CHAPTER I

CONCEPT OF EXTRAJUDICIAL EXECUTION AND
PROHIBITION OF ARBITRARY DEPRIVATION OF LIFE

1.1 Concept and Definition of Extrajudicial Execution

Extrajudicial executions (EJE afterwards) are those executions carried out in the absence of a death sentence imposed by a court judgment\(^1\). In the human rights context, extrajudicial executions are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence. This description is used to distinguish EJE from other executions like capital punishment after a fair trial. An EJE is deliberate, not accidental. An EJE is unlawful and it violates national laws such as those that prohibit murder, and/or international standards forbidding the arbitrary deprivation of life.

An extrajudicial execution, strictly speaking, is carried out by order of a government or with its acquiescence\(^2\). The concept of extrajudicial executions brings together several types of killings: death in police custody, assassination or killings by officers performing law enforcement functions but involving a disproportionate use of force to any threat posed\(^3\). The combination of unlawfulness and governmental involvement puts extrajudicial executions in a class of their own. Therefore, an extrajudicial execution is, in effect, a murder committed or condoned by the state. The unlawfulness of extrajudicial executions distinguishes it from justifiable killings in self-defense, deaths resulting from the use of reasonable force in law enforcement, killings in war that are not forbidden
under international laws regulating the conduct of armed conflict, and the use of
the death penalty following a lawful process⁴.

Dictionary meaning of EJE is referred as political assassination and refers
to illegal killing of leading political, trades union, dissident and/or social figures
by either the state government, state authorities like the armed forces and police
(as in Liberia under Charles G. Taylor), or by criminal outfits such as the Italian
Mafia⁵. Extrajudicial executions are also referred as ‘targeted killing’ as a policy
of killing outside the boundaries of any legal framework⁶.

EJE may be defined as ‘any and all homicides committed by State security
or (police officers, military personnel, municipal guards, prison guards, death
squads) or similar forces (death squads, and *justiceiros* or ‘justice makers’ with
official involvement, support or acquiescence) where the victim is denied the right
to a legal defense, is executed before being sentenced, or after a trial in which
fundamental guarantees are violated’⁷. Extrajudicial executions is also defined as
‘killings committed outside the judicial process by, or *with the consent of* public
officials, [emphasis added] other than as necessary measures of law enforcement
to protect life or as acts of armed conflict carried out in conformity with the rules
of international humanitarian law’⁸ (IHL hereafter).

The Principles on the Effective Prevention and Investigation of Extra-
legal, Arbitrary and Summary executions were adopted by Economic and Social
Council (*EcoSoC* hereafter) resolution 1989/65. Although the instrument is of
itself not legally binding, it is relevant in determining the scope of what
constitutes unlawful deprivations of life⁹. These Principles have conceptualized
extrajudicial, summary and arbitrary executions and pointed out that such act shall
‘not be carried out under any circumstances including, but not limited to situations of internal armed conflict, excessive of illegal use of force by a public official or other person acting in official capacity or by a person acting at the instigation, or with the consent or acquiescence of such a person, and situations in which deaths occur in custody'.

EJE is often clubbed together with summary or arbitrary executions. The EcoSoC resolution 1982/35 which originally gave the UN Special Rapporteur his mandate contains no definition of what amounts to ‘summary’ or ‘arbitrary’ execution. These concepts are not defined in international treaties. The first Special Rapporteur, Amos Wako, therefore, attempted to define the concepts and presented the following tentative definitions:

‘Extra legal execution’ [read EJE] refers to killings committed outside the judicial or legal process, and at the same time, illegal under relevant national and international laws. Accordingly, in certain circumstances ‘arbitrary execution’ as defined above can be an ‘extra legal execution’.

‘Summary executions’ is the arbitrary deprivation of life as a result of a sentence imposed by the means of summary procedure in which the due process of law and in particular the minimum procedural guarantees as set out in Article 14 of the Covenant are either curtailed, distorted or not followed.

‘Arbitrary execution’ is the arbitrary deprivation of life as a result of the killing of persons carried out by the order of a government of with its complicity or tolerance or acquiescence without any judicial or legal process.

Amnesty International defines summary executions and arbitrary executions. Summary executions are those executions taking place after some sort
of judicial or legal proceedings which fall short of international minimum procedural or substantive standards while arbitrary executions consist in the arbitrary deprivation of life as the result of the killing of person carried out by order of the government or with its complicity, tolerance, or acquiescence without any judicial or legal process.

Minnesota Protocol, 1991, a manual greatly facilitated by Minnesota Lawyers International Human Rights Committee, has referred EJE as: (a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention, (c) death resulting from enforced disappearances, (d) deaths resulting from the excessive use of force by law-enforcement personnel, (e) executions without due process and (f) acts of genocide.

From the above discussion it can be concluded that EJE refers to killings committed by state forces outside the judicial or legal process and are illegal under relevant national and international laws.

1.1.1 Category of EJE

EJE may be classified into two categories: Direct EJE and Indirect EJE. Summary and arbitrary executions, shoot to kill policies, disappearances, secret killings, targeted killings, genocide, death due to excessive use of force/torture, fake encounter killings, executions without due process, death in custody, political assassinations, compulsory death penalty, mercy killing in armed conflict situation may fall under the first category.

Various factors that may contribute to commit EJE may be classified under second category. These may be absence of independent, impartial investigation into death under suspicious circumstances, lack of transparency, death threats,
kidnapping/hostage taking, custodial rapes, arbitrary detention or arrest without warrant, imminent expulsion, refoulement or return of persons to a country or a place where their lives are in danger as well as closure of national borders so as to prevent persons seeking asylum and any other killing that violates the laws of armed conflicts.

A study on EJE in Brazil concluded that, ‘cases of EJE involve various types of modus operandi including the work of death squads with police involvement, the illegal use of deadly force by on duty police, killings by police while off-duty, frequently while serving as private security guards, the targeted elimination of potential witnesses of other crimes, extortion attempts followed by murder, kidnappings followed by murder and massacres of three or more victims in a single incident with suspected police involvement’\textsuperscript{15}.

