Chapter 2

2. ORIGIN AND EVOLUTION OF HUMAN RIGHTS AND TERRORISM

2.1 INTRODUCTION

The Concept of human rights is as old as the human race. These rights have their roots in antiquity. The roots for the protection of the human rights may be traced as far back as in the Babylonian laws, Assyrian laws and in the dharma of the Vedic period in India.\(^1\) Writings of the Plato and other Greek and Roman Philosophers also depict for the protection of human rights though they had a religious foundation.

The City state of Greece gave equal freedom of speech, equality before law, right to vote, right to be elected to public-office, right to trade and right of access to justice to their citizens. Similar rights were secured to the Roman by the Jus Civil of Roman law.

The Magna Carta granted by King John of England to the English barons on June 15, 1215 ensured feudal rights and dues and to guarantee that the King would not encroach upon their privileges. The Carta was buttressed in 1628 by the Peririon of Rights\(^2\)

The concept of human rights is as old as the ancient doctrine of ‘natural rights’ founded on natural law, the expression ‘human rights’ is of recent origin\(^3\) and has emerged after the Second World War. The fact is that certain rights of

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\(^2\) The Bill of Rights was officially entitled as an Act for Declaring the Rights and Liberties of the Subject and for setting the Succession of the crown. It was enacted by Charles-II on the occasion of the accession of William of Orange and Mary Stuart to the throne of England.

man existed in the ancient period which was known as the natural rights or divine rights. These rights find place in all ancient societies though they were known by different names.

A right is a claim of an individual recognized by the society and the state. Rights are those conditions of social life without which any man seek in general, to be himself at his best. Hobbes, Locke and Rousseau were the profounder of social contract theory of origin of State. People established State because “everyone was against everyone and the life was solitary, poor, nasty brutish and short” and “in into being because people willed to have civil society.”

The doctrine of natural rights had greatly influenced the drafting of British Bill of Rights (1689), Declaration of Independence (1776) and Declaration of Rights of Man and Citizen (1789) and formed part of the U.S. Constitution. The doctrine of natural rights viewed man as a self determining and self directing agent living in an environment that offered him ample resources and opportunities to pursue his own goals and choose his own actions free form interference by others.

The human rights were referred to as civil rights, political rights, personal rights, legal rights, economic and social rights and natural or divine rights in ancient period. The names and the classification of rights kept on changing with the passage of time. Generally, it is believed that, “the concept of human rights is western and that the origin of the concept of human rights in the world history found its expression in Magna Carta of 1215.”

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4 Johaari, J.C., Contemporary Political Theory, (1979), P 32.
5 Laski, Harold, J., Grammar of Politics.
6 Leviathan.
7 Gokhale, B.K., Political Science, Theory and Governmental Machinery, (1984) p. 139.
In India, Swami Vivekananda long back expressed, “implementation of the principles of social justice and human rights for establishing a welfare State in the true Indian sense”, to diminish gap between the high and the low was necessary. The human rights in the form of ‘Dharma’ can also be traced in ‘Arthasastra’ of Kautilya and ‘Manusmriti’ of Manu, which laid down legal jurisprudence in ancient India.

The idea of equality was germane to the Vedas. Vedic ethics had idealized an equality of treatment among equals. Mahabharata tells about the importance of the freedom of the individual (civil liberties) in a State. Much earlier than the Greeks and Romans, Ancient Indian philosophers and thinkers expounded a theory of higher moral law of Dharma, about 5000 years ago, with a view to establish harmonious social order free from the traces of conflicts, exploitations and miseries.9

The human rights movement emerged in the 1970s, especially from former socialists in eastern and Western Europe, with major contributions also from the United States and Latin America. The movement quickly jelled as social activism and political rhetoric in many nations put it high on the world agenda. By the 21st century, Moyn has argued, the human rights movement expanded beyond its original anti-totalitarianism to include numerous cases involving humanitarianism and social and economic development in the Developing World.

Man creates a world to live in and attempts to shape it to his inner ideal. The fiction in Robinson Crusoe merely illustrates the untiring endeavor of a man to create a world of things and relations. From the remnants left after his shipwreck, Crouse manufactured implements and, in course of time, he expanded his universe; collected a large number of goods and chattel; possessed a host of animals and pets.

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Each man has the device to expand his universe and realize it in outer reality. Man acquires a land and erects a dwelling, settles a family and begets children; affords food and hoards money; collects goods and accumulates chattel; makes friends and creates relations. It then becomes difficult to dissociate him from his own attainments and belongings.

The objects and relations are part of human being. Because it is through them that he asserts, expresses and manifests his own self. His title to each of his objects and relations is unquestionable. These constitute the complex of his rights because he must claim them in and against the whole world. A free and frequent association of human beings with each other based on and geared by such objects and relations, gradually, necessitates a civil society which ultimately merges into a political order.

2.1.1 The Mighty Revolutions

The craving for rights was initially a doctrine of social philosophy which has since entered into political and captured the constitutional field. The process has been historical. The violent revolutions perpetrated in the wake of social and political consequences, have secured to the individual his natural rights which central theme of this concept, but in the ancient period its significance was metaphysical which confined itself to the Episcopal authority of the Church till the medieval period. The great revolutions have simply proselytized this puritan doctrine into political prospects forging a simultaneous by-pass into the economic field also.

The feudal system, the Holy Roman Empire and a strong Church were the three evils clinging with medieval Europe. The Church and the State had become allies in maintaining a civil society mainly based on the Divine Rights of Kings. The feudal system was backbone of political economy, and the whole society was cleft between classes of the privileged and the unprivileged and their sub-classes.
That is why the preponderant theme of these Revolutions was Equality; and Equality became the principle which gradually geared its acceptance in the field of public economy. The mighty Revolutions started some time from the sixteenth century with a crusade against the Divine Right of kings.

The age began when the rulers had totally bereaved the rulers of their rights and the Revolutions amply made men disillusioned so as to launch an aggressive movement against the divine rights of rulers which at that time the church, wholeheartedly, and the feudal system fully implemented. This had mainly become a political feud in the sense of a beginning towards modern democracies republics, and commonwealths, through a fierce battle of the rights of the ruled against the right of the rulers.

In 1628, Charles I, in England, was compelled to concede to the petition of Rights; but his later disregard for the same earned his own decapitation in 1649, in 1688, the arbitrariness of James II wrought a situation for him to retreat to France. The Century during 1588 to 1688 was a period of revolution in England for the rights of men. The success of the Glorious Revolution of 1688 was the start of respect for such rights. On the outset, the Declaration of Rights was codified into the Bill of Rights, 1689.

Within the next century; the American war of independence fought by the thirteen colonies against the rule by the British king had doomed the old colonial system. The first war took place in 1775 and independence was won with the Treaty of Versailles in 1783. The famous Constitutional Convention met at Philadelphia in May, 1787.

The Constitution of the United States of America was adopted in the same year. The process of its ratification by the Federalizing States was completed by 1788 and the First Congress under the Constitution met to work on March 4, 1789.
The event secured to people independence from a foreign rule by giving them a Constitution based on the rights of men.

The same time, the French also arose from their own slumber. The claim of Luis XIV that the sovereign authority vested in his person and rights of men n his hand, proved to be self-betrayal when he and his Queen. Antoinette, were massacred and from that royal blood was accorded the solemn approval on the Declaration of Rights of Men adopted in the French Revolution of 1789.

The present century began with Russian Revolution. On January 27, 1905, Father Gapon led a huge procession to the palace of Czar, voicing for the rights of men against a fusillade of bullets, but his Bolshevik Revolution ultimately succeeded by a complete overthrowing of Czardom on March 15, 1917. Such Revolutions having a political base ultimately succeeded in bringing to the people charter of their rights social, political, as well as economic, through written Constitutions.

The United Nations Charter on Human Rights is the conclusive word of honour for the security of these rights. The United Nations Human Rights Commission has been empowered to investigate and report on matters involving violations of Human Rights. Since the year 1955, the commission has become competent to take cognizance of violations of such rights. This is the final evidence of a place of pride for these rights in the Constitutions of Nations.

The history of origin and development of human rights is very fascinating. The origin of human is traced, by some scholars, back to the times of ancient Greeks. The fact that the human rights were recognized as natural rights of man is illustrated by a Greek play Antigone. In this play, Sophocles describes that Antigone’s brother, while he was rebelling against the king, was killed and his burial was prohibited by the King Creon. In defiance of the order Antigone buried
her brother. When she was arrested for violating the order she pleaded that she had acted in accordance with the “immutable, unwritten laws of heaven” which even the king could not override.  

In philosophy the development of the notion of natural rights of man was contributed by the Stoic philosophers. They first developed natural law theory and by virtue of it they explained the nature of human rights i.e., rights which every human being possesses by virtue of human being. However, it may be noted that the citizens of the Greek City States enjoyed some basic rights even before the formulations of natural law theory by the Stoic philosophers. These were in particular: (i) the right to freedom of speech (Isogoria); (ii) the right to equality before law (Isonomia); and (iii) the right to equal respect for all (Isotimia).

The central notion of the Stoic philosophy was that the principles of natural law were universal in their nature. Their application was not limited to any class of persons of certain State; rather it applied to everybody everywhere in the world. It was the embodiment of those higher principles of justice which could be discovered by human reason and as such were superior to positive law. The natural rights of man being its embodiment of those higher principles of justice which could be discovered by human reason and as such were superior to positive law.

The natural rights of man being its embodiment were “not the particular privileges of citizens of certain State, but something to which every human being, everywhere, was entitled in virtue of the simple fact of being human and rational.” They set forth further that men “could comprehend and obey this law of nature because of their common possession of reason and capacity to develop and attain virtue.” In this way the Stoic philosophers were able to preach the idea

10 Sophocles: Antigone “The unwritten, unchanging laws of the gods.”
13 Supra, n. 6 p. 3.
of universal brotherhood of mankind and laid stress upon the equality and freedom for all.

The Stoic formulation of natural law was best suited to the Roman temperament, for they, in principle, believed that man should improve himself both rationally and morally. Writing about natural law, Cicero (106-43) B.C., like Stoic philosophers, laid emphasis upon the universal nature of it and said that natural law is of “universal application, unchanging and everlasting…..It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.

We cannot be freed from its obligation by Senate or People..........And there will not be different law at Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all nations and for all times.”¹⁴

Roman applied the Stoic conception of natural law in the formation of body of legal rules for the administration of justice. It was the most outstanding intellectual contribution of Romans. They developed this body of rules on the basis of the custom and as well as by the application of reason. Acting in this manner, they not only modernized their old law, but also said stress upon the incorporation of high ethical standards in legal procedure.

