

**TERRORISM, INTERNATIONAL LAW  
AND  
RIGHTS OF THE ACCUSED**

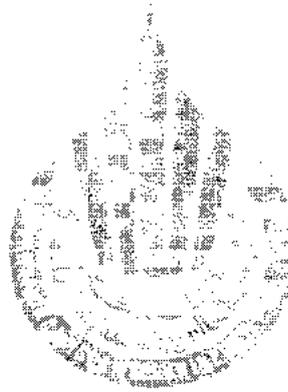
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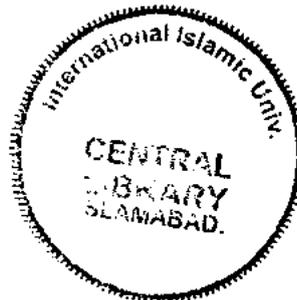
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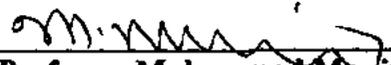
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## CERTIFICATE

It is certified that we have read/examined the dissertation submitted by Chaudhry Munir Sadiq in partial fulfillment of requirements for the degree of MASTER OF LAWS (International Law). We have evaluated the dissertation and found it up to the requirements, in its scope and quality, for the award of the degree.

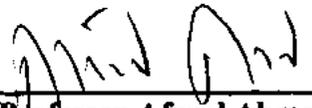
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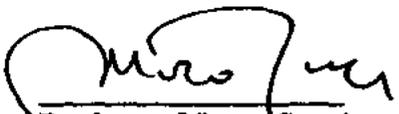
  
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## LIST OF ABBREVIATIONS

### I. SELECTED INTERNATIONAL INSTRUMENTS:

#### 1. GLOBAL:

Abbreviation =	Name/ Title	Year of Adoption,	Entry into force
UNCH =	United Nations Charter.	1945	1945
UDHR =	Universal Declaration of Human Rights. 1948,	-----	
ADRDM =	American Declaration of the Rights and Duties of Man. 1948,	----	
ICCPR =	International Covenant on Civil and Political Rights.	1966,	1976.
ICESCR =	International Covenant on Economic, Social and Cultural Rights.	<i>Ibid</i>	
ICCPR OP =	Optional Protocol to ICCPR.	1966,	1976.

#### 2. REGIONAL

CECHR =	Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms.	1950	1953
CECHR P1=	First Protocol to CECHR.	1952	1954
ESC =	European Social Charter.	1961	1965
Am.CHR =	American Convention on Human Rights.	1969,	1978
Af.CHR =	African Charter on Human and Peoples' Rights.	1981	---

### II. OTHER ABBREVIATIONS:

IHL = International Humanitarian Law.	US = United States of America.
NSGT = Non-self Governing Territories.	RSD = Right to Self-Determination.
PLO = Palestine Liberation Organization.	KLA = Kosovo Liberation Army.
ICJ = International Court of Justice.	ICC = International Criminal Court.
IIUI = International Islamic University Islamabad.	

## Dedication

*To my God "ALLAH", the most magnificent and the most merciful, who blessed me everything I could dream of, and provided me the blessings of most generous & loving parents.*

## ACKNOWLEDGEMENTS

Although it is not possible to acknowledge all the help and influences that have contributed to this research work, yet I have tried here to mention and show my deep indebtedness to those whose support has been the most immediate.

I am immensely grateful to my parents, especially my late mother, who sacrificed a lot for me, and other family members for helping and encouraging me to complete this work successfully.

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I will be unjust to conclude without thanking Hina, my daughter, who typed with extraordinary care, at thoroughly unreasonable hours, to ensure the submission of my thesis before the end of this semester.

Finally, and primarily, I am thankful to my ALLAH, who blessed me health and the resources to finish this task with ease.

## ABSTRACT

Terrorism is the hot issue of our times. Pakistan itself is a victim of terrorism. We know how ugly, cruel, inhumane, brutal and barbarous the acts of terrorism are. We condemn terrorism, in all its forms and manifestations but at the same time, we do remember that terrorists leave little clues/ evidence behind them and there is likelihood of arrest of innocent persons by the law enforcement agencies/ officers in the haunt of terrorists. Figures shows that small number of persons accused of such acts are proved guilty while others turn out to be innocent. I have no sympathy with those who commit acts of terror but I have great concern for those who albeit their innocence are apprehended/ detained under suspicion of being terrorists or having links with terrorists. The research topic has an immense significance and importance because an accused is supposed to be treated as a human being, not as an object.

In chapter I, various definitions of terrorism have been mentioned to have a fair understanding of the term '*terrorism*'. There is a large variety of definitions of terrorism but none has received a consensus till to day, the reason being difficulty in defining terrorism, the various factors involved in it and diversity of methods of executing terrorism. The states where terrorist acts take place have a right to pursue the terrorists, to arrest them and to put them on trial. However, accused is presumed to be innocent until proved guilty. Being human beings, all accused have certain well established rights under the International law as well as domestic/municipal laws of the countries where they are to be tried. Some important Human Rights such as recognition before the law, equality before the law, and non-discrimination have also been discussed in this chapter. Chapter II deals with the pre trial rights of the accused. It contains a short introduction followed by some rights of the accused such as right to life, right not to be arrested or detained arbitrarily, right not to be compelled to

incriminate himself/ herself or to confess guilt, a right to “torture free” environment, the right to a trial within a reasonable time or to release etc.

In Chapter III, a little discussion has been made on *Audi Alteram Partem* and equality of parties. Provisions of International law on right of the accused to be presumed innocent, protection against *Ex post facto* laws and double jeopardy have also been examined in some detail. General principles of criminal law have also been mentioned. Specific provisions of International law on rights of the accused to have adequate time to prepare his defence, to a fair and public trial, protection against cruel, inhuman or degrading punishment, right to a reasoned judgment, have been mentioned. Post trial rights such as conviction reviews, right to be released forthwith on acquittal, to be compensated in case of miscarriage of justice have also been discussed. Chapter IV tells us about the obligations of the UN member states under the *UNCH, UDHR & ICCPR* etc. Although derogation clauses permit the suspension rather restriction of certain rights in times of war or public emergency, yet they do not preclude application of the ICCPR to the ‘war on terror’.

The nature of international human rights law suggests that it applies in all circumstances as it defines the minimum rights protections necessary to prevent the arbitrary exercise of power. International human rights law establishes conclusively that all persons subject to the jurisdiction of a UN member State are entitled to certain basic rights including: the right not to be detained arbitrarily; the right to humane conditions and treatment if detained; and, the right to a fair trial on any criminal charges, including terrorism or some other heinous offence. International human rights law reflects the collective normative aspirations of the international community; and as such, provides an indispensable framework for evaluating specific policy options in the fight against terrorism.

## **CHAPTER I**

### **INTERNATIONAL LAW AND RIGHTS OF THE ACCUSED**

#### **1.1 INTRODUCTION**

Terrorism is the hot issue of our times. Pakistan itself is a victim of terrorism. We know how ugly, cruel, inhumane, brutal and barbarous the acts of terrorism are. We condemn terrorism, in all its forms and manifestations but at the same time we do remember that terrorists leave little clues/ evidence behind them and there is likelihood of arrest of innocent persons by the law enforcement agencies/ officers in the haunt of terrorists. It is a fact that a small number of persons accused of such acts are proved guilty while others turn out to be innocent. For instance, Police in the United Kingdom arrested more than 300 people as terrorist suspects since 9/11, but only three have been convicted of any offence under the Terrorism Act.<sup>1</sup>

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<sup>1</sup> Thackrah, John Richard, Dictionary of Terrorism, Routledge, London, 2nd Ed. 2004, p.50.

Terrorism has become a universal phenomenon not limited to one ethnic group or one faith. Combating it also needs to be universal in nature and extent. Although Terrorism is country-less, colourless, and creedless but unfortunately it has been associated, by the West, with Islam.

The question of my research “Do the people accused of terrorism have rights provided to other accused in international Law” has an immense significance and importance. For the last few years, we have seen that the persons accused of terrorism and detained in Guantanamo bay and other detention facilities/ centers have been fighting a battle for their rights in various courts of the USA.<sup>2</sup>

As a human being, every body is interested in knowing what legal rights a person accused of terrorism has had under the International Legal instruments. An accusation may turn out to be true or false at the end of a trial. It needs mention that I have no sympathy with those who commit acts of terror but I have great concern for those who albeit their innocence are apprehended/ detained under suspicion of being terrorist or having links with terrorists. Accused should be treated as a human being, not as an object.

In this chapter, various definitions of terrorism have been mentioned to have a fair understanding of the term terrorism. Since International law is to be discussed in the coming chapters, therefore a brief introduction to international law and international law of Human Rights has been made. Some important Human Rights such as Recognition before the Law, Equality before the Law, and Non-Discrimination have also been discussed.

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<sup>2</sup> See for instance: In *Boumediene v. Bush* and *Al Odah v. United States*, forty-five men challenged the constitutionality of the habeas corpus-stripping provision of the Military Commissions Act; *Hamdan v. Rumsfeld*; *Bismullah, et al., v. Gates*; *Parhat, et al., v. Gates*, *Rasul et al. v Bush*, 542 U. S. (2004) 3.

## 1.2 WHAT IS TERRORISM?

Terrorism is one of the most widely discussed issues of our time, but at the same time, it is also one of the least understood.

Bassiouni, M. Cherif writes, "to define international 'terrorism' in a way that is both all inclusive and unambiguous is very difficult, if not impossible".<sup>3</sup>

In common parlance 'Terrorism' is defined as "the use of force and violence to intimidate, subjugate etc., especially as a political policy." The word 'terror' is derived from a French and Latin word a '*terrere*'- to frighten, which is defined as "a person or thing causing intense fear, the quality of causing dread; terribleness; a program of terrorism". To 'terrorize' means, "to fill with terror, to coerce, make submit, etc., by filling with terror." In Black's law dictionary<sup>4</sup> the word terror is defined as follows:

"Alarm; fright; dread; the state of mind induced by the apprehension of hurt from some hostile or threatening event or manifestation; fear caused by the appearance of danger." In Webster's International Dictionary the expression 'terrorism' is defined as: "Systematic use of terror as a means of coercion", 'Terrorist' means: "An advocate or practitioner of terror as a means of coercion, one who panics or causes anxiety". "Terror" means: "A state of intense fright of apprehension; stark fear; one that inspires fear; a frightening aspect; an

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<sup>3</sup> Bassiouni, M. Cherif, *Legal Responses to International Terrorism*, Martin Nijhoff Publishers, The Netherlands, 1988, p. xv.

<sup>4</sup> Henry Campbell, Black, *Black's Law Dictionary*, West Publishing Co., Deep & Deep Publications Pvt. Ltd. New Delhi, 1990, p. 1473.

appalling person or thing.” “Terrorize” means: “To fill with terror or anxiety; to coerce by threat or violence; to excite fear; rule by intimidation.”

In Funk and Wagnalls Standard Dictionary, terror has been defined as: “An overwhelming impulse of fear, extreme fright or dread; that which or one who causes extreme fear, an intolerable terror”, Terrorism is defined as: “The act of terrorizing; a system of government that seeks to rule by intimidation; unlawful acts of violence committed in an organized attempt to overthrow a government”. “Terrorist” means: “One who adopts or supports terrorism; a ‘Jacobin’ or ‘Republican’ of the French Revolution of 1789, especially during the Reign of Terror, a member of political extremist group in czarist Russia; an alarmist; a scaremonger”, “Terrorize” means: “To reduce to a state of terror, terrify; to coerce through intimidation”.

