced in terms of international law.
26. The classification of apartheid as a crime against humanity emphasises the scale and depth of victimisation under apartheid and, to that extent, adds further weight and urgency to the need to provide adequate and timely responses to the recommendations of the Commission. It also enhances the legitimacy of the Commission's recommendations in respect of reparations, which now require urgent implementation. The classification also gives greater legal legitimacy to the Commission's recommendations for the institutional reform of apartheid institutions (including the security forces, public administration, the judiciary and business).
27. The Constitutional court in the Azanian People's Organisation (AZAPO) case took the issue further. Not only did it recognise the rights of victims, but it also confirmed the statutory duty of the state to provide an appropriate reparation policy for victims emanating from the Commission process.

Importance of this classification for the struggle of the liberation movements against the apartheid state

28. As elaborated more fully in the section on African National Congress (ANC) violations (see below), the legal designation of apartheid as a crime against humanity has important consequences for the struggle conducted by the liberation movements. In terms of international law, the designation of apartheid as a crime against humanity has ensured that the legal status accorded to the war waged against the former apartheid state is that of a 'just war' or '*ius ad bellum*'.¹⁰
29. The effect of this designation is to render as just the moral, political and legal status of the struggle against apartheid.
30. The criteria for determining whether a struggle can be regarded as a just war are: (i) that those who waged it turned to armed conflict to fight an unjust system, and (ii) that they did this in a context where alternative routes for legal and political action had not only failed, but were likely to trigger further repression.
31. Thus those who waged war against the illegitimate apartheid state had legitimacy conferred upon them in terms of international law.
32. However, a distinction needs to be drawn between the means and the cause. The fact that the cause is just does not automatically confer legitimacy on all conduct carried out in the pursuit of that war (*ius in bello*). International law imposes a continued obligation on the liberation struggle to employ just means, even in the conduct of a just war.
33. The laws that apply to the conduct of a just war rest on two broad principles: the principle of necessity and the principle of humanity. Simply interpreted, this means that 'that which is necessary to vanquish the enemy may be done', but that 'that which causes unnecessary suffering is forbidden'.
34. The balancing of these two principles has been the subject of much debate and writing in international law.
35. In essence, these principles have meant that combatants in a conflict or war situation enjoy certain rights. If they are captured and disarmed, they are considered to be prisoners of war and must be treated accordingly. This

¹⁰ Volume One, Chapter Four.

requires of the party in command of the situation that prisoners of war be safeguarded against execution or deliberate injury. In the event that they are *hors de combat*¹¹ because they have surrendered or have been wounded or captured and disarmed, they must be protected. Warfare cannot be continued against them. These principles also apply to non-combatants or civilians (as they are now known). The laws of war require that civilians or non-combatants may not be subjected to deliberate or indiscriminate attacks, reprisal killings, seizures, hostage taking, starvation or deportation, nor may they have their cultural objects and places of worship destroyed.

36. Both civilians and combatants in conflict circumstances are protected against criminal sanctions unless they have been accorded due process of law.

INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions

37. The Geneva Conventions were adopted in 1949 and additional Protocols I and II in 1977. The Conventions are considered to be binding in international law. Virtually every government in the world has accepted their tenets by ratifying them. However, even where states have not ratified the treaty, they have the force of 'customary international law' – that is, they bind governments irrespective of whether those governments have formally ratified the treaty accepting their obligations. The apartheid state acceded to the Geneva Conventions in 1952. It did not, however, ratify or accept the additional protocols, and sought to argue that it could not be bound by their provisions. However, because the international community does not regard ratification as a criterion for holding a state to be bound, it is generally accepted that, even though the previous government did not ratify these conventions, it was formally bound by the principles enunciated by these bodies during the relevant period, as they are expressions of customary international law on state responsibility for the commission of gross human rights violations.
38. In the case of the ANC, President Oliver Tambo signed a declaration at the headquarters of the International Committee of the Red Cross, Geneva, on 28 November 1980, committing the ANC to be bound by bound by the Geneva Conventions and Protocol I.¹²