Roman Law was divided into two categories of rules: ‘jus civile’, or Roman Civil Law dealing with citizens, things and actions; and ‘jus gentium’, or the law of non-citizens, which signifies the rights of those who were not the citizen of Rome and they referred to those rights to which men were entitled in general.

It is also referred to the rules of international law at the same time many principles of ‘jus gentium’, were adopted from ‘jus naturale’ (natural law) which

enabled them to humanize these rules in such a way that a man of common sense and good faith could approve them as just.  

2.1.2 Various Perspectives of Human Rights

The preamble to the United Nations Charter of 1945 refers to “human rights,” which runs: “…to affirm faith in fundamental human rights in the dignity and worth of human person, in the equal rights of man and woman and of nations large and small…”

As per above Preamble, human rights are available to natural persons and also to the nations irrespective of their small or large geographical size. Milne while defining human rights observed, “human rights are simply what every human being owes to every other human being and as such represent universal moral obligation.” Human rights are sometime called “fundamental rights”. As fundamental or basic rights these are those rights which must not be taken away by any Act of legislature or government and which are often set out in the fundamental law of the land, i.e., Constitution.

To speak broadly, human rights are those “fundamental rights to which every man inhabiting any part of the world should be deemed entitle by virtue of having been born a human being”, because these rights “are required for the full and complete development of human personality”.

In general terms it has been maintained that by resorting to needs one accepts that anthropological base of human rights is to be found within them, in

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15 Swain, J.E., A. History of World Civilization, 1947, pp. 172-173; it may be noted here with concern that in the Graeco-Roman system of thoughts, particularly in the teachings of Aristotle the slavery was recognised as valid practice- Aristotle; Politics, Book one.

16 Preamble to the U.N. Charter, 1945; the term “human right” was used for the first time in this document.


such a way that to recognize, exercise and protect a basic right means that in the end one hopes to satisfy a series of needs, understood as claims which are considered essential for the development of a “dignified life.” What is more significant is that these human rights are universal and accepted by all States, regardless of their historical, economic, social, and cultural differences and ideological persuasions.

It can be derived that “Human rights” are those minimal rights which are available to every human being without distinction of language, religion, sex, caste, nationality and social or economic conditions in the society. These human rights are universal and have no boundaries.

The term “human rights” is thought of recent origin but these rights were in existence from time immemorial. Human beings are entitled to human rights for having been born as human, as the French Declaration provides. “Men are born and remain free and equal in rights. Social distinctions can be based only on public utility.”

The United Nations Charter was not a binding instrument. It merely states the ideals which were to be developed by different agencies and organs. Further step was taken in this regard by adopting Universal Declaration of Human Rights, in 1948 for declaring “Human Rights” at universal level. This declaration was also not a binding document on States, therefore two Covenants; namely, the Covenant on Civil and Political Rights and the covenant on Economic, Social, and Cultural Rights were adopted in 1966.

These were legally binding on the State parties to these Covenants, Afterwards, United Nations Proclaimed rights of specific categories of people like

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21 Principle and Theories of Human Rights, IIHR, Delhi, p. 4.
women, children, physically disabled, mentally retarded and the prisoners and those concerning all spheres of human activities—political, social, economic, civil and cultural.

There are other Covenant ions also relating to prevention of genocide, slavery, forced labour, suppression of traffic in human beings, elimination of all forms of racial discrimination, torture and cruel, inhuman or degrading treatment or punishment. The very objective of all these Conventions is to uphold, preserve and protect human dignity.

During Vedic period there were rules of ethics and morality to treat human beings with dignity. The Indian culture never treated women with indignity. The caste system was established as per social utility of human beings. King used to hear urgent matters without delay and dispense justice in open court (durbar).

Later on, jury system was also adopted in the Indian legal system to demonstrate justice to the public. The sentences and punishments were provided in ‘Arthasastra’ and ‘Manusmriti’ and there was provision for physical punishment as well as monetary fine. Kautilya even prescribed provision of conviction and punishment of the King if he punishes an innocent man.22

The principles of natural justice and fairness were in vogue in Ancient India. Narada, an eminent jurist said, “The King having purged him of selfish interests and regarding all human beings as equal should dispense justice.”23 Two norms, viz, Dharma and Danda, which were necessarily influenced by the theological tenets of the Vedic Aryans, contained several features of a regulatory mechanism during Vedic period and afterwards.

Kauthyia prescribed protection for even prisoners and under trials and disturbing sleep or creating hindrance to meals, call of nature, putting fetters were punishable with fine, and He expected humane treatment with humans. After centuries Supreme Court refers to Natural law and Dharma in *Sunil Batra v. Delhi Administration*, that “Natural law or Dharma commands humane treatment even to those in prison. Prisons are built with stones of law and so it behooves the court to insist that, in the eye of law prisoners are persons, not animals.

The rules of 'Dharma' continued till Hindu period. The Medieval period in India is called the Dark Age as far as human rights are concerned. The advent of Muslim rulers especially Aurangzeb used repressive measures for conservation of Hindus with use of force, which reveals his religious intolerance. Akbar was, however, a mature king and had religious tolerance. People enjoyed religious freedom during his period.

The history of Human Rights movement is one of the growths; it is an ever-enlarging field to ensure human dignity for a peaceful life. To revive the philosophy of human rights in modern sense, concerted efforts were made by Congress which demanded basic human rights in the Constitutions of India Bill, 1895.

The rights like freedom of expression, right to property, equality before law and inviolability of one's own home, figured in this Bill. Congress as early as in 1918 in again demand of these basic rights was reiterated in Nehru Committee Report in 1928. The Congress in the resolutions of 1917 and 1919 asserted demand of civil rights and equal status with the English men.

In 1922, Congress aimed at achieving 'Swaraj' to shape destiny of the country. The Sapru Report (1945) incorporating the proposals of fundamental

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24 See Kauthyia's *Arthasastra*, Book IV, Chapter 9, Sec. 21.
25 AIR 1980 SC 1579.
rights did not find factor. Simultaneously, the freedom struggle had reached its climax and now the demand for independence gained momentum.

After independence the makers of the Indian Constitution had onerous duty to prepare the Constitution which could meet the aspirations and needs of the Indian people. The Universal Declaration of Human Rights was adopted by the United Nations (On Dec, 10, 1948) while debates in the Indian Constituent Assembly were being held. It is assumed that framers of the Constitution were influenced by the provisions of this Declaration and it helped in shaping Part-III on Fundamental Rights and Part-IV on Directive Principles of State Policy.

In modern times the State has undertaken the task of affording adequate protection of the individual and providing reasonable opportunities to every one for full development of individual personality. It is on this universal recognition of the dignity of individual freedom that the concept of human right has been evolved.

As far as human rights in Islam are concerned, the prophet of Islam (S.A.W) proclaimed the in the early 7th century i.e. one thousand years before the Western concept was developed when prophet of Islam (S.A.W) received the first revelation in 610 A.D in which he declared: He who taught the use of pen, taught man that which he knew not [The Al-Qur'an, section 96: 4, 5]. In this verse the 'rights of education’ was declared. Thus it was the start of the declaration of basic human rights in Islam.

Human rights gained currency from the Second World War and the establishment of the United Nations in 1945. They have been traditionally known as “the rights of man” or the 'natural rights'. The political philosophers such Hobbes, Locke and Rousseau and such acute political thinkers and leaders of
French and American revolutions each had a clear conception of rights that must be assured to people if they were to live with security and dignity.

The normative development of human rights is some time traced in terms of three generations. The first generation of civil and political rights arose out French and American revolutions. The second generation of economic, social and cultural rights is linked with Russian revolution and the third generation rights are called solidarity rights reflecting contemporary issues such as peace and development and environment.

Since human rights are grounded in humanity, these rights simply require positive social and political in their support. A number of institutional arrangements have been established to deal with the promotion of and protection of human rights. These arrangements constitute the international human rights regime.

The UN efforts in this regard have been through the use of committees, commissions, and sub-commissions, penalized agencies, and working groups. It uses global and regional conferences and seminars on various specialized topics, open to individuals and organisations, to make them aware of human rights values enshrined in international participation of women in the economic life of their States, human rights and technological development; women equality, development and peace; and human rights teaching the significance of these topics help to promote penetrating discussion of deeper issues of injustice underlying human rights violations.

### 2.2 HUMAN RIGHTS IN ANCIENT TIMES

Historically, the idea of Natural Rights is very old. In the classical literature of Ancient Greece from the 5th century B.C we come across a striking
expression of the belief in the power exercised by the gods in a human society based on law. According to Ancient Greece writers, the god establish a law which stand above the obligations and interdictions imposed by the rules of the community.26

In Roman law a distinction was made between national law (jus civile) and the law which is actually common to all nations (jus gentium).27 Jus naturale was regarded as that law which the nature has her established. According to Marcus Tullius Cicero, the great Roman Jurist there is one eternal and immutable law, which will apply to all people at all time and which emanates from the God-is Natural Law, From man’s essential nature, which is reason and which he shares with God, Cicero deducted not only a common law, but also a common share in justice.28

Despite the scarcity of information on Ancient Indian history, scholars have expressed the view that there was a rich jurisprudence in ancient India. That jurisprudence provided an adequate framework for the regulation of the behavior of ordinary persons as well as the sovereign, the King. Two norms, viz. Dharma and Danda which were necessarily influenced by the theological tenets of the Vedic Aryans, contained several features of a regulatory mechanism for religious practices.

The king had the authority to implement this system and the laws under it. But he himself was bound to follow the law, the norms laid down by religion codes and commentaries. Torture and inhuman treatment of prisoners were

27 The expression “Jus Gentium” develops in more recent times into the concept for the rules of law regulating relations between states, i.e., international law.
prohibited under Ashoka’s administration. Therefore, we find the traces of natural law and natural rights in ancient India

2.3 NATURAL LAW AND NATURAL RIGHTS IN MIDDLE AGES

In the Middle Ages, the scholastic philosophers like Abelard (1079-1142) and Thomas Acquinas (1224-1274), the most original thinkers of their times, laid stress upon the concept of natural law as the higher principles of law to be derived from reason. But they did not go in quest of making the human personality as the main concern of law and social life.

Thomas Acquinas, like Aristotle, justified the existence of the practice of slavery. Thus, the “man” was dispensed with as central notion of medieval philosophy of law. Much attention was focused on the development of the principle of the sovereignty of state rather than on the development of respects of human qualities. This principle later on became one of the greatest obstacles to the international protection of human rights.