Terrorism has been defined in Oxford Legal Dictionary as ‘The use or threat of violence for political ends, including putting the public in fear of the U.K. In the United Kingdom the Terrorism Act 2000<sup>5</sup> has abolished all the previous statutory provisions

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<sup>5</sup> Now “*The Terrorism Act 2006*” is in force in the United Kingdom. It received Royal Assent on 30 March 2006. The Act creates a number of new offences. It is a criminal offence to commit: **Acts Preparatory to Terrorism:** This aims to capture those planning serious acts of terrorism. **Encouragement to Terrorism:** This makes it a criminal offence to directly or indirectly incite or encourage others to commit acts of terrorism. This will include the glorification of terrorism, where this may be understood as encouraging the emulation of terrorism. **Dissemination of Terrorist Publications:** This will cover the sale, loan, or other dissemination of terrorist publications. This will include those publications that encourage terrorism, and those that provide assistance to terrorists. **Terrorist training offences:** This makes sure that anyone who gives or receives training in terrorist techniques can be prosecuted. The Act also criminalises attendance at a place of terrorist training. The Act also made amendments to pre-existing legislation, including: Introducing warrants to enable the police to search any property owned or controlled by a terrorist suspect; Extending terrorism stop and search powers to cover bays and estuaries; Extending police powers to detain suspects after arrest for up to 28 days (though periods of more than two days must be approved by a judicial authority); Improved search powers at ports; Increased flexibility of the proscription regime, including the power to proscribe groups that glorify terrorism.

relating to terrorism, apart from a number of specific provisions that continue to exist under the Northern Ireland (Emergency Provisions) Act 1996, the Terrorism (Temporary Provisions) Act 1989, and the Criminal Justice (Terrorism and Conspiracy) Act 1998. The Terrorism Act 2000 defines terrorism in section 1 as (a) the use or threat of action that involves serious violence against a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or a section of the public, or is designed to interfere with or disrupt an electronic system, or (b) the use or threat of violence designed to influence the government or intimidate the public or a section of a public: in both cases the use or threat of such action or violence is made for the purpose of advancing a political, religious, or ideological cause.

Terrorism is some times used as synonym for aggression.<sup>6</sup> However, it is not easy to define terrorism. There are as many definitions for the word terrorism as there are methods of executing it. At least a hundred definitions have been proposed but none has received a consensus, the reason being the larger ideological argument about whether the acts committed are "criminal" or are in the interest of promoting the "greater good". They say "One man's terrorist is another man's freedom fighter." As the term means different things to different people therefore trying to define terrorism to everyone's satisfaction is impossible. However most definitions of terrorism have three ingredients: the methods

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<sup>6</sup> When South Africa attacked Lesotho in 1982, the King of Lesotho appealed to the Security Council to restrain South Africa from pursuing a strategy of 'naked terrorism'. Libya in 1983 said 'the United States was pursuing 'a policy of terrorism'. In 1984 U.S.S.R. declared in the Security Council that U.S interference with shipping off the coast of Nicaragua was a policy of 'State terrorism'.

(violence), the target (civilian or government), and the purpose (to instill fear and force political or social change).

The FBI definition is as follows:

“The unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” (FBI 1997).

The Council of Europe Convention on the Prevention of Terrorism 2006 (*CECPT*) defines “terrorist offence” as any of the offences defined under the 12 existing international conventions on terrorism presently in force.

The *1973 Convention on terrorism* describes it as ‘criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’ (Article 1.2). That definition is satisfactory so far as it goes, but it does not bring out the fact that most terrorist acts that come before the Security Council now a days are not simply to create a state of terror but are intended to induce governments to act in ways that they had not otherwise intended; for example, to release prisoners, etc.

“The term ‘Terrorism’ was”, writes Dinah POKEMPNER, “conceived originally to describe State action, specifically that of the revolutionary regime in France of 1793-4 against all perceived subversives and dissidents.”<sup>7</sup>

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<sup>7</sup> Dinah Pokempner, “*Terrorism And Human Rights: The Legal Framework*”, in *Terrorism and International Law, Challenges & Responses*, ed., Michael N. Schmitt, International Institute of Humanitarian Law, Sanremo, 2002, p. 22.

Generally Terrorism is understood as unlawful, coordinated, politically motivated violence against “innocents” or “civilians” with the effect of terrorizing the people/ population.....“Terrorism” when defined in reference to non-state actors, runs a range of groupings. There is the saying that one man’s terrorist is another’s freedom fighter.<sup>8</sup>

The subject of terrorism was raised in the year 1934 in connection with the assassination at Marseilles by certain terrorists of the Yugoslav monarch --King Alexander. Yugoslavia formally accused the Hungarian government before the League, of tacitly conniving in the assassination, and terrorism. In the course of settlement of the dispute between the two countries, the League Council affirmed that two duties rested on every state: 1) neither to encourage nor tolerate on its territory any terrorist activity with a political purpose; 2) to do all in its power to prevent and repress terrorist acts of a political character, and for this purpose to lend its assistance to governments which request it. Arising out of this dispute, the League ultimately promoted in November 1937 a Convention for the Repression of International Terrorism. However this Convention did not come into force.

The UN General Assembly in December 1972 established an ad hoc 35-member committee on terrorism which considered various drafts and proposals. One major difficulty, inter alia, concerned the search for a formula to define the concept of ‘terrorism’.

Acts of terrorism in the 19th century remained territorial. There has been an increase in that sort of terrorism in recent decades. It is the instrument of those with a grievance but who have inadequate support within their own community or are weak in conventional military terms. Acts of terrorism often, but not invariably, are directed against innocent

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<sup>8</sup> *Ibid.*, p. 22

persons, as means of exerting pressure on the strong.<sup>9</sup> The situation has now changed. The modern terrorists seem to be completely unconcerned with the geographic location of their acts and equally reckless as to the nationality of their victims. In fact, he or she tries to internationalize the issue.<sup>10</sup> In the past, 74 Non-self Governing Territories (NSGT), as enumerated in General Assembly resolution 66(I), dated 13 December, 1964 have exercised their Right to Self-Determination (RSD). In addition to the trust territories, the after-acquired NSGT which have also been entitled to RSD since 1995 are Angola, Mozambique, Macau, Western Sahara, Southern Rhodesia, Equatorial Guinea and East Timor. The Right to Self-Determination is *jus cogens* in the law.<sup>11</sup> Terrorism does not fit in the category of the accepted forms of armed conflicts, as the act itself is a crime. Wars of National Liberation must not be misconstrued as terrorism, because of the international legitimacy the national liberation movements enjoy since the 1960s. However, a couple of powerful states or the super-powers fix any label on struggles to suit their national vital interest and foreign policy. To the West, Kosovo Liberation Army which has operated as per Western necessity is not a terrorist organization, but Palestine Liberation Organization (PLO) is terrorist structure till it falls in the Western line. The UN, however, has given legitimacy to PLO in a series of resolutions and support. The Human Rights instruments have to be studied without harbouring strong prejudices or preconceptions.<sup>12</sup> There are already twelve international instruments that censor or forbid terrorism. 27- Article Indian

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<sup>9</sup> Sydney D. Bailey, *The UN Security Council and Human Rights*, St. Martin's Press, New York, 1994, p. 90.

<sup>10</sup> Jamshed Hameed, Lectures on International Law (unpublished) delivered at Foreign Service Academy, Islamabad, 2005 and IIUI, 2006.

<sup>11</sup> N. Sanajoba, *International Human Rights*, Manas Publications, New Delhi, 2005, p. 15.

<sup>12</sup> *Ibid.*, pp. 21-22.

comprehensive draft of Convention against Terrorism was tabled for wider discussion of the international community. Article 18(2) of the UN Draft Convention on Terrorism, initiated by India had invited objection from the USA and Israel, because American bombing of civilian targets in countries of its choice for one reason or another was to be outlawed by the Convention; and secondly, the exclusion from the ambit of the Convention, PLO et. el. and other armed forces of the national liberations elsewhere which are within the scope of the Geneva Conventions and international Humanitarian laws, would not serve Israeli interests. Armed conflict in situations of foreign occupation would entitle national liberation forces that status and privilege of armed forces. The Indian draft had been broadly accepted as comprehensive save on minor details.<sup>13</sup>

Hagenbach trial in the 15<sup>th</sup> century laid down the basic foundation of fixing personal criminal responsibility. 28 Judges of allied coalition led by Austria had tried and executed in 1474, the bloody governor of Breisach in upper Rhine-Peter von Hagenbach- for reducing Breisach population to total submission, commission of murder and rape. That was the first reliable account of individual criminal responsibility.<sup>14</sup>

The following instruments of International law have provisions outlawing crimes that have come to be considered acts of terrorism, and, as such, provide the substantive law bases for prosecuting acts of terrorism.<sup>15</sup>

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<sup>13</sup> *Ibid.*,

<sup>14</sup> *Ibid.*, pp. 21-22.

<sup>15</sup> Of course, these treaties provide the legal basis for States Parties to amend their criminal codes, as required pursuant to their national constitutions, in order for these treaties to provide the bases for criminal prosecution.

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963.<sup>16</sup>
2. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.<sup>17</sup>
3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.<sup>18</sup>
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
5. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December, 1979.
6. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March, 1980.
7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February, 1988.
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March, 1988.

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<sup>16</sup> United Nations, *Treaty Series*, vol. 704, p. 218.

Available at <http://untreaty.un.org/English/Terrorism/Conv1.pdf>.

<sup>17</sup> Commonly known as "Hijacking Convention".

<sup>18</sup> Commonly known as "Safety of Aircraft Convention".

9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March, 1988.
10. International Convention on Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December, 1997.
11. International Convention for the Suppression of Financing Terrorism, adopted by the General Assembly of the United Nations in 1999.

It is interesting to note that terrorism has not been defined comprehensively in any of the above instruments and the States have not been able to agree on a definition acceptable to all member states. This shows how difficult it is to define terrorism. One of the most challenging problems for the parties in facing terrorism trials is the lack of a clear definition of the crime and a total absence of case law under international law.<sup>19</sup>

Clifton M. Johnson, an attorney adviser in the U.S. State Department and formerly the Department's primary attorney on terrorism issues, has identified seven provisions that are common to recent antiterrorism conventions.<sup>20</sup> These treaty provisions:

1. Apply only to crimes with an international element;
2. Obligate States Parties to criminalize the covered offences irrespective of the motivation of the perpetrators;
3. Obligate States Parties to take into custody offenders found on their territory;
4. Facilitate the extradition of offenders;

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<sup>19</sup> The trial of General *Stanislav Galic* before the ICTY provides a good example of an international trial where the accused was charged *inter alia* with inflicting terror. Although not a prosecution for "terrorism" *per se*, this case could have important ramifications for future international prosecutions.

<sup>20</sup> Clifton M. Johnson, "Introductory Note to the International Convention for the Suppression of the Financing of Terrorism", 39 ILM 268, 2000.

5. Require States Parties to afford one another the greatest measure of assistance in connection with criminal investigations or proceedings related to the enumerated crimes;
6. Prohibit the political offence doctrine being the grounds for the refusal of an extradition or request for mutual legal assistance;
7. Provide for the transfer of prisoners in order to assist the investigation or prosecution of covered offences.<sup>21</sup>

Presently, the U.S.A. and its allies are engaged in a war against terrorism<sup>22</sup>, but there is little consensus about what they are fighting against in this war. Alas no one is concerned about this conceptual disaster.

It is also important to know what 'International law' is and how it is to be applied or interpreted. 'International Law' may be defined as a body of rules and principles which regulates the relationship of states inter se and between states and international organizations or between international organizations. Art. 38(1) of the ICJ statute identifies two primary sources as follows: (1) international treaties; and (2) international custom.<sup>23</sup> Subsidiary sources include (3) the general principles of law recognized by civilized nations; and (4) judicial decisions and teachings of jurists. The court can also decide cases *ex aequo bono*. It needs mention that general International law even today rests essentially on consent and can be enforced only by self help, and individual or collective sanctions

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<sup>21</sup> *Ibid.*,

<sup>22</sup> As alleged by USA.

<sup>23</sup> For example, fundamental norm *Pacta sunt servanda* is itself a rule of customary law.

imposed on “out-laws”. The consent may be signified in an express contract or treaty imposing obligations by which all the state parties to it agree to be bound.<sup>24</sup>

Treaty law forms a large part of International Law. However, codes of conduct or Multilateral Declarations of common policy which are not themselves treaties, may, over time, provide sufficient evidence of consistent practice to become rules of International Law. Once those rules are so firmly established as to form part of the international *jus cogens*, they bind even states that have never expressly consented to be bound by them. As such a principle of International law may also be imported from municipal law where the principle in municipal law is universally recognized and when that principle is not in conflict with any rule of International law itself.<sup>25</sup>

### 1.3 TERRORISM AND HUMAN RIGHTS

No doubt terrorism is condemnable, and the States where terrorist acts take place have the right to pursue the wrongdoers, to arrest them and to put them on trial; But even the war against enemy is subject to some international legal obligations<sup>26</sup> and war against criminals is subject to domestic and international law, and suspects/accused of crimes have certain well established rights. Persons accused of terrorism are also human beings. Let us see what are their “rights”? What International legal instruments say about it?