1.1.2 Contexts of EJE

The shortage of definitions of the concepts extrajudicial, summary and arbitrary executions indicates the difficulties in providing comprehensive definitions of these concepts\textsuperscript{16}. The Special Rapporteurs on Extrajudicial, Arbitrary and Summary Executions, appointed at different times, have clarified the concepts by listing different contexts of executions. In his report to Human Rights Council, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Philip Alston has referred EJE as those killing falling strictly under the government’s sphere. Different contexts of EJE as reflected in the various reports of Special Rapporteur are listed as follows\textsuperscript{17}:

- Genocide
• Violations of the right to life during armed conflict, especially of the civilian population and other non-combatants, contrary to IHL

• Deaths due to attacks or killings by security forces of the State, or paramilitary groups, death squads, or other private forces cooperating with or tolerated by the state

• Deaths due to the use of force by law enforcement officials or persons acting in direct or indirect compliance with the State, when the use of force is inconsistent with the criteria of absolute necessity and proportionality

• Deaths in custody owing to torture, neglect, or use of force, or life-threatening conditions of detention

• Deaths threats and fear of imminent extrajudicial executions by State officials, paramilitary groups, private individuals, or groups cooperating with or tolerated by the Government, as well as by unidentified persons who may be linked to the categories mentioned above

• Expulsion, refoulement, or return of persons to a country or a place where their lives are in danger, as well as the prevention of persons seeking asylum from leaving a country where their lives are in danger through the closure of national borders

• Deaths due to acts of omission on the part of the authorities, including mob killings.

• Breach of the obligation to investigate alleged violations of the right to life and to bring those responsible to justice
- Breach of the additional obligation to provide adequate compensation to victims of violations of the right to life, and failure on the part of Governments to recognize compensation as an obligation
- Violations of the right to life in connection with the death penalty

An analysis of UN human rights documents indicate that the following contexts can be direct EJE such as: (a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention; (c) deaths resulting from enforced disappearances; (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide. The extralegal, arbitrary or summary execution of three or more persons has been defined as massacre.

For the purpose of this study, EJE would mean five contexts like death in custody, fake encounter killings, killing by excessive use of force and torture leading to death, sexual violence leading to death and involuntary/enforced disappearances.

EJE are the killings that constitute human rights violations as well as violations under international humanitarian law which governs the conduct of war. Such killings may be committed by any parties to the conflicts, including government troops and nongovernment troops or armed groups. However, not all killings in armed conflicts are illegal. For instance, armed forces are not prohibited from killing individuals taking a direct part in hostilities, such as soldiers, members of armed opposition groups, etc. as long as those taking part in hostilities are not prisoners or have not put down their arms, they may be lawfully killed under the laws of war.
Sexual violence leading to death will be considered as extrajudicial execution for the purpose of this study. The Trial Chamber of International Criminal Tribunal for Rwanda (ICTR hereafter) held that rape, which it defined as 'a physical invasion of a sexual nature committed on a person under circumstances which are coercive', and sexual assault constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group, as such.  

1.2 Prohibition of arbitrary deprivation of life: history of human rights standard setting

Religions and traditions contributed enormously to the development of human rights standards for a human life with dignity. For that purpose certain norms were established to be followed by the ruler and the subjects. Arbitrary prohibition of life is reflected in various writings on Confucious, Kautilya and various texts of Buddhism, Hinduism, Christianity, Islam among others. Hinduism preached that 'all life is sacred, to be loved and respected (Vedas). Buddhism urged its followers to 'respect for all life and duties of compassion and charity; urged renunciation of differences of caste and rank in favor of universal brotherhood and equality. The Quran speaks to justice, the sanctity of life, freedom, mercy, compassion and respect for all human beings as all races are equal and religious toleration should be guaranteed.

Confucius (551-479 BC) considered how a virtuous ruler should be chosen based on his own merits including his moral conduct and devotion to his people. A ruler should exhort his people to extol his example showing respect, tolerance, trustworthiness, quickness and generosity towards others, he taught. Kautilya in
his, Arthashastra stressed for state obligation and argued for a benevolent autocratic being with obligations to rule his subjects fairly, to manage a transparent judiciary and penal system and to regulate an efficient and solid economy.

Contribution of Hammurabi, Plato, Aristotle, Cicero and other Roman and Greek philosophers are of great influential and cannot be over looked. The standard of state obligation put forward by these philosophers spoke of basic rights for the subject and rulers. These basic rights were certainly to prohibit arbitrary prohibition of life and to establish state accountability. The 282 laws drafted by Hammurabi, king of Babylonia (1728-1686 BC) marked the inception of the conviction that some laws are so basic as to be beyond the reach of even the King to alter them. The Hammurabi code focused on various liberties and overall integrity and transparency of the Judiciary system. Socrates, too, defined virtue, the fundamental ethical conception as insight. According to him, one of the dictates of natural law is the authority and positive law should be obeyed. Plato put obligation to the 'philosopher kings' whose education and wisdom is such that there is no necessity to link them up with a higher law. Aristotle said 'man as a part of universal nature is governed by nature. When man lives according to reason, he lives 'naturally'.

Among the codified documents, Magna Carta, 1215 has provided for dignity of life. It says (Para 40) 'no one will sell; to no one will we deny or delay right or justice'. Para 38 reads as 'no bailiff for the future shall put any man to his 'law' upon his own mere words of mouth, without credible witnesses brought for this purpose. Magna Carta declared that that no freeman shall be arrested or
detained in prison or deprived of his freehold or outlawed or banished or in any way molested and we will not set forth against him nor send against him, unless by the lawful judgment of his peers and by the law of the land...  

Other important developments in this aspect include Habeas Corpus Act of 1679, an Act was passed by the Parliament of England during the reign of King Charles II, for the better securing the liberty of the subject and for prevention of imprisonment beyond the seas. Parliament to define and strengthen the ancient prerogative writ of habeas corpus, whereby persons unlawfully detained cannot be ordered to be prosecuted before a court of law.