Again, a set-back was also caused during 16th century to the development of the concept of natural rights by Machiavelli’s teachings. He was opposed to the concept of natural law and supported absolute monarchy. His philosophy was not based on any mystical thought such as that of natural law; rather, it was “here-and-now philosophy”. For him human nature was bad and selfish which necessitated the establishment of State to curb and crush the anti-social elements existing in human mind.

2.3.1 Philosophical Approach:

2.3.1.1 The natural right theory

31 Supra.
32 Supra.
In the contemporary sense of the term, human rights has been defined by Elaine Pagels as “the idea that the individual has rights: claims upon society, or against society: that these rights, which society must recognize, on which it is obliged to act, are intrinsic to human beings.\textsuperscript{33}

What is postulated here is not only that there are human rights but also these have universal application, it is opposed to the idea that the human rights are conferred upon the individual members by the society in which they live. It postulates that the human rights are claim upon or against the society and these rights exist independent of and even prior to the formation of society. Thus, the natural rights theory in its ultimate analysis rests upon the intrinsic nature of man. This natural rights explanation of the human rights has following three characteristic features:

\textbf{2.3.1.1. a Human rights are said to be recognized}

Human Rights are neither derived from the social order nor conferred upon the individual by the society. They reside inherently in the individual human beings independent of and even prior to his participation in the society. As such, they are the result of recognition by the State but they are logically independent of the legal system for their existence. For this reason, many thinkers have assigned the origin of human rights to natural law and not to positive law.

In this sense natural is said to be “a normative system which is characterized by the fact that the criterion for the validity of its norms is based not on their enactment or recognition by certain individuals but on their intrinsic justification.” In the same spirit, the human rights being derived from the principles of natural law do not depend for their validity on being formulated or

accepted by any authority. Thus a positive legal system which does not recognize human rights is not law.

2.3.1.1.b Human rights are said to be inalienable, natural and inherent

Human Rights are inalienable in the sense that a holder of these rights cannot divest himself of them. The reason is simple. These rights are inherent in the very nature of human being. Jacques Maritain has said that the “human person possesses rights because of the very fact that it is a person, a whole, a master of itself and of its acts…..by natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to a man because of the very fact that he is a man”.  

The inalienable or natural rights are not identified with the norms of positive law. They are independent of the positive law, as such; human rights are used as a reference to evaluate the rules of positive law, law enforcement machinery, legal institutions and performances of State. When a legal system does not recognize human rights it is criticized as being oppressive and persistent demand is made for upholding the value of human rights.

Teanamen square episode of 1989, in which pro democracy demonstration of students was brutally crushed is always cited as an instance to criticize China for its no concern for human rights and the brutal suppression of dissent in the country. For that matter, African and Asian nations are criticized for not implementing international human rights standards.

2.3.1.1.c All human beings are said to be essentially equal

Now it is an established fact that human rights are derived directly or indirectly form the very nature of man. From this it may be argued that by virtue


35 Carlos Santiago, Nino.
of being human, one inheres all those attributes which are inherent in human personality, and natural rights being one among those attributes are inherited naturally. Thus, the only condition necessary for enjoying natural basic rights is to be a human being.

Apparently, this appears to be a very reasonable proposition because it lays down an objective equalitarian principle according to which a human being, by virtue of being human, can possess or enjoy all human rights without any distinction as to his colour, statute, wealth or to his rationally.

From this, Carlos Santiago Nino argues that, “if the only relevant condition for enjoining certain rights is being human, and if this property does not admit of degrees, there cannot be differences of degree in the extent to which the rights in question are held; this is, all human beings have them to the same degree”.

This leads to inevitable conclusion that all human beings are equal. It may be useful to quote Barnard Mayo also: “Human Rights are the rights that a human being has in virtue of whatever characteristics he has that is both specifically and universally human.”

2.3.1.2 The legal right theory

Jermy Bentham has criticized the natural right theory as ‘nonsense upon stilts. He has advocated in favour of legal rights theory. In the opinion of supporters of legal right theory rights are the creation of State. As such, they are neither absolute nor inherent in the nature of man.

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These rights such as right to life, Liberty or property are artificially created by the law of the land. Thomas Hobbes, one of the ardent supporters of the legal right theory holds the view that fundamental rights of individual are the right of self-preservation which can be protected by State in better manner than by any other means.

This theory can be upheld to the extent that the recognition of a right by State is necessary for its enforcement. If a State does not recognize a right it cannot be enforced, however potential it may be. Even in democratic societies where people will reign supreme recognition of rights by State is essential for their enforcement against the State.

Bosanquet has rightly noted that: “A right………… Has both a legal and moral reference. It is a claim which can be enforced at law, which no moral imperative can be; but it is also recognized to be a claim which ought to be capable of enforcement at law, and thus, it has a moral respect………a typical ‘right’ unites the two sides. It both is, and ought to be, capable of being enforceable at law."

2.3.1.3 The historical theory of rights

The historical theory maintains that the rights are the creation of historical process. A long-standing custom in the course of time concretise in the specific form of right. A traditional example may be used here to explain the process in which rights generally concretise. A person who receives birth day presents from his friends and relatives regularly for a long time develops expectation to receive it as a matter of right.

Indeed there are rights which are created in this process more particularly most of the prescriptive rights, such as, right of way or right of light or air. In the

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same spirit many of the natural rights have “the sanction of the longest and the least broken custom,”
for example, the rights of Englishmen, which have found mention in the Magna Carta and the Petition of Right.

These in fact have been enjoyed from very early days. This justifies the comment of Ritchie that “those rights which people think they ought to have are just those rights which they have been accustomed to have, or which they have a ‘tradition’ (whether true or false) of having once possessed. Custom is primitive law.” The Historical theory of rights has some very important limitations:

First: The statement that rights originate from historical process or custom may be true to a limited extent only. In fact, there is more exaggeration than truth in it. Practice of slavery which once had been considered as lawful cannot be claimed as a matter of right nor so the practice of infanticide. Mores or customs of people cannot make everything right.

Second: To relate origin of rights to custom is to stop all social reforms. For instance, practice of satee, polygamy, child marriage, untouchability, etc, had once been recognized as valid custom but now they are disapproved by the enlightened public opinion and therefore, prohibited by law.

2.3.1.4 The social welfare theory of right

The Social Welfare Theory is also known as the Social Expediency Theory. The advocates of this theory believe that law, custom and natural rights, all are conditioned by social expediency. For instance, right to freedom of speech is not absolute but rather regulated in accordance with the requirements of social expediency. Roscoe Pound and Prof. Chafee have supported this theory.

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The utilitarian like Bentham and Mill have also supported this theory. They have advocated for the ‘greatest happiness of the greatest number’ as a principle on the basis of which all the social measures should be judged. Utility can be determined by means of reason and experience.

The Social Welfare Theory has played an important role in the development of number of human rights. A large number of economic and social rights have been incorporated in the Universal Declaration of Human Rights and then in the International Covenant on Economic, Social and Cultural Rights, wherein, it is expressly provided that the entitlement to those rights has to be ‘in accordance with the organisation and resources of each State.’

2.3.1.5 The idealistic theory of rights

The Idealistic Theory of Rights is also known as Personality Theory of Rights. This theory insists on the inner development of man, on the development of his full potentially. Hence, it treats right of personality as a supreme and absolute right.

All other rights, such as, right to life, right to liberty or right to property are derived from this one fundamental right. These various rights are related to the right of personality. The chief merit of this theory is that it insists upon right of personality as the only absolute rights and all others rights are derived from it and are conditioned by it.

However, this theory has limitations also. First, it is difficult for a State to ascertain the extent to which various rights are required for an individual for the development of his full potentiality. Since personality is a subjective idea no objective standard can be laid down for it. Second: Generally social good and
individual good coincide. But if conflict occurs between the social good and individual good, it is the later that must be followed according to this theory. It goes against the spirit of the Social Welfare Theory.

2.3.1.6 Pragmatic approach

Besides philosophical and theoretical approach, another way of looking at the meaning and nature of human rights is pragmatism. Every right whether it has been perceived as inalienable or otherwise can have validity and effectiveness only through some process or institution. Thus, it cannot be defined without reference to some institutional structure. As a room cannot be defined without reference to the walls, so human rights, cannot be defined without reference to institutional settings.

In the Indian context, for instance, fundamental rights are incorporated in Part III of the Constitution of India. Although, the term fundamental right has now where been defined in the Indian Constitution but on careful examination of these several fundamental rights one would conclude that these rights constitute restrictions on the power of State and also require the State to adhere to the guidelines pronounced in the matter, by the Supreme Court of India.

View as such, the nature and meaning of ‘human rights and fundamental freedoms’, as referred to in the Charter of the United Nations, should be ascertained with reference to the catalogue of human rights instruments which may be divided into three broad categories:

A. Global, Such as, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the

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Elimination of All Forms of Racial Discrimination, the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, The Convention on the Rights of Child and such other Covenants and Declarations. These instruments have been adopted by forums set up under the auspices of the United Nations.

B. Regional, such as, the European Convention on Human Rights and Fundamental Freedoms, the European Social Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the African Charter on Human and People’s Rights. These human rights instruments have been developed under regional forums, such as, the Council of Europe, the Organisation of American State and the Organisation of African Unity.

C. Subsidiary treaties, which deals with only one human right or very small number of human rights. These treaties impose more specific and detailed obligation upon the State parties. For instance, the Conventions Relating to the Statues of Refugees and the Status of Stateless Persons which contain detailed provisions for the specific application of ‘right of asylum’ proclaimed under Article 14 of the Universal Declaration of Human Rights.

Article 22 of the American Convention on Human Rights and Article 12 of the African Charter on Human and People’s Rights It is important to note that during the initial period after the establishment of the United Nations there was considerable difference of opinion regarding the meaning and nature of human rights as referred to in the Charter of the United Nations but now it is “generally agreed that the meaning of “human rights and fundamental freedoms” is to be ascertained by reference to the human rights catalogue proclaimed in the major U.N. Human rights instruments, starting with the Universal Declaration of Human
Thus, this “catalogue should be our minimal definitional guide on what the international community understands by “human rights and fundamental freedoms.

2.3.1.7 The social contract theory

The doctrine of social contract was closely linked with the theory of natural law because the basis upon which the natural law theories were formulated was the same for the social contract doctrine also. This doctrine became popular during 16th and 17th century through the writings of such political philosophers as Thomas Hobbes (1558-1679), John Locke (1632-1704) and Jean Jacques Rousseau (1719-1778). In general, they took the help of the notion of social contract to explain the relationship between individual and society. Initially, the social contract writers claimed that a superior power, either manual or legal was established in pursuance of the social contract under which the people collectively undertook to obey the commands of such superior power so long it governed them in their common interest and kept itself within the terms of contract.