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<sup>24</sup> See Vienna Convention on the Law of Treaties, 1969.

<sup>25</sup> ICJ Reports 1957 p. 125 Per. M.C. Chagla, Judge *ad hoc*, in his dissenting opinion in the *Right of Passage (Preliminary Objections) Case*.

<sup>26</sup> See Geneva Conventions ( I-IV) of 12 August 1949, and Additional Protocols.

Rights of accused find mention in various legal instruments dealing with the Human Rights and Fundamental freedoms. The purpose of stress on rights of the accused, while administering justice, is to combine humanity with efficiency. It needs mention that human rights are those benefits to which human beings are entitled simply by being human.<sup>27</sup> As such, all humans hold all human rights.<sup>28</sup> However, the universality and inalienability, (inviolability) of a human right mostly depends on the character of the right involved. As individual societies develop particular conceptions of what constitute a dignified life, the essential needs of humans, as well as the relationship between individuals and their community, therefore these Universal and inalienable qualities of Human Rights are disputable in both their conception and operation. Many people mistakenly inflate the concept of a right by asserting benefits they believe are right (good or proper) to be rights but not every thing which is right (good or proper) is right.<sup>29</sup> It is necessary to distinguish between the adjectival use of the word 'right' which means good or proper, from the substantive 'a right', which is a special possess-able benefit.<sup>30</sup>

International human rights law is defined as a set of international rules established by treaty or custom creating rights inherent in every person as a consequence of being human. International Human Rights law is embodied in the standard forms of International

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<sup>27</sup> Prakash Talwar, *Human Rights*, Isha Books, Delhi, n.d., p. 1

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. 4

<sup>30</sup> *Ibid.*

Law: i.e. treaties, covenants, other international agreements, customary law such as declarations, General Assembly resolutions etc.<sup>31</sup>

Human Rights are not an invention of the United Nations or any particular country.<sup>32</sup> However, 20<sup>th</sup> century is regarded as a century of human rights. The reason is that a lot of instruments of International law such as Charter of the United Nations 1945,<sup>33</sup> Universal Declaration of Human Rights,<sup>34</sup> International Covenant on Civil and Political Rights,<sup>35</sup> American Convention on Human Rights,<sup>36</sup> African Charter on Human and Peoples' Rights (1981), American Declaration of the Rights and Duties of Man (1948), etc. have codified the Human Rights. It needs mention that the Covenant on Economic, Social and Cultural Rights; the Covenant on Civil and Political Rights<sup>37</sup>; and an optional protocol to the latter, are binding for parties and constitute a detailed codification of Human Rights. The European Convention for the Protection of Human Rights was adopted in 1950 in

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<sup>31</sup> Apart from the substantive provisions of the Universal Declaration of Human Rights (1948), the principal conventional sources of the international law of human rights are the Convention Relating to the Status of Refugees (1951), the International Covenants on Economic, Social and Cultural Rights (1966) and on Civil and Political Rights (1966), as well as the Conventions on Genocide (1948), the Elimination of Racial Discrimination (1965), Discrimination Against Women (1979), Torture (1984), the Rights of the Child (1989), the Protection of the Rights of Migrant Workers and Members of their Family (1990). The principal regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969), and the African Charter of Human and Peoples' Rights (1981).

<sup>32</sup> See AL-QURAN, "And we made the Human beings respectable". Human dignity is the core of an Islamic society and so should be of a civilized society. In fact Human rights are those benefits which are neither conferred on any human being by any ruler, nor earned or acquired by purchase, but inhere in him by virtue of his humanity alone, as such, all humans hold all human rights.

<sup>33</sup> As amended. Amendments to Articles 23, 27 and 61 in force 31 August 1965. Article 61 further amended, in force 24 September 1973. Amendment to Article 109 in force 12 June 1968.

<sup>34</sup> 1948, General Assembly Resolution 217 A(III).

<sup>35</sup> International Covenant On Civil And Political Rights Adopted And Opened For Signature, Ratification, And Accession By United Nations General Assembly Resolution 2200a (Xxi) On 16 December 1966. Entered Into Force 23 March 1976 In Accordance With Article 49.

<sup>36</sup> Year of Adoption 1969, year of Entry into force 1978.

<sup>37</sup> U.S.A. is also a party to ICCPR, Date of signatures 5<sup>th</sup> October 1977, Date of ratification 8<sup>th</sup> June 1992.

Rome. Today more than 40 member States of the Council of Europe are party to it.<sup>38</sup> The Convention is supplemented by eight protocols. They lay down the implementation mechanisms which involve two main organs, the Commission and the Court. During this period two developments took place. First was the adoption of the Final Act of the Conference on Security and Co-operation in Europe in Helsinki in August 1975. The Final Act was signed by 35 States. It constitutes an important statement of intent but is not legally binding. The declaration of principles includes a section entitled 'respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. The second development took place on 25 June 1993 when representatives of 171 States adopted by consensus the Vienna Declaration and Programme of Action on Human Rights. The Conference was marked by an unprecedented degree of participation by government delegates and the international human rights community which numbered around 7,000 participants.<sup>39</sup>

The Vienna Declaration and Programme of Action mark the culmination of a long process of review and debate over the current status of human rights machinery in the world. It also marks the beginning of a renewed effort to strengthen and further implement the body of human rights instruments that have been 'painstakingly constructed'<sup>40</sup> on the foundation of the Universal Declaration of Human Rights since 1948. The first global

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<sup>38</sup> By now, there are 47 member States of the Council of Europe.

<sup>39</sup> Jamshed Hameed, Lectures on International Law (unpublished) delivered at Foreign Service Academy, Islamabad, 2005 and IIUI, 2006.

<sup>40</sup> *Ibid.*

meeting on human rights, followed by 'Proclamation of Tehran', was held at Teheran in 1968.<sup>41</sup>

It needs mention that these instruments define and create specific rights for individuals over whom those states are able to exercise power, but who are not themselves parties to the instruments.<sup>42</sup> They have created *iura quaesita tertio* for hundreds of millions of the world's human population. The global and regional human rights treaties have much in common<sup>43</sup> and have laid down minimum standards for treatment of human beings by the states. These minimum standards have in fact acquired the status of *jus cogens*.

Human Rights law co-exists with humanitarian law, but is subject to derogation in times of declared national emergency. International Human Rights law functions as *lex specialis*, elaborating general guarantees of Humanitarian Rights law under the special condition of a state of armed conflict.<sup>44</sup> It needs mention that derogation is an extraordinary restriction of the right. Most Human Rights instruments specify rights that are non derogable among these are the right to life; freedom from torture and cruel, inhuman and degrading punishment; slavery; *ex post facto* criminal liability and

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<sup>41</sup> *Ibid.*

<sup>42</sup> 'The individual has acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right.' H. Lauterpacht, *International Law and Human Rights*, Cambridge Univ. Press, London, 1950; reprinted 1968, pp. 80-83.

<sup>43</sup> For example they specify the obligations of all the State Parties in respect of certain 'human rights and fundamental freedoms' of all the persons within their territories and subject to their jurisdictions. They define and circumscribe the rights and freedoms concerned. They contain general provisions applying to the protection or realization of all those rights.

<sup>44</sup> Pokempner, "Terrorism and Human Rights", p. 25.

punishment; recognition of a person before the law; and freedom of conscience and religion.<sup>45</sup>

Human Rights law and International Humanitarian law have the same aim i.e. to protect the individual. They give every person on the globe a reason to cherish his own rights, and to respect those of others. It should be kept in mind that the boundaries between international human rights law and international humanitarian law are not contiguous, but rather overlapping, and often poorly understood. Responses to terrorism, whether understood as “war” or law enforcement, involve choices that have implications for the rule of law, its development, and its reciprocal observance. These International instruments lay great emphasis on the peace, prosperity of nations and Human Rights of every person regardless of his race, color, sex etc. but at the same time we have seen a lot of violation of Human Rights by many states in a most shameful way. Most of them had shown no regret or remorse for such illegal acts and rather have taken a brazen face stand and tried to justify their cruel acts.

The law of Human Rights, being subset of International law, deals with the obligations of States with respect to the observance and guarantee of fundamental rights of individuals. States are the subject of this law (of Human Rights) and individuals are the beneficiaries. It will be adequate to mention some important rights of every human being acknowledged/recognized by these instruments of international law.

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<sup>45</sup>See ICCPR, Art 42.



## **1.4 RECOGNITION BEFORE THE LAW**

Everyone has the right to recognition everywhere as a person before the law.<sup>46</sup> Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.<sup>47</sup> On the same subject International Covenant on Civil and Political Rights says that everyone has the right to recognition everywhere as a person before the law.<sup>48</sup> American Convention on Human Rights describes that 'Every person has the right to recognition as a person before the law.'<sup>49</sup> African Charter on Human and Peoples' Rights says that 'Every individual shall have the right...to the recognition of his legal status'.<sup>50</sup>

## **1.5 EQUALITY BEFORE THE LAW**

Universal Declaration of Human Rights declares that 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.<sup>51</sup> American Declaration of the Rights and Duties of Man describes that 'All persons are equal before the law and have the rights and duties

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<sup>46</sup> Universal Declaration of Human Rights, Article 6.

<sup>47</sup> American Declaration of the Rights and Duties of Man, Article XVII.

<sup>48</sup> Article 16 of the International Covenant on Civil and Political Rights, 1966.

<sup>49</sup> American Convention on Human Rights, Article 3.

<sup>50</sup> African Charter on Human and Peoples' Rights, 1981; Article 5.

<sup>51</sup> Article 7 of the Universal Declaration of Human Rights.



established in this Declaration, without distinction as to race, sex, language, creed or any other factor.<sup>52</sup> It is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be.’<sup>53</sup> International Covenant on Civil and Political Rights provides that ‘All persons shall be equal before the courts and tribunals’.<sup>54</sup> ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’<sup>55</sup> As per American Convention on Human Rights ‘All persons are equal before the law.’ Consequently, they are entitled, ‘without discrimination, to equal protection of the law’.<sup>56</sup> African Charter on Human and Peoples’ Rights says that ‘Every individual shall be equal before the law.’<sup>57</sup> Every individual shall be entitled to equal protection of the law.’<sup>58</sup>

## 1.6 NON-DISCRIMINATION

The primary characteristic which distinguishes “human rights” from other rights is their universality. They are said to “inhere” in every human being by virtue of his humanity alone. Human Rights cannot be denied on basis of sex, religion, nationality race

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<sup>52</sup> Article II of the American Declaration of the Rights and Duties of Man.

<sup>53</sup> Article XXXIII of the American Declaration of the Rights and Duties of Man.

<sup>54</sup> Article 14(1) of the International Covenant on Civil and Political Rights.

<sup>55</sup> Article 26 of the International Covenant on Civil and Political Rights.

<sup>56</sup> Article 24 of the American Convention on Human Rights.

<sup>57</sup> Article 3(1) of the African Charter on Human and Peoples’ Rights.

<sup>58</sup> Article 3(2) of the African Charter on Human and Peoples’ Rights.

etc. Thus the principle of non-discrimination is fundamental to the concept of human rights.

Universal Declaration of Human Rights declares that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>59</sup> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.<sup>60</sup>

American Declaration of the Rights and Duties of Man describes that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."<sup>61</sup>

International Covenant on Civil and Political Rights describes that "Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>62</sup> And the 'state parties to the present covenant undertake to ensure the equal right of men and women to the

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<sup>59</sup> Article 2 of the Universal Declaration of Human Rights. See also (i) International convention on discrimination against women, (ii) International convention on the elimination of all forms of racial discrimination, 1966, (iii) Article 25 of the constitution of the Islamic Republic of Pakistan, 1973, Article 15 of the Indian Constitution.