The French Declaration of the Rights of Men and Citizen, 1789 contributed towards human rights standard setting as it declared that 'men are born free'. 'No man may be accused, arrested or detained except in the cases determined by law and according to the forms prescribed thereby and hence [emphasis added] whoever solicit, expedite or execute arbitrary orders or have them executed must be punished'. Every man is presumed innocent until declared guilty if arrest be deemed indispensable and all unnecessary severity for securing the person of the accused must be severally repressed. The aim of every political association is the preservation of the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression. The law is to establish only penalties that are absolutely and obviously necessary and no one may be punished except by virtue of a law established and promulgated prior to the offence and legally applied. The law has the right to forbid only actions which are injurious to society.
United States Declaration of Independence, 1776 declared that all men created are equal and endowed with inalienable rights – among these are the life, liberty and the pursuit of happiness, to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

The development of codified human rights standards since the Second World War has been one of the great achievements of the international community. These standards have proved invaluable in determining measure necessity for a human life with dignity. The United Nations (UN), formed at the end of the war, was concerned with human rights from the outset. In the Charter of the United Nations, adopted in 1945, the member states of the UN pledged to work for the achievement of ‘universal respect for and observance of, human rights’, a great new goal and later on at the initiative of UN, the international community adopted and brought into force various human rights treaties. International treaties created binding obligations on the ratifying parties, which countries aspire to honor. Parties to international treaties generally aspire to comply in the spirit of *pacta sunt servanda* (agreements are to be kept and honored) where ‘compliance is the normal organizational presumption’.

From 1948 until the late 1960s, the United Nations focused its attention on listing those rights whose protection should be guaranteed by all states under international supervision. Various norms and standards of human rights were spelled out in the Universal Declaration of Human Rights (UDHR hereafter), adopted without dissent and proclaimed by the UN General Assembly on 10 December 1948. The adoption of the UDHR was an immensely important event.
The UDHR is now truly universal, in the sense that almost every country is a member of its declaratory body, the United Nations. Its 30 articles, lists the rights to which everyone is entitled set forth 'as a common standard of achievement for all peoples and all nations'.

Later the contents of the UDHR formed the body of the two other legally binding Covenants namely International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966 and came into force on 1977. Basic International Standards on the right to life are contained in Articles 3 of the UDHR, Article 6 of ICCPR and other regional Conventions like article 2 of European Convention on Human Rights, Article 4 of American convention on Human rights and African Charter of Human and Peoples Rights. These treaties specify that no one may be 'arbitrarily' deprived of life without further explanation.

1.3 Non-derogable character of right to life

UDHR has declared that everyone is entitled to fundamental human rights. Article 3 of the UDHR enshrines one of the core non-derogable rights by saying 'everyone has the right to life, liberty and security of person.' This protection is guaranteed to all whether a combatant or a civilian. The ICCPR, the 'most authoritative legal instrument in the field of civil and political rights', reiterates the right to life, liberty and security of person and prohibits, in particular, the arbitrary deprivation of life - a characteristic of the extrajudicial execution.

An imperative norm of international law is one which is, generally recognized by the international community as a whole, a norm from which no
derogation are permissible. This is supported by article 4 of ICCPR. International human rights recognise that rights are not absolute. This concept of law thus incorporates the concepts of national security, public order, and public emergency. ICCPR recognizes the need to resort to special measures in extraordinary circumstances. It states that, in times of public emergency, states may take measures derogating from their obligations under the Covenant. Some rights, however, are of such a fundamental character that States cannot derogate from them at any time. The prohibition of extrajudicial executions applies during public emergencies. All derogation must be proportional to the threat in terms of both degree and duration. Non-derogable rights constitute 'a certain core of fundamental rights ... [which] acquire an absoluteness and pre-eminence in the hierarchy of legal norms'.

Relating specifically to extrajudicial killings, the Human Rights Committee, monitoring body under ICCPR, places a special dictum on the excessive use of force by states’ security forces as reflected in General Comment No. 6. The right enshrined in article 6 is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. The law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities (General Comment No. 6, para 3). The Committee nonetheless held that combating terrorism with arbitrary and excessive state violence, including numerous extrajudicial executions, couldn’t be justified under any circumstances (Human Rights Committee 1992).

UN Special Rapporteur on Extrajudicial, Arbitrary and Summary Execution stated 'the right to life is fundamental right in any society irrespective
of its degree of development or the type of culture which characterizes it, since this right forms a part of *jus cogens* in international human right law. The preservation of this right is one of the essential functions of the state and numerous provisions of national legislations establish guarantees to ensure the enjoyment of this right\(^5\).

Other regional conventions on human rights have similar provisions like article 15 of European Convention, article 27 (1) of the American Convention on Human Rights. However it has been argued the in view of the fact that in the African Charter where derogation is permitted and is expressly so stated in the article which assert the right, there are strong argument in favour of the interpretation that even in the African Charter no derogation to the light to life is permitted since such derogation is not expressly stated in article 4\(^5\).

However, the practical aspects of enforcement of anti terror law especially during armed conflict situation are practiced with rampant torture, enforced disappearances, arbitrary or summary executions\(^5\). Inter-American Commission observed, 'An essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*...\(^5\).

1.4 Regional Human Rights standards prohibiting arbitrary deprivation of life

Complementing the worldwide scope of the United Nations, governments in different regions of the world have created organizations where their representatives meet to discuss matters of regional concern, including human rights. Three of these ‘regional intergovernmental organizations’ have adopted
human rights treaties which are legally binding on the states in those regions which become parties to them. They are the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), signed in 1950 and entered into force in 1953; the American Convention on Human Rights, adopted in 1969 and entered into force in 1978; and the African Charter on Human and Peoples' Rights, adopted in 1981 and entered into force in 1986. All three treaties provide for the right to life and, in particular, the right not to be arbitrarily deprived of life. All three provide for the right to liberty and security of person, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right not to be subjected to arbitrary arrest or detention.

The American Convention on Human Rights declares that 'no one shall be arbitrarily deprived of his life'. The African Charter on Human and Peoples' Rights declares, 'every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. The European Convention for the Protection of Human Rights and Fundamental Freedoms declares, 'no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by laws'. Each of the three regional treaties provides for the establishment of institutions to supervise its implementation. The activities of these and other regional institutions in combating 'disappearances' and EJE have added a new dimension to the human rights discourse.

The African (Banjul) Charter on Human and Peoples Rights is unique as a regional human rights instrument in that it not only awards rights to individuals
and peoples, but it also includes duties. The duties recognise include those towards the family and state security, the duties to pay taxes, and to promote the achievement of African unity (article 29). Article 27(2), which is included under the heading 'duties', provides 'the rights and freedoms of each individual shall be exercised with due regards to the rights of others, collective security, morality and common interest'⁵⁸

The 'Arab Charter on Human Rights'⁵⁹ came into force on March 15, 2008. This Charter was adopted by the Council of the League of Arab States on September 15, 1994 and affirms the principles contained in the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the Cairo Declaration on Human Rights in Islam.