However, in the 17th century, the protagonists of social contract theory, particularly Rousseau, undertook to explain that State was an artifact, an artificial creation of individuals, or the result of the social contract. Rousseau began with the state of nature, in which man was free and independent in all respect. From this state of nature according to him, there emerged a political society by the separate acts of individuals, whereby they undertook with one another to set up government which would be responsible to promote their common interests.

\[\text{See d’ Entreves, Natural Law (1960), p. 56.}\]
\[\text{Supra.}\]
The political society, so created would, by majority will, proceed to appoint governors who would govern in accordance with the terms of contract, or the instrument of trust or an act of delegation by which he was so empowered, the governor was to act on the behalf of the people thus protecting their general interests and respecting their natural rights. The violation of the terms of social contract on the part of the governor would justify not only its disobedience but also rebellion against it.  

2.3.1.8 American revolution

American Revolution originated in the colonial revolt of 1763. There were many factors which contributed towards the rise of this revolt, for instance, the growing importance of the notion of natural rights, teachings of the writers of social contract doctrine, the British Bill of Right of 1689, and the coercive actions of George III (1760-1820) and his predecessors.

The British Government was of the view that the colonies should also share in the expenses incurred in their administration. With this view, the British Government in the last half of the 18th Century started to take various regulatory measures under which it introduced certain new taxes. This resulted into militant opposition by the American people. They argued that since they did not have their representatives in the British Parliament, it had no right to impose taxes upon them.

2.3.1.9 The French revolution

The French Revolution was based upon those principles which were set in motion by the English and American Revolution. It differed mainly in that it was

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44 John Locke, Civil Government, Book II.
45 British Bills of Rights of, 1689, established the idea of representative government firmly and became a charter of liberty for England.
basically the result of economic and social inequalities and injustices of the French ancient regime. These inequalities were conspicuous not only among the third Estate (lower classes) but also in the First Estate (clergy) and in the second Estate (nobility).

It had caused the greatest amount of concern among the writers, who were apparently influenced by the teachings of Rousseau. They enthusiastically claimed that it marked the dawn of new age for the mankind in general and believed in the prospect of right reason and natural and imprescriptible right to life, liberty and the pursuit of happiness. The government, in their opinion, must preserve and safeguard these rights and if it fails to do so it has no right to remain in existence.

However, it was not the writers or philosophers who had influenced the course of events but it was the convening of the French Estates General which produced the desired result. As a matter of fact, it was on 17th June, 1789, when Third Estate in defiance of Louis XVI proclaimed itself the National Assembly and three days later they took the famous the Tennis Court Oath “never to separate…. until the Constitution of the kingdom shall be established.” It was joined by more than half of the clerical deputies and 47 nobles.

The National Assembly thus established was, evidently, dependent on the consent of common people for its authority and not on the royal prerogatives. The members of the National Assembly although worked under strains and restrictions but their achievement was nonetheless of great significance.

They completed their work almost by the end of spring of 1791. A list of inalienable rights of free citizens was prepared which was proclaimed as the “Declaration of the Rights of Man and of the Citizen”. In it the philosophical

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46 Ferguson and Brun. A Survey of European Civilization. PP. 565-612; Martin, French Liberal thought in the 18th Century.
47 Swain, J.E.,
teachings of Rousseau permeated to its full extent. This document was of the rank of the English Magna Charta and the Bill of Rights in the Constitution of the United States of America.

The concept of Natural Law was considered during the middle Ages in the works of the Christian theologians, in the form of a belief in a law of God, above all human laws. St. Augustine carried out the principle further and said that a law which violated justice was in principle invalid.\(^48\) St. Thomas Acquinas also noted the importance of Natural Law and defined this concept as ‘the participation in the eternal law of the mind of a rational creature’. The state is subject to that higher law which determines the relation of the individual to the state.

He further stated that the justification of the state is in its service to the individual; a king who is unfaithful to his duty forfeits his claim to obedience.\(^49\) This idea led to the establishment of doctrine of natural rights and by the end of Middle Ages the concept of natural rights of man became well established. All this leads to the formation of right to revolt against a tyrannical ruler. According to Jean Bodin, Tyrannical Monarch is one who violates the freedom of his subjects, “Trampling the laws of Nature beneath his feet”.\(^50\)

In middle Ages, numbers of acts were enacted to show the superiority of Natural Law and Natural Rights. The principle of the Habeas Corpus Acts latent in the 39\(^{th}\) Clause of Magna Carta was acknowledged already in 1188 by Alfonso IX at the Certes of Leon. The Great Charter of the Liberties of England or the Magna Carta of 1215 was imposed in King John by the Prelates, Earls and Barons of his realm after his defeat by the king of France in 1214. The Golden Bull issued in 1222 by King Andrew II of Hungary is couched in language strikingly reminiscent

\(^{48}\) “Mihi les esse non videtur, quae justa non fuerit”.

\(^{49}\) D.R. Bhandari, History of European Political Philosophy, 1956, pp. 119-22.

\(^{50}\) Frade Casterg, op. cit, pp. 20-21.
of that used in Magna Carta. So is the law of General Privileges granted in 1283 by Peter III of Aragonete.\textsuperscript{51}

### 2.4 NATURAL LAW AND NATURAL RIGHTS IN 17\textsuperscript{TH} AND 18\textsuperscript{TH} CENTURY

Teachings of Machiavelli which dominated politicians and jurists of 16\textsuperscript{th} century, set in a wave against Natural Law. But soon after two factors combined to revive and strengthen the idea of natural rights of man. First factor was religious tolerance which brought forth the insistence on the natural rights of freedom of conscience and religious belief.\textsuperscript{52}

Second factor which helped to keep alive the idea of natural rights was the theory of social contract, which of course started in middle Ages but became more predominant by the beginning of the 18\textsuperscript{th} century. The very notion of the social contract implied the existence of rights which the individual possessed before entering organized society.\textsuperscript{53} The contributions of Hugo Grotius,\textsuperscript{54} Vattel,\textsuperscript{55} Pufendorf\textsuperscript{56} and Wolff\textsuperscript{57} in the development of the concept of natural rights are commendable.

\textsuperscript{52} D.R. Bhandari, op. cit., pp. 200-210.
\textsuperscript{53} The main propounders of social contract theory were Grotious, Hobbes, Locke and Rousseau, According to Grotious, Political Society rests on a ‘social contract’. It is the duty of the sovereign to safeguard the citizens because the former was given power only for that purpose. According to Hobbes, out of chaos one man came and known as Leviathan. He had superior power; People entered into a social contract and transferred all authority to sovereign. According to Locke, two social contracts were entered into i.e., Partum Unionis and Partum Subjections. From this he derived the doctrine of inalienable rights. ‘Social Contract’ and ‘Natural Law’ received a new interpretation from Rousseau. According to him ‘Social Contract’ is not a historical fact but by a hypothetical construction of reason. He emphasized on ‘General Will’. For Social Contract theory, see George H. Sabine, op.cit. Hobbes, pp. 387-403, Locke’s theory, pp. 503-575, Rousseau, pp. 485-502; William Archibald Dunning, A History of Political Theories (From Lurther to Montesquieu), New York, 1947, pp. 263-304 and 335-368.
\textsuperscript{54} Walter Schiffer, the Legal Community of Mankind (A Critical Analysis of the Modern Concept of World Organisation), New York, 1954, pp. 35-36.
\textsuperscript{55} H Lauterpacht, op. cit., p.118.
\textsuperscript{56} William Archibald Dunning, op. cit., 318-25
\textsuperscript{57} Ibid. p. 1200; Maryland, Delaware, New Jersey and North and South Carolina.
In addition to these two factors, there were other factors which emphasized the vitality of the natural rights of man. Milton’s appeal to the natural freedom of man as the basis of his claim to be ruled by law and not by the arbitrary whim of man; the insistence in the course the Puritan revolution, on natural rights in support of political freedom, social equality and universal suffrage; the place which Blackstone assigned to the natural rights of man are some of the examples of the factors which gave force to the doctrine of natural rights in 16th century.

The Virginian Declaration of Rights of 1776; other similar constitutional enactments, in the same year; the constitutions of New York and of New Georgia of 1777; and that of Massachusetts of 1780; the Declaration of Independence of 1776 and the Bill of Rights in the form of the first ten Amendments to the Constitution of America; the Declaration of the Rights of Man and of the Citizen adopted in 1789 by the French National Assembly and prefixed to the Constitution of 1793 and 1795- all these expressly acknowledged the inherent rights of man. In all the enactments, the formal incorporation of the inherent human rights and the possibility of their consequent protection not only against the tyranny of Kings but also against the intolerance of democratic majorities was a new idea. This was the first attempt to derive human rights from natural rights.

2.5 NATURAL RIGHTS AND DOCTRINE OF HUMANITARIAN INTERVENTION IN 19TH CENTURY

At the turn of the century after the French Revolution the doctrine of Natural Law was a doctrine of abstract and immutable principles and of eternal and inviolable human rights. In England Burke launched his attack against the

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58 Pennsylvania, Maryland, Delaware, New Jersey and North and South Carolina.
59 H Lauterpacht, op.cit. p.88.
assertion of the Natural Law doctrines. In Germany, reaction against the philosophy of Natural Law emerges with “Historical School” of jurisprudence.

But we come across the occasions, in this century, on which the doctrine of ‘humanitarian intervention’ has been invoked on behalf of nationals or inhabitants of foreign countries. Such, for example, was the intervention in 1827 by Great Britain, France and Russia on behalf of the Greek Revolutionaries, the numerous interventions protecting Turkish treatment of Armenians and other Christians, and the protests by the United States in 1891 and 1905 against anti-Semitic outrages in Russia.

From the beginning of the 19th century, attention was directed ore to the rights of the individual than to the objective norms. But nation states have persistently claimed supreme authority over all persons within their respective territories. Traditional international law recognized only nation states as the appropriate subjects of international law. In consequences, subject to permissible exceptions, relation between a nation state and its subjects according to traditional prescriptions are a matter of ‘domestic’ concern or law, not covered by rules of international law.

Under this prescription, therefore, an individual cannot claim international rights as against his own state and, in the absence of international agreements, he has no locus standi before an International Court for demanding redress against the violation of rights by his home state. It is pertinent to note here that in spite of the inadequacies of traditional international law an increasing number of treaties were

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62 One possible exception was of aliens. They were subjected to the objective minimum standard rule- an international standard which could be higher than one established by the law of the host country. But now international law recognises rule as giving aliens ‘the same rights and the same guarantees as nationals but these rights and guarantees shall in no case be less than the human rights and fundamental freedoms recognised and defined in contemporary agreement’. See, Sixth Report on International Responsibility, U.N. Doc. A./CN4/134 and Year book on the International Law Commission, Vol. 11 (1961), pp. 46-54
entered into the purpose of which was to protect the rights of certain classes of persons. These developments of 18th and 19th century culminated the idea of human rights.