<sup>60</sup> Article 7 of the Universal Declaration of Human Rights.

<sup>61</sup> Article 11 of the American Declaration of the Rights and Duties of Man.

<sup>62</sup> Article 2(1) of the International Covenant on Civil and Political Rights.



enjoyment of all civil and political rights set forth in the present covenant'.<sup>63</sup> It also says that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>64</sup>

International Covenant on Economic, Social and Cultural Rights says that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without distinction of any kind, as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>65</sup> And "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".<sup>66</sup> It further describes that "the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".<sup>67</sup> Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms describes that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

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<sup>63</sup> International Covenant on Civil and Political Rights. Article 3.

<sup>64</sup> *Ibid.*, Article 26 .

<sup>65</sup> *Ibid.*, Article 2(2).

<sup>66</sup> *Ibid.*, Article 2(3).

<sup>67</sup> *Ibid.*, Article 3.

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color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>68</sup>

American Convention on Human Rights describes that “the States Parties to this convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction to the free and full exercise of those rights and freedoms, without any discrimination” on the basis “of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.”<sup>69</sup> For the purposes of this Convention, ‘person’ means every human being.”<sup>70</sup>

African Charter on Human and Peoples’ Rights declares that “Every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.<sup>71</sup> And “The state shall ensure the elimination of every discrimination, against women.”<sup>72</sup> Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”<sup>73</sup>

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<sup>68</sup> Council of Europe Convention for the protection of Human Rights and F. Freedoms; Article 14.

<sup>69</sup> American Convention on Human Rights, Article 1(1).

<sup>70</sup> *Ibid.*, Article 1(2).

<sup>71</sup> African Charter on Human and Peoples’ Rights, Article 2.

<sup>72</sup> *Ibid.*, Article 18(3).

<sup>73</sup> *Ibid.*, Article 28.



The expression used in Universal Declaration of Human Rights,<sup>74</sup> International Covenant on Civil and Political Rights,<sup>75</sup> and African Charter on Human and Peoples' Rights<sup>76</sup> "without distinction of any kind"; or in the case of Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms,<sup>77</sup> "without discrimination on any ground" followed in each case by the words 'such as' clearly reveal that the catalogue of grounds which follow is not comprehensive and has been given only as an example.

It is note worthy that UN Charter only lists four grounds: race, sex, language and religion.<sup>78</sup> American Declaration of the Rights and Duties of Man adds 'or any other factor' to these grounds.<sup>79</sup> Universal Declaration of Human Rights sets out twelve grounds.<sup>80</sup> Universal Declaration of Human Rights<sup>81</sup> and International Covenant on Civil and Political Rights<sup>82</sup> add a positive State obligation to protect individuals from discrimination and from incitement to it. It may be said that International Covenant on Civil and Political Rights<sup>83</sup> creates a separate 'right not to be discriminated against' independent of other rights and freedoms. International Covenant on Civil and Political

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<sup>74</sup> See Article 2 of the Universal Declaration of Human Rights.

<sup>75</sup> See Article 2(1) of the International Covenant on Civil and Political Rights.

<sup>76</sup> See Article 2 of the African Charter on Human and Peoples' Rights.

<sup>77</sup> See Article 14 of the Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms.

<sup>78</sup> See 55(C) of UNCH.

<sup>79</sup> See Article II of the American Declaration of the Rights and Duties of Man.

<sup>80</sup> race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See Article 2 of the Universal Declaration of Human Rights.

<sup>81</sup> Universal Declaration of Human Rights, Article 7.

<sup>82</sup> International Covenant on Civil and Political Rights; Article 26.

<sup>83</sup> See Article 26 of the International Covenant on Civil and Political Rights.

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Rights,<sup>84</sup> International Covenant on Economic, Social and Cultural Rights<sup>85</sup> and African Charter on Human and Peoples' Rights<sup>86</sup> follow the standard catalogue set out in the Universal Declaration of Human Rights.<sup>87</sup>

Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms also adopts it, but adds 'association with a national minority'. African Charter on Human and Peoples' Rights, instead adds 'ethnic group' Article 1(1) of the American Convention on Human Rights, catalogues 'economic status' and any other social condition instead of 'property' and 'other status' whereas Article 2 of the African Charter on Human and Peoples' Rights, substitutes "fortune" for 'property'.

The unequivocal language and the placing of the non-discrimination Articles in Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, and African Charter on Human and Peoples' Rights, are very important. These Articles govern all the rights declared in the instruments concerned.

As accused is presumed to be innocent until proved guilty, therefore law has recognized his many rights. Being a human being accused is included in the definition of every person/everyone. The purpose of discussing provisions regarding recognition before the law, equality before the law and non discrimination was to show that every person,

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<sup>84</sup> See Article 2(1) & 26 of the International Covenant on Civil and Political Rights.

<sup>85</sup> See Article 2(2) International Covenant on Economic, Social and Cultural Rights.

<sup>86</sup> African Charter on Human and Peoples' Rights; Article 2.

<sup>87</sup> See Article 2 of the Universal Declaration of Human Rights.



including person accused of any crime, hold all these rights and whenever a State Party discriminates against anyone or more persons/citizens in respect of any of these rights it fails to comply with its obligations under the instrument concerned.

## **1.7 SUMMARY**

It is difficult to define terrorism. Terrorism has not been defined comprehensively in any of the instruments of international law. Terrorism is to be condemned in all its forms and manifestations. However to eliminate terrorism its root causes should be eradicated/addressed.

States where terrorist acts take place have the right to pursue the wrongdoers, to arrest them and to put them on trial

As a human being every person, including person accused of any crime, has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. All are equal before the law and are entitled without any discrimination to equal protection of the law. Everyone is entitled to all the rights and freedoms set forth in the UDHR, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## CHAPTER II

### PRE-TRIAL RIGHTS

#### 2.1 INTRODUCTION

The purpose of pre trial phase is to allow the investigators:

- i. To collect all evidence, whether in favour of the accused or against him;
- ii. To have an opportunity to know the version of the accused and to confront him with the evidence against him;
- iii. To dismiss accusation or charges against the accused in case of no incriminating evidence ;
- iv. To have a plea negotiating (commonly known as plea bargaining) with accused, if evidence is unwarranted, or not of the standard or quality required for award of maximum/proper sentence for the initial charge. It is an agreement between the prosecutor and the defence to reduce a charge to lesser crime, to drop certain charges, or to receive a lessened sentence in return for a guilty or *nolo contendere* plea.
- v. To send for the trial if, in the opinion of prosecutor, there is sufficient evidence against the accused.

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It should be kept in mind that the aim of pre trial detention is not to punish the accused but to prevent the suspect/ accused from evading justice. In any case it is not to be used for repressive or coercive purposes. Let us have a look at legal provisions on pre-trial rights of the accused.

## 2.2 LIBERTY AND SECURITY OF PERSON

Before examining the right to liberty and security of person, it will be expedient to discuss the right to life.

Life is the supreme human right and a base for other human rights, as none of the other rights would have any value or utility without it. A man can lose his right to life by committing certain proscribed acts or omitting certain prescribed acts. Religious scriptures reveals that one of the signs of believers was/is that 'they do not deprive anybody of his life which God has made sacred, save *in accordance with Divine law, after the guilt has been established beyond any shadow of doubt*'.<sup>1</sup>

The English Magna Charta<sup>2</sup> of 1215 is claimed to be the earliest national statute prohibiting deprivation of life. It provides that:

No free man shall be taken or imprisoned, or be disseised [deprived] of his free hold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.<sup>3</sup>

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<sup>1</sup> Quran, 25: 68 .Translation for Arabic word "HAQ" italicized. Translation is mine.

<sup>2</sup> Also spelled as Magna Carta. see Gilbert B. Stuckey, procedures in the justice system, A Bell & Howell Co. Ohio, 1986, p. 20.

<sup>3</sup> See Ch. 26 in the version confirmed by King Edward I in 1297; 6 Halsbury's Statutes 3<sup>rd</sup> ed. p. 401.



The first ten amendments known as American Bill of Rights, guaranteed certain rights to the people, including the right to life, liberty and security of person. International law instruments also contain similar views about right to life. They all contain qualifications rendering the 'right to life' less than absolute and allowing deliberate termination of human life in certain specified cases. These instruments reveal that right to life stands in marked contrast to some of the other rights protected by the same instruments: for example, the freedom from torture and other ill treatment and the freedom from slavery and servitude are both absolute, and subject to no exceptions of any kind.<sup>4</sup> Therefore one should not raise too much hue and cry if a convict loses his life in execution of a legal sentence of a court following his conviction of a crime for which death penalty was provided by law. In fact, International human rights law assigns a higher value to the quality of living as a process, than to the existence of life as a state. It regards acute or prolonged sufferings as a greater evil than death, which is ultimately unavoidable for everyone.

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*In Mum V Illinois*<sup>5</sup> Field, J. of US Supreme Court observed that the expression 'deprived of life' should not be construed to refer only to the extreme case of death. He added:

By the term 'life' as here used [Fourteenth Amendment to the US Constitution], something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The prohibition equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicate with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and

<sup>4</sup> See Universal Declaration of human rights, Article 4; also see Convention Against Torture, 1984.  
<sup>5</sup> 94 US 133. Also see "*Ms. Shehla Zia and others v Wapda*" PLD 1994 Supreme Court 693.

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enjoyment, is prohibited by the provision of question, if its efficacy be not frittered away by judicial decision.

Universal Declaration of human rights declares in unequivocal terms that 'Everyone has the right to life...'<sup>6</sup> American Declaration of the Rights and Duties of Man also describes that 'Every human being has the right to life...'<sup>7</sup> International Covenant on Civil and Political Rights says that every human being has the inherent right to life. This right is to be protected by law. No one shall be arbitrarily deprived of his life.<sup>8</sup> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the ICCPR and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.<sup>9</sup> When deprivation of life constitutes the crime of genocide, it is understood that nothing in Article 6 of ICCPR shall authorize any state party to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>10</sup> Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.<sup>11</sup> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out

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<sup>6</sup> Universal Declaration of human rights, Article 3.

<sup>7</sup> American Declaration of the Rights and Duties of Man, Article I.

<sup>8</sup> International Covenant on Civil and Political Rights, Article 6(1).

<sup>9</sup> *Ibid.*, Article 6(2).

<sup>10</sup> *Ibid.*, Article 6(3).

<sup>11</sup> *Ibid.*, Article 6(4).

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on pregnant women.<sup>12</sup> Article 6(1) ICCPR shall not be invoked to delay or to prevent the abolition of capital punishment by any State Party to the ICCPR.<sup>13</sup>

Council of Europe Convention for the protection of human rights and Fundamental Freedoms says that law shall protect everyone's right to life. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.<sup>14</sup> Deprivation of life shall not be regarded as inflicted in contravention of Article 2 CECHR when it results from the use of force which is no more than absolutely necessary:

- (a) In defense of any person from unlawful violence;
- (b) In order to affect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) In action lawfully taken for the purpose of quelling a riot or insurrection.<sup>15</sup>

American Convention on human rights describes that every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.<sup>16</sup> In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.<sup>17</sup> The death penalty shall not be reestablished in states that have

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<sup>12</sup> *Ibid.*, Article 6(5).

<sup>13</sup> *Ibid.*, Article 6(6).

<sup>14</sup> Council of Europe Convention for the protection of human rights, Article 2 (1).

<sup>15</sup> *Ibid.*, Article 2 (2).

<sup>16</sup> American Convention on human rights, Article 4(1).

<sup>17</sup> *Ibid.*, Article 4(2).

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abolished it.<sup>18</sup> In no case shall capital punishment be inflicted for political offenses or related common crimes.<sup>19</sup> African Charter on Human and Peoples' Rights declares that 'Human Beings' are inviolable. 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.'<sup>20</sup>

Universal Declaration of human rights declares that "Everyone has the right to... liberty and security of person."<sup>21</sup> No one shall be subjected to arbitrary arrest or detention".<sup>22</sup>

American Declaration of the Rights and Duties of Man describes that 'Every human being has the right to... liberty and the security of his person.'<sup>23</sup> No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.<sup>24</sup> No person may be deprived of liberty for non fulfillment of obligations of a purely civil character.'