This Charter did not meet the required ratification and it was re-drafted in 2004. A number of traditional human rights are provided for, including the right to liberty and security of persons, equality of persons before the law, protection of person from torture, the right to own property, freedom to practice religious observance and freedom of peaceful assembly and association. The Charter established a 7 elected member body called Committee of Experts on Human Rights to consider states reports.

1.5 International Customary Law or Jus cogens

The term international customary laws or 'jus cogens' means 'the compelling law'. It results from a general and consistent practice of States that is followed by them from a sense of legal obligation. The most obvious significance of a norm—a principle or rule—of a customary character is that it binds States
that are not parties to the treaty in which the norm is restated\(^60\). A \textit{jus cogens} norm holds the highest hierarchical position among all other norms and principles\(^61\). As a consequence of that standing, \textit{jus cogens} norms are deemed to be 'peremptory' and non-derogable. The legal literature discloses that the following international crimes are \textit{jus cogens}: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture\(^62\) and the legal basis for these crimes is a reflection of international \textit{opinio juris}\(^63\) and \textit{erga omnes}\(^64\) obligation.

The Geneva Conventions, the Hague laws, the Martens Clause etc have been accepted as customary international law. In 1986, the International Court of Justice in Nicaragua vs. USA further re-affirmed their status as customary international law\(^65\). Article 22 of the Hague convention 1907 stipulates that 'the rights of the belligerents to adopt means of injuring the enemy are not unlimited.' The Martens Clause provides that 'even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience\(^66\). Thus in absence of any legal instrument, populations and belligerents [in a situation of armed conflict] remain under the protection and empire of the principles of international law, as they result from the usages [or customs] established between civilized nations, from the laws of humanity and the requirements of the public conscience.

\textbf{1.6 Combined applicability of Human Rights Laws and IHL} 

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\(^1\) The Martens Clause provides that '...belligerents remain under the protection and empire of the principles of international law...'

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\(^61\) 61. As a consequence of that standing, \textit{jus cogens} norms are deemed to be 'peremptory' and non-derogable. The legal literature discloses that the following international crimes are \textit{jus cogens}: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture and the legal basis for these crimes is a reflection of international \textit{opinio juris} and \textit{erga omnes} obligation.

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\(^66\) 66. The legal basis for these crimes is a reflection of international \textit{opinio juris}.
International human rights law and international humanitarian law are traditionally two distinct bodies of law. While the first deals with the inherent rights of the person to be protected at all times against abusive power, the other regulates the conduct of parties to an armed conflict. The relationship between human rights law and humanitarian law is described as a relationship between general and specialized law, in which humanitarian law is the *lex specialis*. Both branches of law are complementary to each other. Complementarity would mean that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values can influence and reinforce each other mutually. Both the International Court of Justice and human rights treaty bodies have insisted that human rights law applies, alongside IHL, to situations of armed conflicts. This is reflected in numerous observations by these bodies as well as analysis by the legal experts.

The four Geneva Conventions of 1949 along with the two optional protocols constitute the body of IHL. These provisions are suited to human rights protection in the times of the armed conflicts both international and non-international.

Each of Four Geneva Conventions of 1949 deals with a particular group of ‘protected persons’ the wounded and sick armed members in the field (Convention 1) and shipwrecked members of armed forces at sea (Convention No 2), prisoner of war (Convention 3) and civilians in the time of war (Convention 4). These four conventions and along with two additional protocols of 1977 prescribed as minimum standards procedural safeguards which must be adhered to in times of war or armed conflict including provisions for internal armed conflicts.
Each of these conventions prohibits murder and other acts of violence against protected persons. They explicitly provide that ‘willful killings’ are to be considered ‘grave breaches’ of the Geneva Conventions.

Article 3 which is common to all four Geneva Conventions prohibits ‘at any time and in any place whatsoever... Violence to life and person in particular murder of all kinds of people ‘taking no active part in the hostilities’ in armed conflict which is not international in character. In respect of people who do not take a direct part or who have ceased to take part in hostilities during an armed conflict which is not international, Article 4 of the Additional Protocol II prohibits violence to life ‘at any time and in any place whatsoever’. Article 75 of Additional Protocol I prohibits ‘violence to life, in particular, murder against all people’. Common article 3 also specifically prohibits the passing of sentences and the carrying out executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

Article 6 of the Additional Protocol II states that a conviction must be pronounced by a court offering the essential guarantees of independence and impartiality and proceeds to enumerate some of the procedural and substantive guarantees among which are : ‘ no one shall be convicted of an offence except on the basis of individual penal responsibility, presumption of innocence until proved guilty according to law, the right of the accused to be tried in his presence, the death penalty should not be pronounced on persons who are below 18 years, pregnant or recent mother and non- retroactivity of legislation.
1.7 Right to life and death Penalty

There is no issue more politically polarized or more heavily litigated, in human rights law then the sentence of death and its modes and rituals of executions. Half the nations of the world abolished death penalty either by law or by practice. International criminal tribunals like International Criminal Tribunal of former Yugoslavia (ICTY hereafter), International Criminal Tribunal of Rwanda (ICTR) and International Criminal Court (ICC) are prohibited by their statutes from impairing death sentences. The second Optional Protocol to the Civil and Political Covenant of 1977 calls for the abolition of death penalty, though it has not attracted many signatories. European countries however show a consensus in abolishing death penalty. It is reflected in the fact that all the Council of Europe members who have ratified the Sixth Protocol of the European Convention on Human Rights have forsworn the imposition of death penalty as a punishment in peace time. The common article 3 to Geneva Conventions 1949 declared ‘To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person’.

No research could confirm that imposition of death penalty deters crime, other than disappearing a few criminals who could be neutralized otherwise by alternative modes of punishment like life imprisonment. Capital punishment policies and practices are often justified with reference to the state of public opinion. The Government of Japan responded to a survey by the Secretary-General that ‘the majority of people in Japan recognize the death penalty as a necessary punishment for grievous crimes. Considering the number of serious
crimes ... it is inevitable to impose the death penalty on offenders who commit such crimes.\textsuperscript{75}

Several safe-guards are provided in case of capital punishment. Undoubtedly death penalty is the most severe punishment and may be imposed in rarest of rare cases\textsuperscript{76} and ‘only for the most serious crimes’\textsuperscript{77}. Death penalty should be quite exceptional in nature and can be awarded only after detail judicial process following due process of law, observed Human Rights Committee\textsuperscript{78}. Due process of law including legal fairness, right to appeal, petition for clemency from the highest authority of the country must be guaranteed while awarding death penalty. Inter-American Commission on Human Rights, observed that ‘Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.’\textsuperscript{79}

UN Special Rapportuer on Extrajudicial, Arbitrary and Summary Execution, Philip Alston, pointed out that transparency is among the fundamental due process safeguards that prevent the arbitrary deprivation of life. His report to Human Right Council concludes ‘secrecy prevents any informed public debate about capital punishment within the relevant society …’\textsuperscript{80} Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty.