2.6 NEW ATTITUDE TO THE CONCEPT OF HUMAN RIGHTS IN 20TH CENTURY.

Great importance has been attached in the 20th century to the human rights issue in the international arena, and tremendous efforts have been made, through the formulation of new principles and procedures to transfers the protection of basic rights from the hands of nation states to an authoritative supranational organisation. The uncompromising acceptance of the principle that ‘all men are born free and equal in dignity’ has emerged pragmatically from the crucible of experience as the most valid of all working hypothesis of human relations.

By the end of First World War, apart from political and civil rights, also developed the concept of economic, social and cultural rights. The idea that workers needed special safeguards was beginning to take hold in many industrial countries. Labour unions were establishing the right to collective bargaining; wages were being increased; and hours were being reduced. The idea that the citizens have certain basic, economic and social rights, which had been recognized in constitutions and legislations of democratic countries.

2.6.1 Human Rights and the Indian Constitution

Historically, the recognition, protection, and implementation of human rights in the Constitution of India had its genesis in the forces that operated in the national struggle for independence during the British rule. After witnessing the colonial rule, every Indian was of the firm opinion that these rights are not only

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64 The most important of these were the treaties aimed at slavery and the slave trade in 1885 in the General Act of the Berlin Conference on Central Africa and in 1889, the Brussels Conference.
basic but also inalienable for them for leading a civilized life. In fact, Indians wanted the same rights and privileges that their British masters were enjoying in India. It was implicit in the birth and formation of the Indian National Congress in 1885.

2.6.1.1 Evolution of fundamental rights during freedom struggle

Perhaps the first explicit demand for fundamental rights appeared in the Constitution of India Bill, 1895.\(^{65}\) The Bill envisaged for India a constitution guaranteeing to everyone of her citizen freedom of expression,\(^{66}\) inviolability of one’s house, right to equality before law, right to property, right to personal liberty and right to free education etc.

A series of Congress resolution adopted between 1917 and 1919 repeated the demand for civil rights and equality of status with English men. The resolutions called for equal terms and conditions in bearing arms,\(^{67}\) for ‘a wider application of the system of trial by jury’, and for the right of Indians ‘to claim that no less than one-half the jurors should be their own countrymen’.

A further resolution to this effect stated the ‘emphatic opinion’, that Parliament should pass a statute guaranteeing ‘The Civil Rights of His Majesty’s Indian subjects’, which would embody provisions establishing equality before the law, a free press, free speech, etc. The statute should, moreover, lay down that

\(^{65}\) This draft Bill represents the first non-official attempt at drafting a Constitution for India. Author is unknown. However, Mrs. Annie Besant, who described it as the Home Rule Bill for India, thought that it was probably issued under Lokamanya Bal Gangadhar Tilak’s inspiration. The author added that he had consulted the Constitutions of Brazil and the United States in drafting the Bill. See, the Constitution of India Bill, 1895; B. Shiva Rao, The Framing of India’s Constitution, Select Documents, Vol. I, the Indian Institute of Public Administration, New Delhi, 1966, pp. 5-14.

\(^{66}\) Art. 16 of the Constitution of India Bill, 1895.

\(^{67}\) Resolution of 1917; Chakrabarty and Bhattacharya, Congress in Evolution, The Book Co. Ltd., Calcutta, 1940, p.19.
political power belonged to the Indian people in the same manner as to any other people or nation in the British Empire.

By the mid-twenties, Congress and Indian leaders generally had achieved a new forcefulness and consciousness of their Indianans and of the needs of the people, thanks largely to the experience of World War I, to the disappointment of the Montague-Chelmsford reforms, to Gandhi’s arrival on the Political scene of India. These influences reflected the tone and form of demands for the acceptance of civil rights for the Indian people. These no longer aimed at establishing the rights of Indians vis-à-vis Englishmen, a goal that was to be achieved through the Independence Movement; the purpose now was to assure liberty among Indians.\(^{68}\)

The appointment of Simon Commission by British Government on November 8, 1927 to undertake a study of the constitutional reforms in India impelled the Indian National Congress to set up a committee to draft a Swaraj Constitution on the basis of a declaration of rights. This resolution was passed in 1927 at the 43\(^{rd}\) Annual Session of the Indian Congress held in Madras.\(^{69}\)

The committee called for by the Madras Congress resolution came into being in May, 1928. Pt. Motilal Nehru was its Chairman. The Committee’s report -- known as Nehru Report -- contained as explanation of its draft Constitution that speaks for itself. The Fundamental Rights incorporated in the Nehru Report\(^{70}\) were reminiscent of those of the American and post-war European Constitutions, and were in several cases taken word for ward from the rights listed in the Commonwealth of India Bill, 1925.\(^{71}\)

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\(^{68}\) Glanville Austin, \textit{The Indian Constitution – The Cornerstone of a Nation}, Oxford University Press, 1966, pp. 53-54.

\(^{69}\) Chakrabarty and Bhattacharya, op. cit., p. 27.

\(^{70}\) Article 4 of this Report listed fundamental rights in XIX of its clauses. For details see, B. Shiva Rao, op. cit., pp. 59-60.

\(^{71}\) Glanville Austin, op.cit. p. 55.
The Indian Statutory Commission\textsuperscript{72} 1930 did not support the general demand for the enumeration and generating of Fundamental Rights. Sir John Simon in his report observed:

“We are aware that such provisions have been inserted in many constitutions, notably in those of European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective.”\textsuperscript{73}

\section*{2.7 HUMAN RIGHTS AND TERRORISM}

This chapter sets out the human rights framework before examining the impact that terrorism has on human rights. It then addresses the relationship between terrorism, human rights and other relevant international legal provisions.

\subsection*{2.7.1 What Are Human Rights}

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to

\textsuperscript{72} This Commission was also popularly known as Simon Commission.

\textsuperscript{73} Report of Indian Statutory Commission 1930, p. 23.
promote and protect human rights and fundamental freedoms of individuals or groups.

2.7.1.1 Universal and inalienable

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and protection by customary international law across all boundaries and civilizations. Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

2.7.1.2 Interdependent and indivisible

All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.
2.7.1.3 Equal and non-discriminatory

Non-discrimination is a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights.”

2.7.1.4 Both rights and obligations

Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.

The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights and others
2.7.2 The Nature of Human Rights

Human rights are universal values and legal guarantees that protect individuals and groups against actions and omissions primarily by State agents that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involves respect for, and protection and fulfillment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal—in other words, they belong inherently to all human beings—and are interdependent and indivisible.74

2.7.2.1 International human rights law

International human rights law is reflected in a number of core international Human rights treaties and in customary international law. These treaties include in particular the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

Other core universal human rights treaties are the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the Rights of the Child and its two Optional Protocols; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The most recent are the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol, which were all adopted in

74 See, for example, the Charter of the United Nations, Art. 55 (c), the Universal Declaration of Human Rights, art. 2, and the Vienna Declaration and Plan of Action.
December 2006. There is a growing body of subject-specific treaties and protocols as well as various regional treaties on the protection of human rights and fundamental freedoms.

International human rights law is not limited to the enumeration of rights within treaties, but also includes rights and freedoms that have become part of customary international law, which means that they bind all States even if they are not party to a particular treaty. Many of the rights set out in the Universal Declaration of Human Rights are widely regarded to hold this character.

The Human Rights Committee has similarly observed, in its general comments (1994) and (2001), that some rights in the International Covenant on Civil and Political Rights reflect norms of customary international law. Furthermore, some rights are recognized as having a special status as norms of *jus cogens* (peremptory norms of customary international law), which means that there are no circumstances whatsoever in which derogation from them is permissible.

The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self-determination are widely recognized as peremptory norms, as reflected in the International Law Commission’s articles on state responsibility.

The International Law Commission also lists the basic rules of international humanitarian law applicable in armed conflict as examples of peremptory norms.\(^{75}\) Similarly, the Human Rights Committee has referred to arbitrary deprivation of life, torture and inhuman and degrading treatment, hostage-taking, collective punishment, arbitrary deprivation of liberty, and violations of certain due process

rights as non-derogable, while the Committee on the Elimination of Racial Discrimination, in its Statement on racial discrimination and measures to combat terrorism, has confirmed the principle of nondiscrimination as a norm of *jus cogens*.

### 2.7.2.2 The nature of states’ obligations under international human rights law

Human rights law obliges States, primarily, to do certain things and prevents them from doing others. States have a duty to respect, protect and fulfill human rights. *Respect* for human rights primarily involves not interfering with their enjoyment. *Protection* is focused on taking positive steps to ensure that others do not interfere with the enjoyment of rights. The *fulfillment* of human rights requires States to adopt appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfill their legal obligations.

A State party may be found responsible for interference by private persons or entities in the enjoyment of human rights if it has failed to exercise due diligence in protecting against such acts. For example, under the International Covenant on Civil and Political Rights, State parties have an obligation to take positive measures to ensure that private persons or entities do no inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. Human rights law also places a responsibility on States to provide effective remedies in the event of violations.76 Those human rights that are part of customary international law are applicable to all States.77 In the case of human rights treaties; those States that are party to a particular treaty have obligations under that treaty.

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There are various mechanisms for enforcing these obligations, including the evaluation by treaty-monitoring bodies of a State’s compliance with certain treaties and the ability of individuals to complain about the violation of their rights to international bodies. Moreover, and particularly relevant to a number of human rights challenges in countering terrorism, all Members of the United Nations are obliged to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set out in Article 55 of its Charter, including universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

A key question is the territorial reach of a State’s international human rights obligations. The nature of the general legal obligation of States parties in this respect is addressed in article 2 of the International Covenant on Civil and Political Rights. As confirmed by the Human Rights Committee in its general comment 31 (2004), this obligation on States to ensure Covenant rights to all persons within their territory and subject to their jurisdiction means that a State party must ensure such rights to anyone within its power or effective control, even if not situated within its territory. Furthermore, the enjoyment of international human rights is not limited to the citizens of States parties but must be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers and refugees.