International Covenant on Civil and Political Rights says that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'<sup>25</sup> No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.<sup>26</sup> Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms describes that:

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<sup>18</sup> *Ibid.*, Article 4(3).

<sup>19</sup> *Ibid.*, Article 4(4).

<sup>20</sup> African Charter on Human and Peoples' Rights, Article 4.

<sup>21</sup> See Universal Declaration of human rights, Article 3.

<sup>22</sup> *Ibid.*, Article 9.

<sup>23</sup> American Declaration of the Rights and Duties of Man, Article I.

<sup>24</sup> *Ibid.*, Article XXV.

<sup>25</sup> International Covenant on Civil and Political Rights, Article 9(1). See also Article 9 of the constitution of the Islamic Republic of Pakistan, 1973, Article 21 of the Indian Constitution.

<sup>26</sup> *Ibid.*, Article 11.

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure described by law:

- (a) The lawful detention of a person after conviction by a competent court;
- (b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) The lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.<sup>27</sup>

American Convention on human rights says that 'Every person has the right to personal liberty and security'.<sup>28</sup> And 'No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the

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<sup>27</sup> CECHR, Article 5(1).

<sup>28</sup> American Convention on human rights, Article 7(1).

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constitution of the State Party concerned or by a law established pursuant thereto.<sup>29</sup> No one shall be subject to arbitrary arrest or imprisonment.<sup>30</sup> African Charter on Human and Peoples' Rights declares that 'Every individual shall have the right to liberty and to security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'<sup>31</sup> 'Punishment is personal and can be imposed only on the offender.'<sup>32</sup>

The Rome Statute of the International Criminal Court (1998) provides that a person shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute<sup>33</sup>.

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
  - (i) to ensure the person's appearance at trial,
  - (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
  - (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.<sup>34</sup>

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<sup>29</sup> Ibid, Article 7(2).

<sup>30</sup> Ibid, Article 7(3).

<sup>31</sup> African Charter on Human and Peoples' Rights, Article 6.

<sup>32</sup> Ibid, Article 7(2).

<sup>33</sup> The Rome Statute of the International Criminal Court (1998), Article 55(d).

<sup>34</sup> Ibid, Article 58(1).

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Vienna Declaration and Programme of Action<sup>35</sup> provides that promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify, members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.<sup>36</sup> Arrest or detention pending investigation and trial shall be carried out only for the purposes of administration and the accused shall be entitled to release pending trial.

### **2.3 THE RIGHT TO BE INFORMED PROMPTLY OF THE CHARGES AND THE SUPPORTING EVIDENCE AGAINST HIM**

International Covenant on Civil and Political Rights says that 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.<sup>37</sup> Accused person has a right to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charge against him<sup>38</sup> and to have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>39</sup> It is right of the accused to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.<sup>40</sup>

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<sup>35</sup> Adopted by Vienna World Conference on 25<sup>th</sup> June, 1993.

<sup>36</sup> Vienna Declaration, Principle 16.

<sup>37</sup> International Covenant on Civil and Political Rights, Article 9(2). See Article 10(1) of the Constitution of the Islamic Republic of Pakistan, 1973, and Article 22(1) of the Indian Constitution.

<sup>38</sup> International Covenant on Civil and Political Rights, Art. 14(3)(a).

<sup>39</sup> ICCPR, Art. 14(3)(f).

<sup>40</sup> CECHR, Art. 6(3)(a).

Council of Europe Convention for the protection of human rights and Fundamental Freedoms provides that everyone who is arrested shall be informed promptly of the reasons for his arrest, in a language which he understands, and of any charge against him.<sup>41</sup> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of Article 5 shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial." However, "Release may be conditioned by guarantees to appear for trial".<sup>42</sup> American Convention on human rights describes that a detained person shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.<sup>43</sup> Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.<sup>44</sup> No one shall be detained for debt'. However this 'principle shall not limit the orders of a competent judicial authority issued for non fulfillment of duties of support'.<sup>45</sup> 'Punishment shall not be extended to any person other than the criminal'.<sup>46</sup> The person arrested must be informed of the grounds for his arrest as soon as may be and the communication should contain particulars sufficiently full to enable him to understand the nature of the accusation against him,<sup>47</sup> so that he may, if he wishes, apply for bail or writ of habeas corpus. Mere reference to the section of law under which he has

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<sup>41</sup> CECHR, Article 5(2).

<sup>42</sup> Ibid, Article 5(3).

<sup>43</sup> American Convention on human rights, Article 7(4).

<sup>44</sup> American Convention on human rights, Article 7(5).

<sup>45</sup> Ibid, Article 7(7).

<sup>46</sup> Ibid, Article 5(3).

<sup>47</sup> *Mrs. Rowshan Bijaya Shaukat Ali Khan v Government of East Pakistan*, PLD 1965 Dacca 241; *Government of East Pakistan v Mrs. Rowshan Bijaya*, PLD 1966 SC 286.

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been arrested will not be treated as a sufficient compliance with the requirement.<sup>48</sup> If no grounds are communicated, the detention would be illegal.<sup>49</sup>

#### 2.4 THE RIGHT TO PROMPT ACCESS TO COUNSEL OF CHOICE

The person arrested must be given reasonable opportunity to engage counsel, and the counsel engaged must be given reasonable opportunity to defend him. The person arrested has inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused did not defend him personally or did not engage his own counsel within the time period established by law.<sup>50</sup> It is right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.<sup>51</sup> It is right of the accused to be assisted without charge, by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court.<sup>52</sup> He has a right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>53</sup> The Rome Statute also provides to an accused person a right to have legal assistance of the accused person's choosing, or, if the accused person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the

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<sup>48</sup> *Vimal Kishore v The State of U.P.* AIR 1956 All. 56; *Madhu v The State*, AIR 1959 Punjab 506.

<sup>49</sup> *Government of East Pakistan v Mrs. Rowshan Bijaya*, PLD 1966 SC 286; *Muhammad Anwar v Government of West Pakistan*, PLD 1963 Lahore 109.

<sup>50</sup> American Convention on human rights, Art. 8(2)(e).

<sup>51</sup> American Convention on human rights, Art. 8(2)(d).

<sup>52</sup> American Convention on human rights, Art. 8(2)(a).

<sup>53</sup> Council of Europe Convention for the protection of human rights, Art. 6(3)(e).

accused person does not have sufficient means to pay for it;<sup>54</sup> and to be questioned in the presence of counsel unless the accused person has voluntarily waived his or her right to counsel.<sup>55</sup>

According to ICCPR an accused person has a right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.<sup>56</sup> An accused person has a right to defend himself in person or through legal assistance of his own choosing and if he has not sufficient means to pay for legal assistance then legal assistance should be provided at state expense where the interests of justice so require.<sup>57</sup> Vienna Declaration and Programme of Action also recognize rather promote this right.<sup>58</sup>

## **2.5 AVAILABILITY OF REMEDIES SUCH AS HABEAS CORPUS, BAIL ETC.**

Anyone who is deprived of his liberty by arrest or detention is entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>59</sup> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial

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<sup>54</sup> The Rome Statute, Article 55(2)(c).

<sup>55</sup> *Ibid.*, Article 55(2)(d).

<sup>56</sup> International Covenant on Civil and Political Rights, Art. 14(3)(d).

<sup>57</sup> Council of Europe Convention for the protection of human rights, Art. 6(3)(c).

<sup>58</sup> Vienna Declaration and Programme of Action, Principle 11.

<sup>59</sup> International Covenant on Civil and Political Rights, Article 9(4).

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within a reasonable time or to release.<sup>60</sup> It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.<sup>61</sup> Anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation.<sup>62</sup> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.<sup>63</sup> In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.<sup>64</sup>

Council of Europe Convention for the protection of human rights and Fundamental Freedoms provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.<sup>65</sup> Everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 of CECHR shall have an enforceable right to compensation.<sup>66</sup>

After the issuance of arrest warrant, the Rome Statute requires that the accused be granted the opportunity to appear before the courts of the country where they

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<sup>60</sup> *Ibid.*, Article 9(3).

<sup>61</sup> *Ibid.*, Article 9(3).

<sup>62</sup> *Ibid.*, Article 9(5).

<sup>63</sup> American Convention on human rights, Article 7(6).

<sup>64</sup> *Ibid.*, Article 7(6).

<sup>65</sup> Council of Europe Convention for the protection of human rights, Article 5(4).

<sup>66</sup> *Ibid.*, Article 5(5).

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are arrested. "A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine... that the person has been arrested in accordance with the proper process; and his rights have been respected".<sup>67</sup>

The above mentioned provisions amount to a declaration that no person is to take the life or liberty of another person, except under a law authorizing him to do so. The person, whose life and liberty is threatened, is therefore entitled to require the person seeking to deprive him of the right to live or move freely, to show the legal authority under which he is purporting to act. No public functionary or private person may injure or confine a person, unless he has a legal warrant to do so. Where an authority deprives a person, whether a citizen or not, of his liberty in flagrant violations of the law under which it purports to act, the arrest or detention cannot be said to be in accordance with law and the competent Court can set such person at liberty.

## **2.6 RIGHT NOT TO BE COMPELLED TO INCRIMINATE HIMSELF OR TO CONFESS GUILT**

It is right of the accused that he shall not be compelled to be a witness against himself or to plead guilty.<sup>68</sup> The Rome Statute of the International Criminal Court, 1998 provides that a person shall not be compelled, during an investigation, to incriminate himself or herself or to confess guilt. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a

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<sup>67</sup> The Rome Statute, Article 59(2). See Article 13(b) of the Constitution of the Islamic Republic of Pakistan, 1973, and Article 20(3) of the Indian Constitution.

<sup>68</sup> American Convention on human rights, Art. 8(2)(g).

request made under Part 9, that person shall also have the right of which he or she shall be informed prior to being questioned, that he has a right to remain silent, without such silence being a consideration in the determination of guilt or innocence.<sup>69</sup> Furthermore, the Pre-Trial Chamber may make orders during investigations specially to ensure the protection of evidence for the defence. Accused person has a right 'Not to be compelled to testify against him or to confess guilt'.<sup>70</sup> A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.<sup>71</sup>

## **2.7 PREJUDICIAL PRE-TRIAL PUBLICITY**

An accused is presumed to be innocent until proved guilty therefore prejudicial pretrial publicity is not allowed. If some one makes such publicity it amounts to defamation and on asking of the accused the court may award damages to him, besides restraining the making of prejudicial pre-trial publicity.

## **2.8 PROTECTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT, SELF-INCRIMINATION, ETC.**

'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or

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<sup>69</sup> *Ibid.*, Article 55(2)(b).

<sup>70</sup> International Covenant on Civil and Political Rights, Art. 14(3)(g).

<sup>71</sup> American Convention on human rights, Art. 8(3).

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intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".<sup>72</sup> Under the convention each state party is bound to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.<sup>73</sup> It needs mention that the provisions of the convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.<sup>74</sup>

Universal Declaration of human rights declares that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'<sup>75</sup> International Covenant on Civil and Political Rights describes that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; in particular, no one shall be subjected without his free consent to medical or scientific experimentation.'<sup>76</sup> Council of Europe Convention for the protection of human rights and Fundamental Freedoms says that 'No one shall be subjected to torture or to inhuman or

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<sup>72</sup> Article 1 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984). Entered into force 26 June 1987, in accordance with article 27 (1).

<sup>73</sup> Article 16, *ibid.*

<sup>74</sup> Article 16 (2), *ibid.*

<sup>75</sup> Universal Declaration of human rights, Article 5.

<sup>76</sup> International Covenant on Civil and Political Rights, Article 7.