Secrecy is also incompatible with a retributive rationale for the death penalty. Transparency is the surest safeguard of fairness. ‘Any judgment rendered in a criminal case or in a suit at law shall be made public’. Even during a state of
emergency, derogation from transparency rights is never permitted in death penalty cases. It might be noted that the permissible scope of derogation from due process rights is always tightly circumscribed. Measures taken in derogation must always be limited ‘to the extent strictly required by the exigencies of the situation’. The UN Special Rapporteur calls countries applying the death penalty to undertake regular, independent, periodic reviews of the extent to which international standards have been complied with and to consider any evidence of wrongful execution because it is impossible to ensure that wrongful executions do not occur.

In India, Capital punishment is included as a penalty in a number of Acts, such as the Indian Penal Code and penalty provisions of national security legislation. Under the Indian Penal code, eleven offences may be punished by death. These offences are abetting any death eligible offences, waging war against the government, abetting mutiny by a member of the armed forces, fabricating false evidence with a intent to secure conviction of another person for a capital offense provided that such a conviction occurs, abetting the suicide of a child or an insane person etc. A death sentence may also be imposed for a number of offenses committed by members of the armed forces under the Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1956. Among other legislations the Commission of Sati (Prevention) Act, 1987, the Narcotics, Drugs & Psychotropic Substances (Amendment) Act, 1988, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 introduced the death penalty as punishment.

In a landmark judgment in 1983, the Indian Supreme Court held that a death penalty should be awarded only in the ‘rarest of rare cases’. Elaborating, it
ruled that this clause could be invoked only 'when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community'.

1.8 Rights of the Victims

In the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (the Victims Declaration onwards), 'victim' has been defined as any person or group of persons that individually or collectively, directly or indirectly, suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.82

Human rights instruments not only talked of state's obligation to protect right to life by prohibiting arbitrary deprivation of life but also talks of state's duty in case of violation of this supreme rights. It has spelled out rights of the victims and their family by putting strict obligation to be followed in case of violation of right to life. State owes a duty towards a victim of violation of human rights to provide justice and reparation.

The victim has right to know the truth, to get justice and to receive reparation. Right to truth would mean a duty on States to investigate alleged violations of the right to life 'promptly, thoroughly and effectively through independent and impartial bodies'83. The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation84. the Human Rights Committee has held, 'it is
inherent in the protection of rights explicitly recognized as non-derogable that they must be secured by procedural guarantees. The provisions of the [ICCPR] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.\textsuperscript{85}

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provided for victim's right to access to justice and fair treatment and their entitlement to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. It calls upon national Judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ensuring their representation in proceedings, providing legal assistance, ensuring their safety and that of witnesses etc.

The United Nations 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\textsuperscript{86} or Theo van Boven/Bassiouni principles (GA, 60/147,2005)\textsuperscript{87} explains that remedies include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms. Basic principles on the right to a remedy and reparation (principles 19 to 23) stated clearly the five form of reparation as:
restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The five forms are explained in details hereunder.\textsuperscript{88}

The European Court of Human Rights in its judgment in Kilic v. Turkey of March 28, 2000, stated, 'the Court recalls that the first sentence of article 2.1 of the European Convention for Protection for the Human Rights and Fundamental Freedoms, enjoins the state not only to refrain from the intentional and unlawful taking of life but also to take to appropriate steps to safeguard the lives of those within its jurisdiction ...'.\textsuperscript{89}

This involves a 'primary duty on the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual'.\textsuperscript{90}

The obligation to punish violations is vital to the rule of law in armed conflict as well as in peace time. The legal duty to punish those individuals responsible for violations of the right to life is not a mere formality. It is, thus, alarming when States punish crimes committed against civilians and enemy combatants in a lenient manner. Punishment is required in order to ensure the right to life and preventing impunity for the perpetrators. Therefore, 'States must punish those individuals responsible for violations in a manner commensurate with the gravity of their crimes. International law does not specify a particular
schedule of sentences, but there are many indications of whether a State is effectively penalizing unlawful killings.\textsuperscript{91}

1.9 Indian legal regime protecting right to life and prohibiting arbitrary deprivation of life

Even if international human rights standards had not been developed, even then the crime of ‘disappearances’ and EJE would be unlawful. These offences violate national law. EJE violate national laws proscribing murder. Many countries now have constitutional provisions spelling out basic human rights. ‘Disappearances’ and EJE are certainly violation of these rights, and thus violate constitution.

Constitution of India guarantees protection of right to life as fundamental right under Part III and state is equally obligated to protect the same under other statutes. The Constitution of India protects ‘equality before the law’ and ‘equal protection of the laws’ which embodies a broad guarantee against arbitrary or irrational state action more generally.\textsuperscript{92} Every Indian citizen is guaranteed the rights to freedom of speech and expression, peaceful assembly, association, free movement, and residence, although the parliament may legislate ‘reasonable restrictions’ on some of these rights in the interests of the ‘sovereignty and integrity of India,’ ‘security of the state,’ or ‘public order.’\textsuperscript{93}

To ensure criminal justice, constitution also prohibits ex post facto laws, double jeopardy, and self-incrimination (article 20). Every person arrested and taken into custody must be provided the information or the basis for the arrest and be produced before a magistrate within 24 hours of such arrest (article 22). The constitution also guarantees the right to counsel of the defendant’s choice, and the
Supreme Court has held that legal assistance must be provided to indigent defendants at the government expense.

The constitution also guarantees 'right to life and personal liberty' under article 21 and this right cannot be taken away except according to 'procedure established by law,' and the Supreme Court has broadly interpreted this guarantee to encompass a range of rights that equals the concept of 'due process' of the American Constitution. Judicial interpretation that 'procedure established by law' means a 'fair, just and reasonable law' has been a part of the Indian jurisprudence since the 1978 case of Maneka Gandhi. The word 'due' is interpreted as meaning 'just', 'reasonable' and 'fair'.