11 Out of the fight.

12 See the Appendix to Chapter Three of this section for a full text of the statement and declaration.

Applicability of the Geneva Conventions to the South African conflict

39. The Commission's mandate encompassed the period March 1960 to 10 May 1994, the date of President Mandela's inauguration. Given that Protocols I and II were adopted in 1977, it is appropriate to consider what law was applicable to the conflict raging in South Africa. Of particular note are those sections of the Protocol dealing with grave breaches.
40. The Geneva Conventions and Protocol I draw a distinction between acts that constitute a 'grave breach' and acts that constitute a 'regular breach'.¹³
41. These definitions become important when dealing with those acts or means used during conflict which the Commission found to constitute gross human rights violations. Furthermore, the provisions of the relevant Conventions and Protocol I become particularly important when dealing with the bombing incidents (Khotso House, the Magoo and Why Not Bars, the London ANC office and so on).

The period March 1960 to 1977

42. During the period March 1960 to 1977, the principal treaties that applied to the conflict were the Geneva Conventions, and in particular Common Article 3. Protocols I and II had not yet been drafted.
43. Common Article 2 of the Geneva Conventions states explicitly that, with the exception of Common Article 3 and the Martens Clause, the Conventions exclusively address armed conflicts between states.
44. Whilst on the face of it this may be interpreted to mean that the Geneva Conventions had no application during that period, this is not the case, as a number of bodies within the UN passed resolutions relating to the armed conflict in South Africa. The resolutions covered subjects ranging from apartheid to colonialism and the right to self-determination. In this regard, Resolution 31029(XXXVIII) of the UN General Assembly adopted in 1973 provided as follows:

¹³ Appendix 2 to this chapter sets out those acts that constitute a grave breach.

The armed conflict involving the struggle of people against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes.

45. It can, therefore, be argued that the conflict in South Africa was regarded not as an internal conflict but as an international armed conflict.
46. One should also have regard to the provisions of Common Article 3, which expressly provide that this Article applies 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Given that South Africa had acceded to the Geneva Conventions in 1952 and has remained a party ever since, there can be no doubt that it was bound by these provisions.
47. The ANC at this time was a non-state actor and lacked the authority or legal capacity to ratify or accede to the Geneva Conventions. However, the ICRC commentary to Common Article 3 makes it clear that non-state parties to non-international armed conflicts become bound to apply the provisions of Common Article 3 upon ratification or accession by the state party to the conflict. Moreover, the ANC itself, in terms of public statements made during this period, considered itself bound by the core principles enshrined in international humanitarian law. The provisions of Common Article 3, therefore, applied to the military and political activities of the ANC during this period.
48. Violations in terms of Common Article 3 fall under the following four sections:
 - a violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b taking of hostages;
 - c outrages upon personal dignity, in particular humiliating and degrading treatment, and
 - d the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognised as indispensable by civilised peoples.

49. These provisions apply to ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention, or any other cause’.

The period March 1977 to 1980

50. It is during this period that Protocol I of the Geneva Conventions was drafted specifically to cover the conflict situations in South Africa and Israel.
51. It is important to note that Protocol I was intended to supplement the existing Geneva Conventions and to ensure that national liberation movements were protected in the conflicts that were taking place.
52. In this regard, Article 1(4) of Protocol I sought to confer prisoner of war status on national liberation movement combatants involved in the conflicts in South Africa and Israel. The article provides that ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’ are to be treated as international armed conflicts and not as internal conflicts.
53. The effect of this was to bring the conflicts in South Africa and Israel under the ambit of the Geneva Conventions, and specifically of Protocol I.
54. As discussed above, the apartheid government did not accede to the additional protocols, particularly Protocol I. This was in the main due to the fact that it was of the view that Article 1(4) of Protocol I was intended to legitimise the struggle of the liberation movements and provide additional protection for their members.
55. As a liberation movement, the ANC did not apply to the ICRC to ratify or accede to this protocol, thus one can conclude that common Article 3 and not Protocol I continued to apply to the ANC.

The ANC and international humanitarian law: The period 1980 to 1994

56. In 1980, the ANC declared itself to be bound by the general principles of international humanitarian law applicable to the conduct of armed conflicts. The then ANC President Oliver Tambo deposited a declaration¹⁴ with the ICRC

¹⁴ See Appendix 3.

declaring the ANC bound by the Geneva Conventions and Protocol I. In fact, the declaration ought to have been deposited with the Swiss Government; but it is the intention of the party making the declaration that is important. By submitting the declaration, the ANC intended to hold itself bound by the Geneva Conventions and Protocol I.