In an advisory opinion, the International Court of Justice has, similarly, concluded that “the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.” It reached the same conclusion with regard to the applicability of the Convention on the Rights of the Child.78

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78 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, paras. 111 and 113. See also Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19
2.8 HUMAN RIGHTS DIMENSIONS OF TERORISM

Terrorist activities are serious violation of human rights. Even as on today thousands are being tortured and many are being deprived or denied their basic human rights such as rights to food, clothing and shelter. Terrorists’ attacks not only kill innocent persons but these attacks are threat to the very welfare and dignity of the entire human family.

In particular the people in and around the places of terrorist attacks suffer mentally, emotionally and physically in as much as they holding their breath and they live under constant fear. Wrong conviction of terrorists makes them blind, deaf, ruthless and inhuman to the sufferings of others.

Conceptualization of terrorism is a very difficult task so much so that even the U.N. Expert Committee on Prevention of Terrorism could not arrive at agreed definition due to political and ideological differences of the member nations. Eventually it is linked with violence. An ancient philosopher says ‘Kill one’, frighten 10,000’ is terrorism.

Our Prime Minister Dr. Manmohan Singh in his address at the 59th Session of the U.N. General Assembly on 23rd September, 2004 observed “Terrorism exploits the technologies spawned by globalization, recruits its foot soldiers on ideologies of bigotry and hatred, and directly target democracies. And yet it is a sad reality that international networks of terror appear to co-operate more effectively than the democratic nations that they target”, particular part of the globe. It is spread all over may be with a difference of degree and purpose. In this view and in the interest of human dignity which is the spine of human rights and to protect fundamental freedom of the people.

It is absolutely necessary for all member Nations of the United Nations to act together with determination and co-operation to fight against terrorism. The world community should become one to fight the terrorism wherever it is. In that process terrorist camps or training centers wherever they are found need to be removed or destroyed so that the terrorist attacks can be minimized if not totally eliminated. In this regard the U.N. Human Rights Council and particularly democratic countries have to play greater role. It is the time to build up a global strategy against terrorism.

Financing terrorism is another serious concern. Countries all over the world as one world community should take strong steps and measures to see that the finance does not flow from one country to the other to aid or to support terrorism. Under international Law, nations have legal obligations to work against the financing of terror by any country.

But what is needed is stronger political will and suitable steps to check and prevent such financing. If this is effectively done it may break bones of terrorism. Similarly, there should be mutual co-operation between different countries particularly the countries which are affected by terrorism in sharing intelligence and information and helping in investigation.

Terrorism is a menace against entire humanity. One cannot be silent spectator when the neighbor’s house is burning; the same may catch up one’s own house at any time. Fear of death is the gravest fear. For suicide bomber even this fear is not there. Hence it becomes necessary to discourage and destroy terrorist’s camps or training in any country or region. The world community must join hands in discouraging, destroying, or removing terrorist’s camps or training centers from such a country so that even suicide bombers cannot come out.
Blame terrorists and terrorist’s camps and not the countries but pressurize them to destroy terrorist camps and flush out terrorists from the country. Hand them over where they are required once prima facie evidence is made available. It is not desirable for one political party to blame a country and the other politicizing to condemn the ruling party. No political party should muddy the waters by turning terrorism an electoral issue in any country.

The Supreme Court of India in *Kartar Singh v. State of Punjab*\(^7^9\) observed that: “Terrorism and public order are conceptually different not only in ideology and philosophy but also in causes, the manner of its commission, and the effect or result of such activity”. “Public order”, the Court has elucidated further, “is well understood and fully comprehended as a problem associated with law and order. Terrorism is a new crime far serious in nature, graver in impact, and highly dangerous in consequence. One pertains to law and order problem whereas the other may be political in nature coupled with unjustified use of force threatening security and integrity of the State.”

It is endless to state that the law enforcing authorities have to observe the rule of law while dealing with activities of any nature disturbing public order. The observance of rule of law is essential feature and requirement of a civilized society more so, in a democratic republic. Therefore, violations of human rights by the authority of the State are detrimental to the rule of law and to the existence of a civilized society.

However, no one can take exception in dealing firmly against terrorists within the domain of law. There is need for strengthening and monitoring mechanism that have been evolved in our country to provide necessary checks and balances on State terrorism. It is better always to keep in mind the words ‘Eye to eye make the world blind’ of Mahatma Gandhi. It is necessary to protect and

\(^7^9\) (1994) 3 SCC 569.
promote human rights and democratic values in the largest democracy of the world.

The fight against terrorism in the present scenario cannot be successfully fought by the State and its forces alone. Ours is a largest democracy in the world with a huge population coupled with much diversity. Being Sovereign, Socialist, Secular and Democratic Republic, has to function within domain of law and the Constitution. The task of fighting against terrorists in this set up is difficult and delicate. But at the same time security of the country and preservation of public order cannot be ignored or minimised. The State has obligation to protect lives and properties of the citizens of the country.

In my view, terrorism can neither be contained nor curtailed by Government only through armed or police force. The State and its agents have to win over the community to which the terrorists belong and local community. The experience shows that in Punjab the Khalistanis had to give up their Movement when they lost sympathy or tacit support of Sikh Jat farmers. It is claimed that the terrorists cannot survive when they lose sympathy of their own community.

If that support is withdrawn the miscreants will have no legs to stand. More often criminal elements join the committed terrorists. They start interfering with lives of innocent people and torture them. Many terrorists are brain washed to the extent that the rule of the Almighty is possible only through murder and mayhem. When terrorism strikes in the name of the religion, culprits are attached from all parts beyond the geographical borders.

It is absolutely necessary for the community to come out and oppose terrorism resorted to in the name of God as no religion preaches or allows killing of innocent. Persuading the community to oppose terrorism is not an easy job. Thousands of ordinary Muslims are led to believe that there is a bias against their
religion. The obvious solution lies in removing the feeling of alienation from their minds and makes them realize that they are treated as equal citizens. The distrust needs to be dispelled.

Some Muslim religious leaders and enlightened Muslims have already expressed against terrorism as being totally anti-Islamic. Secular and enlightened Muslims and Muslim organisations have condemned senseless and inhuman terrorist attacks, even from religious angle, quoting from Quran that ‘whoever kills a person unjustly ….. It is though he has killed all mankind; and whoever saves a life, it is as though he had saved all mankind’.

I read an article by Julio Ribeiro published in *Times of India* who is the former Chief of Mumbai Police. He writes: “The perpetrators, in Hyderabad, Jaipur, Ahmadabad and other cities used cycles, Scooters, cars and in Delhi, dustbins to plant bombs. How many cycles, scooters or dustbins can one protect? How many CCTVs can one install? How many more policemen and intelligence officers can you recruit? The bad boys will always find ways to hit you in the unexpected places and by the most untried methods. The solution is to get round the community so that few trouble makers are marginalized.”

We cannot deny at times there were violations of human rights by the State apparatus. But look at them in a given situation and in a proper perspective. If there is excess, action is needed. It appears the vast majority of the people in this country are of the view that the violation of human rights need to be condemned irrespective of the fact whether they are State forces or terrorists. Justice P. N. Bhagawati, former Chief Justice of India has observed: “When terrorists kill innocent persons they are definitely violating human rights and they must be condemned.
Besides this, human rights of all are to be respected so that the human beings can leave with human dignity. The time demands that everyone in the Country be it from Civil Society or State machinery is required to be vigilant and be co-operative in the fight against terrorism. If people in the community do not either support or sympathize or become silent spectators, it may be very difficult to terrorists to attack.

The Civil Society from every nook and corner of the country realizing the gravity, danger and consequences of terrorism, considering it as an attack on the entire humanity should be ever vigilant and co-operate with State authorities and forces by not giving place to terrorists or inform about them or about the suspected persons to the State authorities to facilitate to prevent the acts of terrorism.

Questions are asked that after 9/11 and after bomb blast in U.K. targeting tube trains, acts of terrorism were not seen in those countries again. If that be so, why in India these inhuman acts of terrorism take place periodically without even a gap of 6 moths? Situation in which our country is placed is somewhat different. But that cannot be an excuse. More effective steps should be taken from all angles. Recent bomb blasts in Mumbai, Jaipur, Bangalore and Hyderabad naturally make people to think that there has failure of intelligence in this Country or failure of action by State.

Forces fighting against terrorism could not reach the place or take action against terrorists quickly and that the politicians and the bureaucrats failed to take action well in-time to prevent the acts of terrorism. These feelings got aggravated especially after the recent acts of terrorism in Mumbai where forces were practically engaged in war like battle with terrorists for about 59 hours in which large number of innocent persons including children and few officers of State force and few terrorists died.
After the recent terrorists attack in Mumbai, feelings of people in the Country and Mumbaikers in particular are deeply hurt, tempers ran high, they were emotionally charged and they expressed their anger. They are forcefully calling the country to fight against terrorism unitedly, firmly and with determination to finish it. They are even cautioning politicians also to act appropriately saying that the public memory on this grave issue will not be short lived.

One can see silver lining and a positive fall out that people from all sections and particularly youths all over the country are pledging to fight against terrorism and incidentally against corruption and incompetency, unitedly. Further Mumbai episode has drawn elements of unity and patriotism, as can be seen from response and our actions of people on TV channels and in print media. Terror is a horror. Never before people of this Country were as angry, hurt and up-set as this time after attacks of terrorism in Mumbai saying enough is enough and justifiably so.

Generally a decision informed by reasons is better than a decision takes charged with emotions. Attack on or war with Pakistan is not a solution to put down the menace of terrorism totally. Pakistan is also not free from terrorist’s attacks. It is better for India and Pakistan together to fight against terrorism rather than fight among them. The terrorists and extremists may take help the terrorists from the neighbouring land to enter Pakistan. It would in the interest of both the Countries that Democracy and Civil Government are strengthened in Pakistan.

Further economic development of our Country will get seriously affected in the event of war taking place. As already stated all efforts are to be made to bring international pressure on Pakistan to flush out terrorists and remove or destroy terrorist-camps found within the territory of Pakistan. War should be the last option when it becomes inevitable, because the security and integrity of our Country is to be preserved and maintained at all costs.
In this background it is necessary to improve and strengthen the system of intelligence and armed force and police equipping them well as is done either in United States or United Kingdom. There is the need for politicians and bureaucrats also to be vigilant, more sensitive and deeply committed with political will to save people and the Country from terrorist’s attacks. There are some issues and problems which are national. The political parties, different religions, different communities or regions etc. should keep aside their ideologies or thinking aside and fight against terrorism unitedly as one person.

Integrity and unity of the Nation should be above all political parties or religions or regions. If India lives all of us alive; if India goes none of us live. All sincere and serious efforts are to be made to go to the root causes of terrorism or naxalism or insurgency and steps should be taken to remove them so that there can be peace and harmony on the earth. In its original sense, the term, right implied purity, virtue and innocence, it had been used to denote the benefit received or deserved. However, it did not carry the idea that one had these benefits as a matter of right.