The meaning of 'life' is not a narrow one. Lord Diplock in Salomon vs. Commissioner of Customs and Excise states that there is a prime facie presumption that the Parliamentarian doesn't intend to act in breach of international law. Again Lord Bridge in Brind vs. Secretary of state for Home Department observed that it is well settled that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to a conflicts with the internal law conventions and not in conflict with it.

The word 'life' has been recognized as a basic inalienable rights in Universal Declaration of Human Rights, 1948 and has influenced the highest judiciary of India. The Supreme Court of India has adopted a broad interpretation of the right to life and liberty enshrined in the Indian constitution under article 21 so as to guarantee freedom from torture or cruel, inhuman, or degrading treatment extending to right to life with 'human dignity'. Supreme Court also
has recognized the rights to a fair trial\textsuperscript{100} and a speedy trial\textsuperscript{101} through its brought principle of broad interpretation of right to life guaranteed under article 21. In Chairman, Railway Board vs. Chandrima Das\textsuperscript{102}, the Supreme Court also held that Indian constitution granted all the basic and fundamental human rights spelled out in UDHR to its citizens and other persons. The primacy of the fundamental rights is reflected in Article 13 of the Constitution. Article 13 (1) states that any law, which is not in conformity with the exercise of the fundamental rights conferred by Part- III of the Constitution, shall be void\textsuperscript{103}.

Right to life is legally protected during a state of emergency in India. The Constitution of India enables the President of India to proclaim a state of emergency whereby the security of India or any part of territory is threatened whether by war or external aggression or armed rebellion, a state of emergency may be proclaimed\textsuperscript{104}. The second type of emergency is that if a situation arises in which the government of the state cannot be carried on in accordance with the provisions of the Constitution, the President may proclaim emergency in that state\textsuperscript{105}.

However, the proclamation of emergency unless revoked cease to operate on the expiration of a period of six months from the date of issue. The constitution also enables the President to proclaim financial emergency\textsuperscript{106}. Apart from these provisions the constitution also speaks of the duty of the state [Union] to protect every state to protect against external aggression and internal disturbance\textsuperscript{107}. During a state of emergency fundamental rights are suspended but right to life guaranteed under article 21 and criminal justice guaranteed under article 20 cannot be suspended at any point of time.
1.10 EJE and section 4 (a) of AFSPA\textsuperscript{108}

Section 4(a) of Armed Forces (Special Powers) Act, 1958 (amended in 1972, AFSPA onwards)\textsuperscript{109}, is a provision that enabled the armed forces with special powers of using force to the extent of causing death in a 'disturbed area' for maintenance of law and order of the state in 'aid to civil administration'. The plain text of section 4 (a) of AFSPA is 'any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may, in a disturbed area, if he is of the opinion that it is necessary to do so for maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms, ammunition or explosive substances'.

The provision for opening fire under 4(a) is broad and there is no reference to opening fire in self defense or opening fire in the context of the likely commission of a terrorist offence. Mere reasonable suspicion that a person is in possession of arms is sufficient to open fire. There is no indication at all that the principle of the minimal use of force is applicable at all. A non commissioned officer can order security forces to open fire. The section has no guidelines for opening fire. Guidelines for any enquiry to be conducted after the forces open fire injuring persons are absent.

Earlier discussion in this chapter provides a basic understanding and a legal framework to conclude about what constitutes EJE. Comparing these
frameworks and taking consideration of the various reviews and observations by different human rights bodies (discussed later) on section 4(a) of AFSPA proves that section 4(a) violates non-derogable human rights like right to life, right to fair trial and right to remedy. Case studies (presented in later chapters) will show that the term 'necessary warning' is entirely at the discretion of exercising officers and has often lead to blatant violation of guidelines like 'Do's and Don'ts'. This proved that there is a lack of check and balances for the use of such lethal discretionary power.

Under section 4(a) of the AFSPA, which grants armed forces personnel the power to use force to the extent of causing death. The offenses under section 4(a) are 'acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or fire-arms, ammunition or explosive substances'. None of these offences necessarily involve the use of force.

AFSPA is applicable in disturbed areas (section 3). According to section 3, Governor of a State or the Administrator of the Union Territory, or the Central Government in either case may notify an area as 'disturbed' if the use of armed forces 'in aid of civil power' is necessary. Many critics of the Act found the declaration of 'disturbed areas' resembles declaration of a de facto emergency devoid of the constitutional mandates and protection. It is to be noted that section 15 of the Police Act 1861 empowers a State Government to declare an 'area disturbed' or in 'a dangerous state' and to deploy any police force for a fixed period. If such a police force is not sufficient, section 130 and 131 of Criminal
Procedure Code (Cr.P.C) permit the civil authorities to bring in the Army. Instead of exploring these provisions, the state has resorted to the AFSPA. Thus an investigation is required if the state is permitting direct Army rule bypassing the Constitution allows army deployment only in aid of civil power for law and order situation.

1.11 Internationally established General Principles of Criminal Law and 4(a) of AFSPA

Life with human dignity requires that certain principles are followed in the trail of a criminal or suspected criminal. Right to fair trial is a basic fundamental rights and the state is accountable to ensure that basic principles of criminal justice is followed by the law of the land.

Some basic principles of criminal justice recognized internationally are *Nullum Crimen sine lege* and *Nulla poena sine lege*. *Nullum Crimen sine lege*, a doctrine that stipulates that a person shall not be criminally responsible unless the conduct in question constitutes a crime at the time it takes place. Any ambiguity in what constitutes crimes may result in injustice and abuse of power. Each criminal act must be well defined and properly codified so as to eliminate confusion. There should be due notice defining what constitutes crime and what not. This will mean prior warning to the criminal informing what constitutes crimes under the law of the land. A person may not be punished if the incriminating acts were not prohibited by law when the crime was committed.

Major human rights conventions have reaffirmed this principle. Article 11(2) of the Universal Declaration of Human Rights declares ‘No one shall be hold guilty of any penal offence on account of any act or omission which did
not constitute a penal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed. Section 4(a) of AFSPA permits use of force over suspects to the extent of killing and thus it imposes heavier punishment to the suspects than the criminals. Article 15 of the ICCPR contains virtually the same provision, 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.'