57. As a result of this declaration, the ANC bound itself to apply Protocol I and the Geneva Conventions. In terms of Article 96(3) of Protocol I, the protocol and the Geneva Conventions came into effect immediately in respect of the conflict, despite the fact that the apartheid state had not acceded to the additional protocol.
58. The importance of the declaration is that the ANC became bound to uphold the same obligations and burdens as other parties to the Conventions and Protocols. It also enjoyed the same rights and benefits. The preamble to Protocol I provides that the provisions of the Geneva Conventions and Protocol I:

must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction, based on the nature or origin of the armed conflict or on causes espoused by or attributed to the Parties to the conflict.

59. As discussed above, while the ANC had bound itself unilaterally by way of the declaration to the provisions of Protocol I, the apartheid government did not consider itself so bound. It treated members of the liberation movements as criminals rather than as prisoners of war. The ANC regularly sought to challenge the jurisdiction of the courts on the basis that they were entitled to prisoner-of-war status and invoked the protection of these treaties in an attempt to commute the death sentences of numerous political prisoners. In this they were unsuccessful. Professor John Dugard commented in a book that he wrote on the status of an ANC prisoner of war:¹⁵

The issue that most starkly illustrates the conflict between perceptions of international law in South Africa is the dispute over the status of captured ANC combatants. From the perspective of most Whites, ANC combatants cannot be accorded prisoner-of-war status as this would confer legitimacy on the ANC and condone the acts of its members. On the other hand, many Blacks view them as 'freedom fighters' engaged in a just struggle entitled to be treated as POW's and not ordinary criminals.

¹⁵ Article by John Dugard: *Denationalization of Black South Africans in pursuance of Apartheid*

Furthermore, the General Assembly has recognized the legitimacy of the struggle of the national liberation movements and demanded that the ANC combatants be treated as prisoners-of-war in accordance with the provisions of the Geneva Conventions of 1949 to include 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination'.

The doctrine of state responsibility

60. The doctrine of state responsibility has emerged through the development of customary international law. In summary, it states that the state is accountable for the commission of gross human rights violations as follows:
 - a It is strictly responsible for the acts of its organs or agents or persons acting under its control.
 - b It is responsible for its own failure to prevent or adequately respond to the commission of gross human rights violations.
61. It is important to note that South Africa did not until recently become a state party to the principal international human rights instruments. In 1998, the newly democratically elected government ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide convention) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
62. This does not mean that South Africa was not bound by these principles of customary international law at the relevant times. They are regarded as expressions of customary international law on state responsibility for human rights violations and have emerged from the broad rubric of human rights law, which includes the Conventions referred to above, the Universal Declaration of Human Rights, regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention for Human Rights, the African Charter on Human and People's Rights, and the judgments of the various human rights bodies such as the decisions of the European Court of Human Rights, the Inter-American Court and Commission of Human Rights and the Human Rights Committee.
63. The decisions of the tribunals for the former Yugoslavia and Rwanda have also had an impact on how the law has developed.

64. The basic principles that have emerged from international customary law can be summarised as follows:

Interpretation of these principles by international human rights bodies, which have application to the question of state accountability

65. In the Velasquez-Rodriguez case¹⁶, the Inter-American Commission on Human rights held that states are strictly responsible for the conduct of their organs or agents who violate human rights norms, whether or not such actors have overstepped the limits of their authority.
66. Thus a state will be held responsible for the actions of an official where excessive force is used that is contrary to law and policy. In South Africa, the practice of the former state was to indemnify the security forces in those incidents where they had used excessive force.
67. It is important to note that, in terms of international law, the state will be held accountable for the act of an agent. The motive or intent of the agent is considered to be irrelevant to the analysis of the crime. In addition, if an agent of the state uses his or her official status to facilitate or cover up a murder s/he commits for personal reasons, the state may still be held responsible for such a gross violation.
68. Another important principle that has evolved from the Velasquez-Rodriguez case is the fact that a state is held responsible for violations perpetrated by any of the organs or structures under its control. In these instances, state responsibility may be invoked independently of any individual responsibility for the crime. All that is required is for the claimant to establish that an agent of the state committed the violation. The fact that the identity of the individual agent who perpetrated the violation is not established does not matter.
69. A difficulty that has been identified in matters of this nature is that the state is the repository of information and is also the party most interested in suppressing the truth. Circumstantial evidence is often all that exists. International human rights law is cognizant of this and thus places the burden on the state to justify its actions in the face of credible allegations of abuses by state agents.