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degrading treatment or punishment.<sup>77</sup> American Convention on human rights describes that 'No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment'. African Charter on Human and Peoples' Rights provides that '...All forms of exploitation and degradation of man, particularly ...torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'<sup>78</sup> The Rome Statute of the International Criminal Court (1998) also provides that a suspect/accused should not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.<sup>79</sup>

## 2.9 ACCUSED NOT TO BE KEPT WITH CONVICTS

Accused persons are, save in exceptional circumstances, to be segregated from convicted persons and are entitled to separate treatment appropriate to their status as unconvicted persons.<sup>80</sup> Same are the rights in American Convention on human rights.<sup>81</sup> Similar is principle 8 of 'Principles for the Protection of All Persons under any form of Detention or imprisonment' (Adopted by UN General Assembly Resolution on 9<sup>th</sup> December, 1988) which provides that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and the persons under any form of detention from imprisonment shall be treated in a human manner and with

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<sup>77</sup> Council of Europe Convention for the protection of human rights, Article 3.

<sup>78</sup> African Charter on Human and Peoples' Rights, Article 5.

<sup>79</sup> The Rome Statute of the International Criminal Court (1998) Article 55(1) (b).

<sup>80</sup> International Covenant on Civil and Political Rights, Article 10(2) (a).

<sup>81</sup> Article 5(4) says that "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons."

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respect for inherent dignity of the human person<sup>82</sup> without discrimination of any kind. There shall be no restriction upon or derogation from any of international human rights of persons under any form of detention or imprisonment. Such persons shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>83</sup>

## **2.10 SPECIAL PRIVILEGES OF JUVENILE**

ICCPR provides that accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.<sup>84</sup> Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.<sup>85</sup> In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.<sup>86</sup>

## **2.11 THE RIGHT TO A TRIAL WITHIN A REASONABLE TIME**

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise to be released. Anyone arrested or detained on a

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<sup>82</sup> Vienna Declaration Principle 1.

<sup>83</sup> *Ibid.*

<sup>84</sup> International Covenant on Civil and Political Rights, Article 10(2) (b).

<sup>85</sup> American Convention on human rights, Article 5(5).

<sup>86</sup> International Covenant on Civil and Political Rights, Art. 14(4). See Articles 37 and 40 of the Convention on the Rights of the Child.

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criminal charge shall be entitled to trial, without undue delay<sup>87</sup> or to release.<sup>88</sup> It needs mention that the Rome Statute provides that, upon arrival of the accused at the International Criminal Court, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under the Rome Statute, including the right to apply for interim release pending trial.<sup>89</sup> A person subject to a warrant of arrest may apply for interim release pending trial.<sup>90</sup> The Pre-Trial Chamber is to ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court considers releasing the person, with or without conditions.<sup>91</sup> Within a reasonable time after the accused arrives at the International Criminal Court, the Rome Statute provides that they must have a hearing to confirm the charges.<sup>92</sup> The accused before the International Criminal Court is guaranteed all traditional legal rights at all times during trial, including the right to be tried without undue delay, the right to remain silent and the right to be provided with free counsel.<sup>93</sup> Vienna Declaration provides that a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial. The accused should also be informed about the place of trial, mode of trial, whether he will represent himself or be assisted by a counsel, the evidence against him and evidence in his favour, physical evidence to be presented or the witnesses to be called against him.

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<sup>87</sup> International Covenant on Civil and Political Rights, Article 14(3)(c).

<sup>88</sup> International Covenant on Civil and Political Rights, Article 9(3).

<sup>89</sup> The Rome Statute, Article 60(1).

<sup>90</sup> The Rome Statute, Article 60(2).

<sup>91</sup> *Ibid.*, Article 60(4).

<sup>92</sup> See The Rome Statute, Article 61.

<sup>93</sup> *Ibid.*

## 2.12 SUMMARY

The aim of pre trial detention is not to punish the accused but to prevent the suspect/ accused from evading justice. In any case it is not to be used for repressive or coercive purposes.

Life is the supreme human right and a base for other human rights, as none of the other rights would have any value or utility without it. International human rights law assigns a higher value to the quality of living as a process, than to the existence of life as a state. It regards acute or prolonged sufferings as a greater evil than death. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation. No person should be arrested or detained unless: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) to ensure the person's appearance at trial, (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. An arrested/detained person should be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.

## CHAPTER III

### TRIAL RIGHTS OF THE ACCUSED

#### 3.1 INTRODUCTION

The law aims by proscribing an act or omission, *inter alia*, to protect and defend the recognized or established values in a society, to maintain public order, to promote the health, welfare, safety, morality of its citizens, or to promote certain behaviour, and to eliminate evil through sanctions. If an innocent person gets punishment instead of an actual offender, it does not serve the ends of justice, rather it breeds crime and other people are encouraged to commit offences/crimes on hope of escaping the punishment. It is the demand of justice that no innocent person should get, nor any guilty should escape the punishment. To achieve this objective a fair trial is necessary. A trial culminates in a conviction or an acquittal of the accused. The sole purpose of a trial is to establish the truth and to dispense justice to the parties. In order to achieve that purpose almost all developed criminal justice systems of the world have recognized some fundamental principles for safe administration of justice; For example the Fifth Amendment to the United States Constitution provides, *inter alia*, that “no person shall be.....deprived of life, liberty, or property, without due process of law.”<sup>1</sup> Due process can

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<sup>1</sup> Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973, and Article 21 of the Indian Constitution also reveal the similar intent.

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be operationally defined as law in the regular course of judicial proceedings i.e. in accordance with natural, inherent, and fundamental principles of justice.<sup>2</sup>

There are two types of *due process*: (1) *substantive due process* and (2) *procedural due process*. Substantive due process is violated by legislation that can destroy the basic enjoyment of *life, liberty, or property* – regardless of the fairness of the procedures employed. In general, substantive due process protects all persons against unreasonable, arbitrary, or capricious laws, and acts as a limitation against arbitrary governmental actions so that no court or governmental agency may exercise powers beyond those authorized by the Constitution. Procedural due process concerns the notice, hearings, and procedure required before the life, liberty or property of a person may be taken by the government. It requires the following:

- a. notice of the proceedings,
- b. a hearing,
- c. and an opportunity to present a defence
- d. before an impartial tribunal
- e. in an atmosphere of fairness.

In U.S.A. *due process* requirements are binding on all federal and state governments, as well as on all branches, tribunals, officials, and agencies of those governments. Same is the position in other countries having good criminal justice system. It seems expedient to discuss some important principles of natural justice that are essential to the concept of *due process* and fairness.

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<sup>2</sup> The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. "Convictions cannot be brought about by methods that offend 'a sense of justice'." See *Rochin v California*, 342 U.S. 165 (1952).

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The changing social and economic systems had prepared a fertile ground for the changing system of responsibilities. The capricious concept of responsibility had given way to a more regular and calculable understanding. So long as human beings govern human beings, arbitrariness, prejudice, and bias cannot be fully abolished from judgment, but the glorious principles of the Enlightenment reduced them. It developed safeguards for the rights of the individual against the arbitrariness of the courts or tribunals. Those safeguards, which are in fact fundamental principles of justice, have gained the status of *jus cogens* through consistent practice of almost all civilized nations. It would be advantageous to have a look at some of them along with a glance at the basic requirements of a trial.

### 3.2 AUDI ALTERAM PARTEM and EQUALITY OF PARTIES

'*Audi alteram partem*'<sup>3</sup> and 'equality of parties' are basically principles of natural law.<sup>4</sup> *Audi Alteram Partem* and equality of parties<sup>5</sup> manifest themselves through a number of fundamental procedural rights of parties. Both of them are inseparable from the concept of impartiality. Carlston lists five fundamental procedural rights, namely: (i) The right to be heard, (ii) right to due deliberation by the duly constituted tribunal, (iii) right to a reasoned judgments, (iv) right to a tribunal free from corruption, and (v) right to proceedings free from fraud<sup>6</sup>. Right to composition of tribunal may be added to this list.<sup>7</sup>

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<sup>3</sup> Hear the other side.

<sup>4</sup> *Voinet Vs Barret*, (1885) 55 L.J.Q.B., 41.

<sup>5</sup> It includes the equal protection of the laws.

<sup>6</sup> Kenneth S. Carlston, *The Process of International Arbitration*, New York, N.Y, 1946; V. S. MANI, *International Adjudication: Procedural Aspects*, Radiant Publishers, New Delhi, Dhawan Printing works, 1980, p 25.

<sup>7</sup> *Ibid*.

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*Audi Alteram Partem* cannot be translated into actual practice without recognizing the equal procedural rights of the parties and equality of opportunity to present their respective cases before the tribunal.

The Dictionary of English law describes *Audi Alteram Partem* or *audiatur et altera pars* as an injunction which postulates that no man can be condemned unheard or without having had an opportunity of being heard. Procedural equality is “not an abstract notion or a mere declaration of principle, but a firm reality originating in the non-eclectic character of international law and the very nature and object of the judicial process”,<sup>8</sup> even in common parlance partiality is synonymous with injustice. The Human Rights Committee interprets the concept of a fair hearing as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformation in pejus, and expeditious procedures.<sup>9</sup> Most important is the principle of equality of arms; that is, that the parties in civil or criminal proceedings must have an equal opportunity; to present their case, to examine witnesses and to be present at all stages.

As the basic norms of international procedural law<sup>10</sup>, *Audi Alteram Partem* and *equality of parties* manifest themselves through a number of fundamental procedural rights

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<sup>8</sup> Shabtai Rosenne, *The law and Procedure of the International Court*, Leyden, 1965, Vol. 2, P. 54.

<sup>9</sup> Views of the Human Rights Committee in *Morael v. France* (Comm. N 206/ 1986).

<sup>10</sup> In international law the fundamental procedural norms should be understood in the light of two principal factors: (i) that the consent of parties is the sole basis of jurisdiction of international courts; (ii) that the principle of sovereignty in international law demands sovereign equality. Being so, the content and field of operation of *Audi Alteram Partem* and equality of parties in international law are not necessarily identical with those in private law.

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of the parties.<sup>11</sup> The administrative Tribunals of the United Nations<sup>12</sup>, the Nuremberg International military Tribunals<sup>13</sup> and the court of justice of European communities, among others, have respected these principles. It needs mention that Article 38(1)(C) of the statute of the International Court of Justice (1945) requires the court to apply, inter alia, “the general principles of law recognized by civilized nations” whenever a case comes before it for adjudication in accordance with international law.

### **3.3 THE RIGHT TO BE PRESUMED INNOCENT**

The presumption of innocence of an accused is a fundamental principle in a criminal trial. Burden of proof lies on the prosecutor. It is unjust to put on the accused the burden of proving his innocence. The primary duty of the court is to establish the truth. The Rome Statute also ensures that everyone should be presumed innocent until proved guilty before the Court in accordance with the applicable law. The onus is on the prosecutor to prove the guilt of the accused. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.<sup>14</sup>

As the accusation may be true or false therefore all international instruments have upheld the rule deeply entrenched in criminal justice system of all civilized nations since centuries that “the accused should be presumed innocent until proved guilty”. This

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<sup>11</sup>V S Mani, International Adjudication, p.25.

<sup>12</sup> See for instance the Kenny Case, Judgment No. 6, Judgments of the U.N. Admn. Tribunal Number 1-70 (1950-57).

<sup>13</sup> See A. 16 of the Charter of International Military Tribunal London. See also Rules 2, 3 & 4 of the rules of procedure adopted by the Tribunal on 29<sup>th</sup> October 1946. Vol. 1 (Nuremberg 1947).

<sup>14</sup> The Rome Statute of the International Criminal Court (1998), Article 66.

principle is of fundamental importance in Criminal Justice System and judges are bound to presume the accused innocent until proved guilty. If they presume otherwise, it would be a biased view and amount to adjudging a person guilty before his guilt is proved.

Universal Declaration of Human Rights declares that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.<sup>15</sup> American Declaration of the Rights and Duties of Man declares that 'Every accused person is presumed to be innocent until proved guilty'.<sup>16</sup> International Covenant on Civil and Political Rights describes that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.<sup>17</sup> Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms describes that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.<sup>18</sup> American Convention on Human Rights says that every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.<sup>19</sup> African Charter on Human and Peoples' Rights describes that 'Every individual shall have the right to have his cause heard' and this includes the 'right to be presumed innocent until proved guilty by a competent court or tribunal'.<sup>20</sup>

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<sup>15</sup> Universal Declaration of Human Rights, Art. 11(1).