Nulla poena sine lege is internationally recognised principle of criminal law. It says that a person convicted by the Court, Judiciary or any other such mechanism, may be punished only in accordance with this Statute and not otherwise.

Rome Treaty of ICC (Article 22 and 23) and European Convention on Human Rights (Article 7) have embodied these two principles in the corpa delict of the statute. Four prohibitions can be derived from these two principles:

- Prohibition of punishment by unwritten law: the punishability must be laid down in accordance with the legality principle. Written legislation must exist; unwritten (customary) law provides no basis for punishment.

- Prohibition of analogy: the penal analogy bans, for the protection of the perpetrator the transference of one legislation to another unlegislated situation. In order to justify the punishability of the perpetrator. On the contrary, the use of an analogy in favour of the perpetrator is permitted.
• Prohibition against ex post facto laws: it is forbidden to impose ex post facto sanctions for a crime or to introduce a more severe sanction or to intensify/tighten the sanction. Punishability and punishment must have been legislated before head.

• Prohibition of unclear terms in criminal statutes: the element of a crime and respective penalty must be defined exactly. Only sufficiently specified sanctions can instruct the judge precisely in which particular behaviour is punishable and how.

Article 20 of the constitution of India, as discussed earlier, provides that there shall be no application of retrospective law, no double jeopardy and self-incrimination. In addition to it, 'presumption of innocence' and 'proof of guilt beyond doubt' are the standard followed in India criminal justice system and right to 'fair trial' is a part of right to life under article 21 of Indian Constitution. However, comparing these standards it can be stated that section 4 (a) AFSPA did not define in clear terms any crime. It only spoke of cognizable offences. Comparing these provisions, it can be concluded that section 4 (a) of AFSPA is as a law that gives 'heavier punishment to suspects than convicts'.

Also as discussed earlier, *jus cogens* principles stand at the top of the international law hierarchy above other norms and principles. A norm will not reach the status of *jus cogens* until it is 'accepted and recognized' by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. In other words, a rule of *jus cogens*
cannot be set aside by mere treaty or acquiesance.’ Common article 3 of Geneva Convention is such a norm.

Common Article 3 (common to all four Conventions) of the Geneva Conventions is most acclaimed law of internal armed conflict. All four Geneva Conventions deal primarily with the conduct of international armed conflicts while common article 3 deals specifically with ‘the case of armed conflict not of an international character’. Notwithstanding its limitations, common article 3 forms the primary basis for the conventional law of internal armed conflict by setting out the fundamental principles of humanity that apply in internal armed conflicts. These minimum safeguards have been applied to all citizens within a country during internal armed conflicts. Common Article 3 also binds each ‘party to the conflict,’ including insurgents and rebels. It requires no minimum threshold of violence to trigger its application.

Being a state party to the Geneva Convention of 1949, Government of India also passed Geneva Conventions Act 1960 in order to implement the Geneva Conventions 1949. This act provides for the punishment of grave breaches of the 1949 Geneva Conventions. It regulates legal proceedings in respect of protected persons (prisoners of war and internees). The act also prohibits misuse of the Red Cross and other protected emblems under the Geneva Conventions. Passing of the Geneva Conventions Act 1960 indicates that India is under an obligation to implement the common article 3 that binds even the non-state armed groups.

1.12 Right to remedy and AFSPA

In Indian context, right to remedy for violation of fundamental rights under chapter III of the constitution is available under article 32 of the constitution.
Supreme Court of India has ruled that right to remedy itself is a fundamental right. Rights to remedy is also available under section 226 of Indian context where an aggrieved party can approach the High Court and file petition in the form of a writ. Section 6 of AFSPA requires 'prior sanction' from the government for initiating legal proceeding against armed forces acting under section 4 (a) of AFSPA.

The judiciary has interpreted AFSPA in the light of right to life and other fundamental rights. In numerous judgments pronounced by the Supreme Court of India\textsuperscript{115} and Gauhati High Court\textsuperscript{116}, it is found that armed forces acting under AFSPA are often guilty of violation of human rights in particular right to life guaranteed under article 21 of the constitution and other fundamental rights. The judiciary also granted compensation and ordered prosecution for the perpetrators. Various inquiry commissions appointed under Commissions of Inquiry Act, 1952 found armed forces violating the inalienable right to life under section 4 (a) of AFSPA\textsuperscript{117}.

1.13 To Sum up

Extrajudicial killings and arbitrary deprivation of life has been prohibited by codified human rights norms, constitution and uncodified norms like religious teachings. In this light, section 4 (a) of AFSPA was judged and is found violating right to life by arbitrary depriving right to life. In subsequent chapters, the researcher will present an extensive study through different court verdicts and field report on the exercise of lethal force under section 4(a) of AFSPA to substantiate the argument that section 4(a) constitutes EJE under the provisions of AFSPA violating right to life of an individual.
Notes and references:


3 ibid


7 GAJOP, 'Extrajudicial, summary and arbitrary execution- An approximation of situations in Brazil', GAJOP publication, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/BR/BRA_BRA_UPR_S 1_2008_Brazil_uprsubmission.pdf, as on April 1, 2008

9 ibid


http://www.extrajudicialexecutions.org/application/media/Handbook%20Chapter
%201%20Use%20of%20Force%20During%20Armed%20Conflicts5.pdf as on January 23, 2013

12 Monitoring and Investigating Political Killings -Amnesty International and CODESRIA, available at
www.protectionline.org/IMG/pdf/spa_killings.pdf as on Dec 4, 007

14 Catagorisation is inferred from the various reports of UN Special Rapporteurs Extrajudicial, Summary or Arbitrary Executions, various years available at www.ohchr.org and at www.extrajudicialexecutions.org as on January 15, 2009.

15 GAJOP, Extrajudicial, summary and arbitrary execution- An approximation of situations in Brazil, supra

16 Katja, Luopajärvi, Extrajudicial, summary or arbitrary executions, 2001, supra


18 The Special Rapporteur intervenes where capital punishment is imposed in violation of article 6(2) and 15 of the International Covenant on Civil and Political Rights and article 37(a) of the Convention of the Rights of the Child, article 77(5) and relevant articles of the Geneva Conventions of 1949 and the Additional Protocols of 1977.