In the eighteenth century, however, such adjectives as ‘natural’, ‘inherent’, ‘inalienable’, imprescritpible’, had usually been used before the term the ‘Right of Man’ to signify that the existence of these rights ‘Human Rights’, as it finds its mention in the Universal Declaration of Human Rights of 1948, is of course a revival of the eighteenth century concept of the ‘Rights of Man’. 80

There is a growing consciousness of the international community of the negative effects of terrorism in all its forms on the full enjoyment of the human rights, fundamental freedoms, on the establishment of Rule of law and democratic freedoms as enshrined in the UN Charter and the International Covenants on

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Human Rights. All States are required to suppress all and any form of terrorist activities within their borders as terrorism represented globalization of fear and contempt for the role of international law.

It was reported that it was unprecedented in the UN history for 168 member States to participate in the discussion of a single agenda item on international terrorism which started on 1st October, 2001, which the International Community regarded acts of terrorism as assaults on civilization itself. Terrorism is one of the ugliest phenomenons of the present time.

The dangerous trend towards an expansion of its scope had turned it into real threat dimensions of terrorism; it is only the number of victims that should be taken into account but also its impact on the victims, the society and the state. Killing innocent people, destroying their property and creating an atmosphere of terror and fear in their minds violates the human rights of these innocent victims.

2.8.1 The Impact of Terrorism on Human Rights

“We are all determined to fight terrorism to do our utmost to banish it from the earth. But the force we use to fight would always be proportional and focused the actual terrorists. We cannot and must fight them by using their own methods-inflicting indiscriminate violence and tern innocent civilians, including children.”

Terrorism is described as the greatest threat against humanity which poses a great threat to the normal enjoyment of human wants. Though, the phenomenon of terrorism was present for centuries, the spread of international terrorism across borders by threatening not only the friendly relations among States but posing an extremely serious threat to human rights and fundamental freedoms in an unprecedented phenomenon of the last few decades. The phenomenon of terrorism

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81 Kofi Annan, UN Secretary General 18th November 1999.
became international concern in the 1960’s when pirates of airplane hijacking hit the head quarters.

When the 1972 Munich Olympic were disrupted by a Palestinian attempt to take Israeli athletes hostage. The then UN Secretary-General asked that the issue be placed on General Assembly’s Agenda under the Measure’s to prevent terrorism and forms of violence which endanger or innocent lives or jeopardize fundamental freedoms.

In the debate that followed. General Assembly amended this already title to add. “And study of the underlying issues of those forms of terrorism and the violence which lie in misery, frustration, grievance and despair and which cause people to sacrifice human lives, included their own in an attempt to effect radical changes.

This item was then assigned to assembly’s Legal Committee, which subsequently proposed several Conventions on terrorism. There are 12 major multilateral conventions and protocols related to State’s responsibilities for combating terrorism and important UN Security Council General Assembly Resolutions on International Terrorism dealing with specific events.

2.8.2 Human Rights and Enforced Disappearance

Human rights are those inalienable, imprescriptible, inherent, basic and fundamental rights which every individual possess by virtue of being human. It is essential for the all-round development of human personality and to promote social progress and better standards of life in a larger freedom.

It is the sovereign function of the state to maintain law and order in its territory and to promote and protect basic human rights of each and every individual residing in its jurisdiction. State acts in two capacities under international human rights law and humanitarian law.
On the other hand, it is under an obligation to abstain from infringing human rights and on the other hand, it is duty bound to guarantee respect of recognized human rights. The content of the principle of respect for human rights contains three propositions. First, all states have a duty to respect the fundamental rights and freedoms of all persons within their territories; second, states have a duty not to permit discrimination by reason of sex, race, religion or language; and finally, states have a duty to promote universal respect for human rights and to cooperate with each other to achieve the desired objective.

But more interestingly and paradoxically most of the human rights violations have their genesis in state’s action itself. It clearly exhibits stat’s inability and apathy in assuring protection to the persons living in its territorial jurisdiction. In real sense, it demonstrates inaction and denial of international and constitutional obligations imposed on states by human rights laws and constitutions of state concerned.

Enforced disappearance is an example of state’s inaction, an abuse of power and the negation of the right of a human being to exist and to have an identity by state. It is rampant in almost all parts of globe irrespective of culture, tradition, boundary, locality etc and became a global phenomenon.

It is both unfortunate and lamentable that enforced disappearance is practiced in an era which is often called era of human rights and gives importance to the protection of human values, worth, dignity, self-respect and good governance in a more effective and responsible manner.

The Republic of India cannot protect itself from the clutches of the infamous crime of enforced disappearance and gradually became one of the countries with highest number of UN clarified cases of enforced disappearance. It is common spread in states of Jammu and Kashmir, Punjab, North-Eastern States and other parts of the country including Gujarat, Uttar Pradesh, and Andhra
Pradesh etc. The regions where separatist groups are active and counterinsurgency action by government is taking place enforced disappearance emerged as a potent weapon of suppression and repression.

2.8.2.1 Definition of enforced disappearance:

The International Convention for the Protection of All Persons from Enforced Disappearance, 2006 defines enforced disappearance as follows:

*Enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law,*

In cases of enforced disappearances done or perpetrated by non-state actors without the authorization, support or acquiescence of the state, the Convention obliges state parties to take appropriate measures to investigate acts defined in Article and to bring those responsible to justice. In a more simplified manner it may submitted that an act of enforced disappearance contains following elements:

1. Violations of the right to security of the person or deprivation of one’s liberty against his will;

2. Involvement of state or its officials directly or indirectly by acquiescence;

3. Refusal to acknowledge the deprivation of liberty or freedom and to disclose the fate and whereabouts of the person concerned;

4. Such deprivation and refusal to acknowledge places persons concerned outside the protection of the law and in situation of complete defenselessness.

2.8.2.2 Advantages of enforced disappearance:
Enforced disappearance has been a potent weapon of repression and suppression and is generally resorted in situations like terrorism, insurgency, armed conflict, armed rebellion, internal disturbances, political upheaval, military rule etc. The advantages of enforced disappearance there is complete deniability and non-acknowledgments.

Governments often use it in silencing their opponents, crushing leaders of insurgency and sometimes to suppress the morale of the people, giving support to their political rival or insurgents groups. Sometimes, it is used to hide the realities of human rights violations to come out before the common conscience of the people because exposure of such violations may affect the image, credibility and legitimacy of the government.

2.8.2.3 Human rights violations involved in enforced disappearance

Enforced disappearance is not a violation of single human right; it is in fact the violation of constellation of basic recognized human rights standards. It entails an arbitrary deprivation of personal freedom, integrity, and safety of a person and even the very existence of victim’s life.

2.8.2.4 Violations of the victim’s rights

Enforced disappearance violates all the basic human rights of the victim and most of them have been recognized under various international instruments as non-derogable rights. Some of they are following:

a. The Right to Life;

b. The Right to Liberty and the Security of the Person;

c. The Right not to be subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
d. The Right to Recognition as a Person Before the law.

**2.8.2.5 Violations of the rights of the victim’s family:**

Enforced disappearance does not only affect the rights of person disappeared but it also violates the rights of victim’s family and peoples living in the society. An individual lives several lives at a same time. He performs various obligations in the society and family as a husband, son, father, brother etc and as distinguish member of the society. The number and area of affect varies according to the status and indispensability of the person concerned.

This procedure of enforced disappearance thus violates the right to a family life as well as various economic, social and cultural rights such as the right to adequate standards of living of victim’s family; right to education of children. In absence of bread earner in the family, the women and children became more vulnerable to various human rights violations such as begging, sexual abuse, trafficking etc.

Furthermore, the family members do not know when if ever their loved one is going to return, which makes it difficult for them to adapt to the new situation. In some cases, national legislation may make it impossible to receive pensions, life insurance policies or other means of support in the absence of death certificate. Problem of inheritance also arises in case of disappearance when death is not proved. These situations completely crush the entire family which resulted in economic and social marginalization.

**2.8.2.6 International Response to Enforced Disappearance:**

The problem of enforced disappearance has been in the agenda of United Nations since last half of 1970s. The first important step in this regard was establishment of the Working Group on Enforced or Involuntary Disappearance in

In order to review the existing international laws on forced disappearance and to suggest a binding normative international instrument an independent Committee was established in the Chairmanship of Mr. Manfred Nowak which successfully accomplished its work within stipulated time. Finally, in December 2006, the United Nations General Assembly after taking note of the resolution of Human Rights Council adopted a Convention on Protection of All Persons from Enforced Disappearance to provide a concrete solution to the problem of enforced disappearance.

This Convention expresses the firm determination to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance. It provides that it is the right of every person not to be subjected to enforced disappearance and recognizes the rights of victims to justice and reparation. Further, it affirms the right of any victim to know the truth about circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.

Article 1(2) of the Convention explicitly and categorically states that ‘no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency may be invoked as a justification for enforced disappearance’.

Besides aforesaid specific laws on enforced disappearance, help of other human rights and humanitarian law instruments can be taken in addressing the
issue of enforced disappearance. Among them Rome Statue on International Criminal Court, 1998, needs special mention as it makes enforced disappearance of a person’s a crime against humanity if it fulfills the required threshold criteria of ‘systematic and widespread practice’ which is very high.

“TO ERR is human’ is an old adage. But ‘crime’ is also a reality, existing in every society. It has to be controlled with appropriate measures to keep the society in functional harmony. To deal with this phenomenon, criminal justice system has, therefore, been invariably a feature of all societies in different forms. In the contemporary world, almost every society/country has an established system to deliver justice and control crime as per its requirements.

Measures are being taken every now and then to improve the system. Earlier, the focus was on punishment of the offender only. Besides the punishment of the offender, the systematic use of terror (such as bombings, killings, and kidnappings) as a means of forcing some political objective. When used by government, it may signal effort to stifle dissent; used by insurrectionists or guerrillas, it may be part of an overall effort to effect desired political change

"Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, and resolutions and universal “sectoral” treaties relating to specific aspects of it define certain acts and core elements.

In 1994, the General Assembly’s Declaration on Measures to Eliminate International Terrorism, set out in its resolution 49/60, stated that terrorism includes “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes” and

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that such acts “are in any circumstances unjustifiable, whatever the considerations
of a political, philosophical, ideological, racial, ethnic, religious or other nature
that may be invoked to justify them.”