¹⁶ The Inter-American Court of Human Rights, 29 July 1988 (Series C, No. 4)

70. In the case of Kurt v Turkey¹⁷, the European Court of Human Rights held that, once the applicant had shown that the victim was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.
71. In the case of Ireland v UK, the European Court of Human Rights applied a strict liability test when dealing with the government of the United Kingdom. In this case, the European Court considered allegations by the Irish¹⁸ that the United Kingdom authorities operating in Northern Ireland were engaged in practices that violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, the Irish alleged that these practices included extrajudicial arrest and internment as well as the use of a coercive set of 'five techniques' in the process of interrogation in order to induce confessions.
72. The court found that that the actions of the UK authorities amounted to a practice 'incompatible with the convention', noting specifically 'the accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system'.
73. Having heard the evidence, the court commented as follows:
- It is inconceivable that the higher authorities of a State should be unaware of the existence of such a practice. Furthermore, under the convention, those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.*
74. The development of the principle of strict liability in dealing with states reinforces that liability in international law. In other words, the state is under an obligation to organise its institutional apparatus so as to ensure that fundamental human rights are protected and, where they are violated, to 'investigate and punish those responsible and to provide reparation to the victim'.

¹⁷ 74 Reports of Judg. Dec. 1152, 1998 111.

¹⁸ N Ireland v United Kingdom (1978) 25 European Court of Human Rights (Series A).

The accountability of states in respect of omissions or tolerance of violations

75. International human rights law has evolved to the point where states can be held responsible because they have failed to prevent a violation or to respond to violations as required by international law.
76. The court in the Velasquez-Rodriguez case describes such failure as ‘the lack of due diligence to prevent the violation or to respond to it’.
77. This principle expands the accountability of the state to cover the official tolerance of actions, even where proof of the victim’s fate is unavailable. The facts of the Velasquez-Rodriguez case revealed evidence of a pattern of forced disappearances. The evidence included the fact that ‘it 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 ...’ The Court also heard evidence that the disappearances followed a similar pattern and were carried out in a systematic manner. These facts, taken together with the fact that officials failed repeatedly to prevent or investigate the crimes, were sufficient to hold the state responsible once the case at hand was shown to fit the pattern.
78. The Inter-American Court of Human Rights noted as follows:
- If it can be shown that there was an official practice of disappearances in Honduras carried out by the government or at least tolerated by it, and if the disappearance can be linked to that practice, the allegations will have been proven to the court’s satisfaction.*
79. The court went further and held:
- that 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.*
80. Thus the concept of state responsibility or liability for a failure to act or prevent or punish violations is not limited to cases where the perpetrators are state agents and problems exist with regard to a lack of evidence. The state may be held accountable even where private persons or groups act to deprive individuals of their fundamental rights, if it fails to act to investigate and punish such actions.

81. The key factor in testing responsibility is whether a human rights violation has been committed with the support or tolerance of the public authority or if the state has allowed the violation to go unpunished.¹⁹

82. The European Court of Human Rights has also held that private citizens may hold the state responsible for tolerating human rights abuses that have been carried out. Thus for example, a state whose legal framework leaves individuals vulnerable to violations of their fundamental rights without adequate recourse, or fails to enact laws restraining the excessive use of force by the authorities, or neglects to punish such abuses, may be held accountable at the international level for failing to guarantee rights recognised under international law. (...p607)

¹⁹ See *Godinez-Cruz*, Inter-American Court of Human Rights, 20 Jan 1989 (Series C No. 5); *Gangaram Panday*, Inter-American Court of Human Rights, 21 Jan 1994 (Series C No. 16).