<sup>16</sup> American Declaration of the Rights and Duties of Man, Art. XXVI.

<sup>17</sup> International Covenant on Civil and Political Rights, Art. 14(2)

<sup>18</sup> Council of Europe Convention for the protection of Human Rights, Art. 6(2).

<sup>19</sup> American Convention on Human Rights, Art. 8(2).

<sup>20</sup> African Charter on Human and Peoples' Rights, Art. 7(1)(b).

The Rome Statute grants the Pre-Trial Chamber the ability to dismiss charges if they are not valid, or Decline to confirm those charges in relation to which it has determined that there is insufficient evidence.<sup>21</sup>

A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial<sup>22</sup> at which he has had all the guarantees necessary for his defence.<sup>23</sup> 'Justice should not only be done, it should manifestly and undoubtedly be seen to be done.' is the rationale behind the requirement of a public hearing. This is not only in the interest of parties but also in the interest of a society.<sup>24</sup>

### 3.4 PROTECTION AGAINST *EX POST FACTO* LAWS

The ancient Latin Maxim, *nullum crimen, nulla poena sine lege*<sup>25</sup> is basic to all developed Criminal Justice Systems<sup>26</sup>. This principle of natural law is recognized by International law<sup>27</sup>. A law creating a new offence, or punishing an act not punishable when

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<sup>21</sup> The Rome Statute, Article 61.

<sup>22</sup> Public trial is one that is not secret and which the general public is free to attend

<sup>23</sup> Vienna Declaration and Programme of Action, Principle 36.

<sup>24</sup> Human Rights: Concept and Standards, ed., Janusz Symonides Ashgate, Dartmouth, Unesco Publishing, 2000 p. 85. Also, see the Bill of Rights especially 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendments to the U.S. Constitution.

<sup>25</sup> There can be no crime, no punishment, except as the law prescribes.

<sup>26</sup> Muhammad Munir, "The Principle of *nulla poena sine lege* in Islamic Law and contemporary Western Jurisprudence", the Annual Journal of IIUI, V. XII, 2004, pp. 39-59. See Article 99 of the Geneva Convention No. III, 1949. See also Article 12 of the Constitution of the Islamic Republic of Pakistan, 1973, Section 9(3) of the U.S. Constitution, and Article 20(1) of the Indian Constitution.

<sup>27</sup> Also see The Rome Statute of the International Criminal Court, Art. 22, 23, 24.

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committed, is *ex post facto*<sup>28</sup> as regards an act committed before its passage. Any law which changes the punishment and inflicts a greater punishment than the law annexed to the crime or offence when committed, or which imposes a new punishment in addition to that then prescribed, as for instance, where it adds solitary confinement to death as punishment for the offence of murder, is *ex post facto*.<sup>29</sup>

*Ex post facto* laws were explained by Justice Blackstone in the following words:-

“After an action indifferent in itself, is committed, the legislature, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore, no cause to abstain from it; and all punishments for not abstaining must of consequence be cruel and unjust”.<sup>30</sup>

An *ex post facto* law is considered a hallmark of tyranny because it deprives people of a sense of what behavior will or will not be punished and allows for random punishment at the whim of those in power.

There is distinction between the terms ‘retrospective laws’ and “*ex post facto laws*” in that former term is applied only to laws relating to civil matters. A retrospective law is one that relates back to a previous transaction and gives it to some legal effect different from that which it had under the law when it occurred, and, in the sense in which it is constitutionally objectionable, is one that impairs vested rights acquired under existing

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<sup>28</sup> [Latin, "After-the-fact" laws.] Laws that provide for the infliction of punishment upon a person for some prior act that, at the time it was committed, was not illegal.

<sup>29</sup> American Jurisprudence: Constitutional Law, Volume 16, Bancroft-Whitney Company, San Francisco, Calif, 2<sup>nd</sup> edition, 1964, Art. 396.

<sup>30</sup> *Philips V Eyre* (1870) The Law Reports 6 Queens Bench 1.

laws, or creates a new obligation, imposes a new duty or attaches a new disability with respect to past transactions.<sup>31</sup> In American Constitutional Law, an *ex post facto* law is one which, operating retrospectively on penal or criminal matters only, renders a previous innocent act criminal, aggravates or increases the punishment for a crime, alters the rules of evidence<sup>32</sup> to the prejudice of the accused, penalizes an innocent act, deprives an accused of some protection or defence previously available, or otherwise alter his situation to his disadvantage.<sup>33</sup> However, one view is that there is no fundamental distinction between *ex post facto* and retroactive laws, except that the former is wider and includes procedural legislation which may require lesser evidence for proof.<sup>34</sup> Operation of retroactive laws is limited than that of the American Provision, which enjoys that “no... *ex post facto* law shall be passed”. By its terms, the provision is only applicable to the creation of and penalties for offences, the principles underlying it being that no law shall

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<sup>31</sup> American Jurisprudence: Constitutional Law, Volume 16, Bancroft-Whitney Company, San Francisco, Calif, 2<sup>nd</sup> edition, 1964, Art. 414.

<sup>32</sup> Laws that lower the ‘burden of proof’ and laws that reduce the quantum of evidence necessary to meet the burden are indistinguishable in all meaningful ways relevant to the concerns of the Ex Post Facto Clause.

<sup>33</sup> *Calder v Bull*, 3 Dall, 386, 390: (1798) 1 Law Edn. 648. The focus of the *Calder* case was a May 1795 resolution of the Connecticut legislature that specifically set aside a March 1793 probate court decree. The resolution allowed the defeated party in the probate contest a new hearing on the matter of the will. The Court in *Calder* ruled that the Connecticut resolution did not constitute an *ex post facto* law because it did not affect a vested property right. In other words, no one had complete ownership of the property in the will, so depriving persons of the property did not violate the *ex post facto* clause. The Court went on to list situations that it believed the clause did address. It opined that an *ex post facto* law was one that rendered new or additional criminal punishment for a prior act or changed the rules of evidence in a criminal case. In *Calder*, the Court's emphasis on criminal laws seemed to exclude civil laws from a definition of *ex post facto*—that is, it implied that if a statute did not inflict criminal punishment, it did not violate the Ex Post Facto Clause. Twelve years later, the U.S. Supreme Court held that a civil statute that revoked land grants to purchasers violated the Ex Post Facto Clause (*FLETCHER V. PECK*, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 [1810]). However, in 1854, faced with another opportunity to define *ex post facto*, the Court retreated from *Fletcher* and limited the prohibition to retroactively applied criminal laws (*Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456, 15 L. Ed. 127 [1854]). See Article 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973, Fifth Amendment to the U.S. Constitution, and Article 20(2) of the Indian Constitution.

<sup>34</sup> PLD 1969 SC 599, *Nabi Ahmed v Home Secretary*.

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be made which authorizes the punishment of a person for any act or omission which at the time of such act or omission was not punishable by the law then in force, or which authorizes the punishment of a person by a penalty which is greater than or different from the penalty which could be imposed under the law for the offence at the time it was committed.<sup>35</sup> It has been held that there is no violation of the *ex post facto* clause where the law, with retrospective effect, merely—changes the place of trial; varies the modes of execution or carrying out the sentence; provides for a longer period of incarceration between conviction and execution; alters matters of procedure, as no person has any vested right in a form of procedure; abolishes courts and creates new ones.<sup>36</sup> Thus, the scope of the provision is restricted to criminal and penal statutes. It should be kept in mind that every *ex post facto* law must necessarily be retrospective but every retrospective law is not an *ex post facto* law.

It is necessary to understand the importance of such a prohibition, considering the historical tendency of government leaders to abuse power.<sup>37</sup> Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled

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<sup>35</sup> PLD 1966 Dacca 439, *Sahib Mia v S.M. Mia*.

<sup>36</sup> American Jurisprudence: Constitutional Law, Volume 16, Bancroft-Whitney Company, San Francisco, Calif, 2<sup>nd</sup> edition, 1964, Art. 413.

<sup>37</sup> As Alexander Hamilton observed, " ... it is easy for men ... to be zealous advocates for the rights of the citizens when they are invaded by others, and as soon as they have it in their power, to become the invaders themselves." The desire to thwart abuses of power also inspired the Framers of the U.S. Constitution to prohibit bills of attainder, which are laws that inflict punishment on named individuals or on easily ascertainable members of a group without the benefit of a trial. Both *ex post facto* laws and bills of attainder deprive those subject to them of Due Process of law—that is, of notice and an opportunity to be heard before being deprived of life, liberty, or property.

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transactions. Furthermore the law must be sufficiently clear so that ordinary people can understand what conduct is being prohibited.

If an act is not an offence at the date of commission, no future law can make it an offence.<sup>38</sup> Universal Declaration of Human Rights declares that no one shall be held 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 when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.<sup>39</sup> International Covenant on Civil and Political Rights describes that 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 a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.<sup>40</sup> However, this article does not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed was criminal according to the general principles of law recognized by the community of nations.<sup>41</sup> Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms says that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence,

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<sup>38</sup> AIR 1961 SC 838, *Chief Inspector of Mines v Thapar*.

<sup>39</sup> Universal Declaration of Human Rights, Article 11(2).

<sup>40</sup> International Covenant on Civil and Political Rights, Article 15(1).

<sup>41</sup> *Ibid.*, Article 15(2).

under national or international law, at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.<sup>42</sup> It also makes clear that this shall not prejudice the trial and punishment of any person for any act or omission that at the time when it was committed was criminal according to the general principles of law recognized by civilized nations.<sup>43</sup> American Convention on Human Rights describes that no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit there from.<sup>44</sup> African Charter on Human and Peoples' Rights declares that 'no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.'<sup>45</sup>

### 3.5 PROTECTION AGAINST DOUBLE JEOPARDY

The maxim "*Nemo debet bis vexari pro una et eadem causa*"<sup>46</sup> expresses a great fundamental rule of criminal law. It is the foundation of the special pleas of *autre fois*

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<sup>42</sup> Council of Europe Convention for the protection of Human Rights and F. Freedoms, Article 7(1)

<sup>43</sup> *Ibid.*, Article 7 (2).

<sup>44</sup> American Convention on Human Rights, Article 9.

<sup>45</sup> African Charter on Human and Peoples' Rights, Article 7(2).

<sup>46</sup> that 'a man should not be put in jeopardy twice for one and the same offence'.

*acquit*, and *autre fois convict*. Plea of *autre fois acquit* is founded on a maxim that a person should not be put in peril, for one and the same offence more than once. The acquittal or conviction should, however, be on a verdict given by a jury on a good indictment on which he could be legally convicted and that if there was an abortive trial, without a verdict, the same would not be legal bar to a second trial either on the same or a fresh indictment.<sup>47</sup> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.<sup>48</sup> An accused person acquitted by a non-appealable judgment shall not be subjected to new trial for the same cause.<sup>49</sup>

### **3.6 SEVEN INTERRELATED AND OVERLAPPING PRINCIPLES FOR EVERY CRIME.**

All crimes share certain general elements, which are also known as principles for a crime. Theoretically, there are seven interrelated and overlapping principles for every crime.

1. Legality – a law defining the crime.
2. *Actus reus* – Violation of law either by commission or omission by the accused.
3. *Mens rea* – a guilty state of mind.
4. Fusion / Concurrence of *actus reus* and *mens rea* – the intention and the act must both occur.

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<sup>47</sup> *Tassawar Hussain V State*, 1968 P.Cr.L.J. 2218.

<sup>48</sup> International Covenant on Civil and Political Rights, Art. 14(7).

<sup>49</sup> American Convention on Human Rights, Art. 8(4).