Ten years later, the Security Council, in its resolution 1566 (2004),
referred to “criminal acts, including against civilians, committed with the intent to
cause death or serious bodily injury, or taking of hostages, with the purpose to
provoke a state of terror in the general public or in a group of persons or particular
persons, intimidate a population or compel a Government or an international
organisation to do or to abstain from doing any act”.

Later that year, the Secretary-General’s High-level Panel on Threats,
Challenges and Change described terrorism as any action that is “intended to cause
death or serious bodily harm to civilians or noncombatants, when the purpose of
such an act, by its nature or context, is to intimidate a population, or to compel a
Government or an international organisation to do or to abstain from doing any
act” and identified a number of key elements, with further reference to the
definitions contained in the 1999 International Convention for the Suppression of
the Financing of Terrorism and Security Council resolution 1566 (2004).83

The General Assembly is currently working towards the adoption of a
comprehensive convention against terrorism, which would complement the
existing sectoral anti-terrorism conventions. Its draft article 2 contains a definition
of terrorism which includes “unlawfully and intentionally” causing, attempting or
threatening to cause: “(a) death or serious bodily injury to any person; or (b)
serious damage to public or private property, including a place of public use, a
State or government facility, a public transportation system, an infrastructure
facility or the environment; or (c) damage to property, places, facilities, or
systems…, resulting or likely to result in major economic loss, when the purpose

83 See a more secure world: Our shared responsibility (United Nations publication, Sales N° E.05.I.5).
of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act.”

The draft article further defines as an offence participating as an accomplice, organizing or directing others, or contributing to the commission of such offences by a group of persons acting with a common purpose. While Member States have agreed on many provisions of the draft comprehensive convention, diverging views on whether or not national liberation movements should be excluded from its scope of application have impeded consensus on the adoption of the full text.

Negotiations continue. Many States define terrorism in national law in ways that draw to differing degrees on these elements. Specific challenges related to the definition of terrorism and the principle of legality are addressed in further detail in chapter III, section G.

2.9 THE MAJOR INTERNATIONAL INSTRUMENTS ON TERRORISM

2.9.1 Convention on Offences and Certain Other Acts Committed on Board Aircraft

This was adopted in Tokyo in 1963. It affects to acts affecting in flight safety. It authorizes the aircraft commander to impose reasonable measures including restraint, on any person he or she has reason to believe, has committed or is about to commit such an act, when necessary to protect the safety of the aircraft. It requires the contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.
2.9.2 Convention for the Suppression of Unlawful Seizure of Aircraft

Which was the Hague Convention adopted in 1970 to deal with aircraft hijackings. This convention makes it an offence for any person on board an aircraft in flight to unlawfully seize or exercise control to that aircraft by force or threat or any other form of intimidation. It requires the parties to the Convention to make hijacking punishable by severe penalties and if they have the custody of offenders, either to extradite the offender or submit the case for prosecution.

2.9.3 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

This was the Montreal Convention of 1971. It makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft or to place an explosive device on the aircraft. It severe penalties and either extradite or prosecute the offenders.

2.9.4 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomat Agents

Adopted at New York in 1973 and requires parties to criminalize and punish attacks against State Officials and Representatives. It defines Internationally Protected Person as a Head of State, a Minister for Foreign Affairs, a Representative or Official of a State or of an International Organisation who is entitled to special protection under international law from grave attacks like international murder or kidnapping or violent attacks upon official premises or private accommodation or means of transport of such persons.

2.9.5 International Convention against the Taking of Hostages

Also known as the Hostages Convention adopted in New York in 1979. It requires Parties to the Convention to make the taking of hostages punishable by
appropriate penalties, to prohibit certain activities to be committed within their territories and to carry out extradition proceedings.

2.9.6 Convention on the Physical Protection of Nuclear Material

Also known as Nuclear Materials Convention was adopted in Vienna in 1980. It obliges the State Parties to criminalize the Unlawful possession; use, transfer etc., of nuclear material or theft of such material or threat to use the nuclear material to cause death or serious injury to any person or substantial property damage. It also requires the State parties to ensure the protection of such material during transportation within their territory or on board their ships or aircraft’s.

2.9.7 International Convention for the Suppression of Terrorist Bombing

Adopted in New York in 1997 seeks to deny safe heavens to persons wanted for terrorist bombings by obliging each State Party to prosecute such persons if it does not extradite them to another State that has issued an extradition request.

2.9.8 International Convention for the Suppression of the Financing of Terrorism

Adopted in New York in 1999 requires State Parties to either prosecute or to extradite persons accused of funding terrorist activities. It also requires banks to enact measures to identify suspicious transactions. Bank security will no longer be justification for refusing to cooperate.

Besides these, the Vienna Declaration and Programme of Action 1993 also condemned the acts, method and practices of terrorism in all its forms and manifestations which are aimed at the destructions of human rights and
fundamental freedoms and democracy threatening integrity, security of states are destabilizing legitimately constituted governments.

2.10 Role Played By the Principal Organs of the UNO

The Security Council as the Principal International Organ of the United Nations Organisations, dealing with international peace and security has long been involved in the fight against terrorism through several resolutions. It unequivocally deemed all acts of terrorism as criminal unjustifiable and asked all Member State to adopt specific measures to combat terrorism and act together to bring the perpetrators to justice. It condemned the 1. September, 2001 terrorist attacks against United States in strongest terms and commanded the Afghanistan’s Taliban authorities to close all camps where terrorist are trained.

The General Assembly, while condemning the heinous acts of terrorism, adopts several Conventions and Resolutions to enhance international Cooperation to prevent and eradicate acts of international Terrorism. It called upon the States to take necessary and effective measures in accordance with the relevant provisions of International Law to prevent, combat and eliminate terrorism in all its forms and manifestation wherever and by whoever committed.

It established a Terrorism Prevention Branch (TPB) in 1999 which is an at the Vienna based UN office for Drug Control and Crime Prevention branch researches terrorism trends its countries to upgrade their capacity to investigate and to prevent terrorist act. Since terrorism has assumed the form of phenomenon.

Terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict. Terrorism has
a direct impact on the enjoyment of a number of human rights, in particular the rights to life, liberty and physical integrity.

Terrorist acts can destabilize Governments, undermine civil society, jeopardize peace and security, threaten social and economic development, and may especially negatively affect certain groups. All of these have a direct impact on the enjoyment of fundamental human rights.

The destructive impact of terrorism on human rights and security has been recognised at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council. Specifically, Member States have set out that terrorism:

• Threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamental freedoms, and aims at the destruction of human rights;

• Has an adverse effect on the establishment of the rule of law, undermines pluralistic civil society, aims at the destruction of the democratic bases of society, and destabilizes legitimately constituted Governments;

• Has links with transnational organized crime, drug trafficking, money-laundering and trafficking in arms, as well as illegal transfers of nuclear, chemical and biological materials, and is linked to the consequent commission of serious crimes such as murder, extortion, kidnapping, assault, hostage-taking and robbery;

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• Has adverse consequences for the economic and social development of States, jeopardizes friendly relations among States, and has a pernicious impact on relations of cooperation among States, including cooperation for development; and

• Threatens the territorial integrity and security of States, constitutes a grave violation of the purpose and principles of the United Nations, is a threat to international peace and security, and must be suppressed as an essential element for the maintenance of international peace and security.

International and regional human rights law makes clear that States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of States to protect individuals under their jurisdiction against interference in the enjoyment of human rights. More specifically, this duty is recognized as part of States’ obligations to ensure respect for the right to life and the right to security.

The right to life, which is protected under international and regional human rights treaties, such as the International Covenant on Civil and Political Rights, has been described as “the supreme right”85 because without its effective guarantee, all other human rights would be without meaning.86

As such, there is an obligation on the part of the State to protect the right to life of every person within its territory87 and no derogation from this right is permitted, even in times of public emergency. The protection of the right to life includes an obligation on States to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction.

85 See Human Rights Committee, general comment N° 6 (1982).
As part of this obligation, States must put in place effective criminal justice and law enforcement systems, such as measures to deter the commission of offences and investigate violations where they occur; ensure that those suspected of criminal acts are prosecuted; provide victims with effective remedies; and take other necessary steps to prevent a recurrence of violations.\textsuperscript{88}

In addition, international and regional human rights law has recognized that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual,\textsuperscript{89} which certainly includes terrorists.

Also important to highlight is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist.\textsuperscript{90} This, of course, includes terrorist threats. In order to fulfill their obligations under human rights law to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts.

At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights. As part of States’ duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must...
they also comply with States’ obligations under international law, in particular international human rights, refugee and humanitarian law?

**2.10.1 Accountability and the Human Rights of Victims**

From a human rights perspective, support for victims in the context of terrorism is a paramount concern. While efforts immediately following the events of 11 September 2001 largely failed to give due consideration to the human rights of victims, there is increasing recognition of the need for the international community to take fully into account the human rights of all victims of terrorism.

In the 2005 World Summit Outcome (General Assembly resolution 60/1), for example, Member States stressed “the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief.” Similarly, the United Nations Global Counter-Terrorism Strategy reflects the pledge by Member States to “promote international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism and for its condemnation.”

In addressing the needs of victims of terrorism, consideration must be given to the distinction between victims of crime, on the one hand, and victims of human rights violations, on the other. While this distinction is not always clear-cut, it is important to note that, in most cases, terrorist-related acts will be addressed as criminal offences committed by individuals and a State will not, in principle, be responsible for the illegal conduct itself, acts constituting human rights violations are committed primarily by organs or persons in the name of, or on behalf of, the State.

In some circumstances, however, the State may be responsible for the acts of private individuals that may constitute a violation of international human rights law. While a comprehensive analysis of the needs of victims of crime and human
rights violations in the context of terrorism, and of responses to those needs, is beyond the scope of this publication, several basic principles should be underscored.

In particular, international and regional standards with regard to victims of crime and victims of gross violations of international human rights law and serious violations of international humanitarian laws may be instructive in addressing the needs of victims of terrorism. Certain provisions of the universal treaties relating to specific aspects of terrorism are also relevant to addressing the situations of victims of terrorism.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted in 2005 by the General Assembly in its resolution 60/147, underscore the need for victims to be treated with humanity and respect for their dignity and human rights, and emphasize that appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.

The Basic Principles and Guidelines also outline remedies to be made available to victims of violations of international human rights and humanitarian law. These include the victim’s right to equal and effective access to justice, effective and prompt reparation for harm suffered, and access to relevant information concerning the violations and reparation mechanisms.

More specifically, they outline certain obligations on States to provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.

of international humanitarian law, and to establish national programmes for reparation and other assistance to victims, if the parties liable for the harm suffered are unable or unwilling to meet their obligations.