19 Guidelines for the conduct of UN inquiries into allegations of massacres, 1995 - DPI/1710 - 2, available at
Religious texts mainly talks of moral duties towards others underlying the rationale of equality, human dignity, and the sacredness of life and all these provide a foundation that constitutes the concept of human rights.


ibid


ibid

ibid. yet most important contribution of Hammurabi was the ‘Talion principle’ called ‘the eye for eye and tooth for a tooth’ or the idea that the nature of the punishment would be determined by the offence.


ibid, pg 690
the most important human rights treaty in the world'- Sarah Joseph, Jenny Schultz and Melissa Castan, The International Covenant on Civil and Political Right: Cases, Materials, and Commentary (2nd edn. 2004), pg 4, as quoted in Shiya, Sun, The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification, Chinese Journal of International Law (2007), Vol.6, No1, pg 17-42

44 Louise Doswald-Beck, ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’, ICRC Review, Volume 88, Number 864, December 2006.

45 Article 2 of UDHR

46 Shiyan, Sun, ‘The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification’, Chinese Journal of International Law (2007), Vol. 6, No. 1, pg. 1

47 Article 6 of ICCPR


49 Article 4(1)

50 Montealegre, Hernan, American University Law Review 33, 1983 as quoted in Maogoto, Jackson Nyamuya, ‘Silencing Human Rights in the Clash of Arms?’ op cit

51 A/37/564, para 22

52 Ramacharan, BG, Right to life in International Law, supra

53 ibid

55 Article 4 (1) of the Convention

56 Article 4 of the Convention

57 Article 2(1) of the Convention


60 Meron, Theador, 'Customary Laws', available at http://www.crimesofwar.org/thebook/customary-law.html as on May 4, 2009


62 ibid
The opinion juris is belief that a state owes an obligation and convinced on the fact that it is binding upon them to do so. The opinio juris stands for a sense of obligation.

International law also has established a category of erga omnes (Latin: ‘toward all’) obligations, which apply to all states. In ordinary obligations, the defaulting state bears responsibility, whereas, in the breach of erga omnes obligations, all states have an interest and may take appropriate actions in response. Source http://www.britannica.com/EBchecked/topic/291011/international-law/233503/Hierarchies-of-sources-and-norms#ref794940 as on April 30, 2009; Posner, Eric A., ‘Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law’ (August 7, 2008), University of Chicago Law & Economics, Online Working Paper No. 419; University of Chicago, Public Law Working Paper No. 224. available at SSRN: http://ssrn.com/abstract=1211424 as on April 30, 2009


Droege, Cordula, ‘The Interplay Between International Humanitarian Law And International Human Rights Law In Situations Of Armed Conflict’, Research

Doswald-Beck, Louise ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’, ICRC Review, Volume 88, Number 864, December 2006.

Under these conventions the International Committee of the Red Cross (ICRC) is given access to all international conflicts. In non-international armed conflicts, the ICRC can only offer its services. The ICRC's mandate in the context of non-international armed struggle is based on Protocol II to the Geneva Conventions.
Out of 191 states of the world, 83 states have retained death penalty.

Robertson QC, Geoffrey, supra, pg 128


Home Ministry, Government of India had claimed, that the execution of Dhananjoy Chatterjee in the year 2004, was the 55th execution in India since independence. However, the Indian non-governmental organization (NGO) People’s Union for Democratic Rights (PUDR) subsequently discovered information indicating that in the 10-year period between 1953 and 1963, 1,422 people had been executed in India. This information was found in an appendix to the thirty-fifth Report of the Law Commission of India (1965). See E/CN.4/2006/53/Add.3, 24 March 2006, www.extrajudicialexecution.org as on January 12, 2009

ICCPR, Article 6.2

General comments on Article 6 of ICCPR

I/A Court H.R., Advisory Opinion OC-16/99, The right to information on consular assistance, in the framework of the guarantees of the due process of law, October 1, 1999 (para. 136). As quoted in Digest of Jurisprudence of the UN and Regional Organisations on the protection of human rights while countering terrorism’ by the Office of the UN High Commissioner for Human Rights.
Report on Transparency and the Imposition of the Death Penalty, by The UN Special Rapporteur on Extra-judicial, Arbitrary and Summary Executions, Philip Alston


Human Rights Committee, general comment No. 31, ‘Nature of the legal obligation on States Parties to the Covenant’ (2004), (CCPR/C/21/Rev.1/Add.13, para. 15). See also Commission on Human Rights resolution 2004/37, paragraph 5, in relation to the mandate of the Special Rapporteur: ‘Reiterates the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to
justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions, as stated in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.', http://www.extrajudicialexecutions.org/law/transparency_in_armed_conflict_2006.html, as on May 11, 2009

84 ibid

85 Human Rights Committee, general comment No. 29, ‘Derogations from provisions of the Covenant during a state of emergency’ (2001), paragraph 15.


87 ibid

88 ibid

89 Digest of Jurisprudence of the UN and Regional Organisations on the Protection Of Human Rights While Countering Terrorism’ by the Office of the UN High Commissioner for Human Rights http://www.unhchr.ch/html/menu6/2/digest.doc as on May 11, 2009

90 ibid

91 ibid
Constitution of India, Article 14; see also Arts. 15-16 (prohibiting discrimination on the basis of religion, race, caste, sex, or place of birth and guaranteeing equality of opportunity in public employment)

Constitution of India, Article 19; Also see Fundamental Rights, Part III of Indian Constitution


SAHRDC, *A Study in National Security Tyranny*, supra

(1996) 3 All ER 871

(1991) 1 All ER 720 (HL)


Maneka Gandhi vs. Union of India, A.I.R. 1978 S.C. 597


(2000) SCC 465

vs. Union of India, AIR 1981 SC 271; S.P Gupta vs. Union of India, 1982 AIR149.

104 Article 352 of Indian Constitution

105 Article 356 of Indian Constitution

106 Article 360 of Indian Constitution

107 Article 355 of the Indian Constitution

108 Armed Forces (Special Powers) Act, 1958 as amended in 1972

109 Annexure A for the text of the Act

110 Full list is included in Chapter II, *infra*

111 Dhavan, Rajeev, *The Manipur Crisis,* The Hindu, August 20, 2004

112 www.nullapoena.de/en and ACHR, *The AFSPA : Lawless Law enforcement according to law?*, a report published by Asian Centre for Human Rights, Delhi, 2005


115 Discussed in Chapter III and Chapter V, *infra.*

116 Discussed in Chapter III and Chapter V, *infra.*

117 Discussed in Chapter III, *infra.*