5. Harm – a crime has a harmful impact on certain legally protected values.
6. *Causation* – a casual relationship between the act and the harm.
7. Punishment – the sanctions to be applied for the prescribed behavior must be stipulated in the law.<sup>50</sup>

The common law doctrine of *mens rea* remains the principle in the administration of Criminal Justice and all criminal laws have to face the difficulty of defining various mental elements of criminal conduct that in some way reflect actual states of mind and that, at the same time, can be used as manageable tools for attributing criminal responsibility. No liability without fault is the basic principle. Liability can be imposed only for acts or omissions that are willed or are perpetrated intentionally by the offender. Offender acts intentionally when: (i) it is his purpose to accomplish a certain consequence, or (ii) he knows that the consequence will result from his conduct, or (iii) he considers such consequence possible and do not mind it. Liability may not be upheld where despite intentionality of the act or omission, the result or consequence whereof was accidental. Theory and practice recognize the 'mistake of act' or 'mistake of fact' as a defence. eg. Section 318 of the Pakistan Penal Code illustrates that "(a) A aims at a deer but misses the target and kills Z who is standing by" 'it is a mistake of act', (b) A shoots at an object to be a boar but it turns out to be a human being," 'it is a mistake of fact'.

The concept of *mens rea* as an actual consciousness of guilt, however, has been abandoned in favour of intentional, or even reckless or negligent conduct. Now the

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<sup>50</sup> These seven principles of crime have been interpreted by the courts to meet the changing conditions.

requirement is that the act be voluntary and that the so-called general defenses such as insanity, unconsciousness, immaturity, involuntary drunkenness or intoxication, coercion, self-defense, necessity, accident and mistake of act or fact etc. be inapplicable. *Mens rea* has evolved into a concept of objectivity and many offences in the public interest have been held to be of strict liability.<sup>51</sup> It should be recognized, however, that negligence in and of itself is not a crime. Negligent conduct can be evidence of a crime only when it falls below some acceptable standard of care. That standard is nowadays applied in courts through the fictional creation of a reasonable person. The new doctrine, called "objective" *mens rea*, asks not whether an individual defendant has consciousness of guilt, but whether a reasonable person in the defendant's circumstances and with the defendant's physical characteristics would have had consciousness of guilt, or would have known better and acted differently than the defendant. Its basic purpose is to promote higher standards of safety and welfare by dispensing the need to prove intent and thus facilitating prosecution. This seems to be unjust in various situations e.g. any body who has taken all reasonable care to do nothing wrong, or an honest trader who is already doing his best. For this reason, in recent statutes, defence equivalent to due diligence is beginning to appear and the conceptual definition of *mens rea* has been left to jurisprudence and practice of the courts.

In fact, both the *mens rea* and the *actus reus* must be present for an act or omission to be a crime. The concurrence of act and intent is sufficient to constitute the *corpus*

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<sup>51</sup> Major Criminal Justice Systems; A Comparative Survey, Edited by: George F. Cole, Frankowski and Marc G. Gertz, SAGE Publications, London, UK, 2<sup>nd</sup> Ed. 1987, p. 39.

*delicti*<sup>52</sup> or body of a crime. The four additional principles mentioned above, i.e. harm, causation (a casual relationship between the act and the harm), legality, and punishment, are, however, necessary before the *corpus delicti* can be established. Thus, a person is criminally responsible and liable to punishment for a criminal act or omission known and willed by him or her regardless of motive. Intent may be direct, indirect or oblique. It is direct if the consequence of the act is desired, indirect intent if the consequence is necessary but not desired; oblique intent if the offender realized the possibility of the consequences and still undertook the act with the risk that the consequence might occur i.e. recklessness.<sup>53</sup> Art 30 of The Rome Statute of the International Criminal Court, 1998 and General Introduction para 2 of Elements of Crimes 2000 stipulates that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with intent and knowledge.<sup>54</sup>

Besides establishing the above seven, in order to succeed, the prosecution has to prove the identity of the accused; i.e. the crime/offence was committed by none else but the accused.

### **3.7 PREPARATION AND ATTEMPT**

The law relating to attempt is very complicated and confused. Attempt is usually defined as an act by which the offender, according to his plan, directly begins to

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<sup>52</sup> *Corpus delicti* is a Latin term which refers to the "body of the crime." It does not mean the body of the victim, as is sometimes thought.

<sup>53</sup> *Ibid.*, p. 198.

<sup>54</sup> See The Rome Statute of the International Criminal Court.

carry out intended crime. This distinguishes an attempt from a preparation. As such attempt is “commencement of the execution of the offence”. Whereas ‘preparation’ is the procurement or adaptation of means or instruments, or any other intentional creation of conditions for the commission of a crime. Intention to commit a crime is in itself insufficient for liability unless the law provides otherwise; there must be evidence of the commission of some act directly connected with the offence for attempt to be charged.

### **3.8 CATEGORIES OF OFFENDERS**

There are three categories offenders:

1. Principals / Perpetrators, co perpetrators;
2. Instigators; and
3. Accessories/Aiders

1. Principals are offenders who commit the crime in person, through another, or together with another principal.
2. The instigator is a person who intentionally incites another to commit an intentional crime. The instigator is punished as an accessory if the crime is committed, or s/he is responsible for his own act whether the crime is committed or not.
3. Accessories are persons who intentionally aid a principal before or while he or she is committing the crime. Punishment of the accessory is to be mitigated.

### **3.9 THE RIGHT TO HAVE ADEQUATE TIME TO PREPARE HIS DEFENSE**

It is right of the accused to have adequate time and facilities for the preparation of his defense.<sup>55</sup> Accused person has a right to have reasonable time and means for the preparation of his defense.<sup>56</sup> Accused person has a right to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.<sup>57</sup> In the determination of any criminal charges against him, accused shall be entitled to prior notification in detail of the charges against him.<sup>58</sup>

### **3.10 THE RIGHT TO A FAIR AND PUBLIC TRIAL**

The United Nations Human Rights committee has observed that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the Court to decide without delay on the lawfulness of detention, must not be diminished by a State Party's decision to derogate from the Covenant.<sup>59</sup>

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<sup>55</sup> Council of Europe Convention for the protection of Human Rights, Art. 6(3)(b).

<sup>56</sup> American Convention on Human Rights, Art. 8(2)(c).

<sup>57</sup> International Covenant on Civil and Political Rights, Art. 14(3)(b). See also, Sixth Amendment to the U.S. Constitution which, inter alia, provides that: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.

<sup>58</sup> American Convention on Human Rights, Art. 8(2)(b).

<sup>59</sup> U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), para. 16, CCPR/C/21/Rev.1/Add.11, 31 August 2001.

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Universal Declaration of Human Rights declares that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.<sup>60</sup> American Declaration of the Rights and Duties of Man describes that every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws.<sup>61</sup> International Covenant on Civil and Political Rights describes that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or parts of a trial for reasons of moral, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceeding concern matrimonial disputes or the guardianship of children.<sup>62</sup> Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms describes that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be

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<sup>60</sup> Universal Declaration of Human Rights, Art. 10.

<sup>61</sup> American Declaration of the Rights and Duties of Man, Art. XXVI.

<sup>62</sup> International Covenant on Civil and Political Rights, Art. 14(1).

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pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.<sup>63</sup> American Convention on Human Rights says that 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'<sup>64</sup> Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.<sup>65</sup> In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.<sup>66</sup> African Charter on Human and Peoples' Rights describes that every individual shall have 'the right to have his cause/case heard' which comprises the 'right to be tried within a reasonable time by an impartial court or tribunal'.<sup>67</sup>

The Rome Statute guarantees that the accused has the right to be present at his or her ICC (International Criminal Court) trial,<sup>68</sup> and the trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be held in closed session for the purposes set forth in article 68, or to protect

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<sup>63</sup> Council of Europe Convention for the protection of Human Rights, Art. 6(1).

<sup>64</sup> American Convention on Human Rights, Art. 8(1).

<sup>65</sup> *Ibid.*, Art. 8(5).

<sup>66</sup> International Covenant on Civil and Political Rights, Art. 14(4).

<sup>67</sup> African Charter on Human and Peoples' Rights, Art. 7(1)(a).

<sup>68</sup> The Rome Statute, Article 63.

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confidential or sensitive information to be given in evidence.<sup>69</sup> In the determination of any charge, the accused shall be entitled to a public hearing,<sup>70</sup> having regard to the provisions of the Statute, to a fair hearing<sup>71</sup> conducted impartially,<sup>72</sup> and to the following minimum guarantees, in full equality:

- a) to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;<sup>73</sup>
- b) to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;<sup>74</sup>
- c) to be tried without undue delay;<sup>75</sup>
- d) to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;<sup>76</sup>
- e) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;<sup>77</sup>
- f) to make an unsworn oral or written statement in his or her defence;<sup>78</sup> and
- g) not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.<sup>79</sup>

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<sup>69</sup> The Rome Statute, Article 64.

<sup>70</sup> *Ibid.*, Article 67.

<sup>71</sup> *Ibid.*, Article 67.

<sup>72</sup> *Ibid.*, Article 67.

<sup>73</sup> *Ibid.*, Article 67(a).

<sup>74</sup> *Ibid.*, Article 67(b).

<sup>75</sup> *Ibid.*, Article 67(c).

<sup>76</sup> *Ibid.*, Article 67(f).

<sup>77</sup> *Ibid.*, Article 67(g).

<sup>78</sup> *Ibid.*, Article 67(h).

<sup>79</sup> *Ibid.*, Article 67(i).

In addition to any other disclosure provided for in the Rome Statute, the Prosecutor shall, as soon as practicable, disclose to the defence, evidence in the Prosecutor's possession or control which he or she believes, shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.<sup>80</sup> It is duty of the States Parties to the present Charter to guarantee the independence of the courts.<sup>81</sup>

### **3.11 THE RIGHT TO EXAMINE PROSECUTION WITNESSES**

The Rome Statute provides that an accused is entitled to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her and to raise defences and to present other evidence admissible under this Statute;<sup>82</sup> the accused is also entitled to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.<sup>83</sup> Accused person has a right to examine, or have examined, the witnesses against him and to obtain the attendance<sup>84</sup> and examination of witnesses on his behalf under the same conditions as witnesses against him.<sup>85</sup>

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<sup>80</sup> The Rome Statute, Article 67.

<sup>81</sup> African Charter on Human and Peoples' Rights, Art. 26.

<sup>82</sup> *Ibid.*, Article 67 (e).

<sup>83</sup> American Convention on Human Rights, Art. 8(2)(f).

<sup>84</sup> International Covenant on Civil and Political Rights, Art. 14(3)(e).

<sup>85</sup> Council of Europe Convention for the protection of Human Rights, Art. 6(3)(d).

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### **3.12 THE RIGHT NOT TO HAVE EVIDENCE INTRODUCED AT TRIAL UNLESS IT HAS BEEN DISCLOSED TO THE ACCUSED AND HE HAS HAD AN OPPORTUNITY TO REBUT IT**

The accused should have access to all of the evidence against them.<sup>86</sup> He has a right to be present at the trial, to conduct the defence in person or through legal assistance of his choice, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.<sup>87</sup>

### **3.13 RIGHT TO A REASONED JUDGMENT**

The accused is entitled under the Rome Statute of the ICC to a reasoned judgment in writing. Requirements of the decision are that the decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.<sup>88</sup>

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<sup>86</sup> See The Rome Statute, Article 61.

<sup>87</sup> The Rome Statute of the International Criminal Court (1998) Article 67(d).

<sup>88</sup> The Rome Statute of the International Criminal Court Article 74.

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### **3.14 POST CONVICTION REVIEW: THE RIGHT TO APPEAL TO AN INDEPENDENT COURT OR TRIBUNAL WITH POWER TO REVIEW THE DECISION ON LAW AND FACTS AND SET IT ASIDE.**

The accused is entitled to appeal the judgment to a higher court.<sup>89</sup> The Rome Statute also provides the accused with the right to appeal the decision in the event he or she is convicted. The convicted person, or the prosecutor on that person's behalf, may make an appeal on the ground of: Procedural error, Error of fact, Error of law, or any other ground that affects the fairness or reliability of the proceedings or decision.<sup>90</sup> An accused who is convicted also has the right to appeal the sentence<sup>91</sup> in accordance with the Rules of Procedure and Evidence, on the ground of disproportion between the crime and the sentence; the accused may also appeal, in accordance with the Rules of Procedure and Evidence, other rulings of the ICC made during the trial process. For example: a decision with respect to jurisdiction or admissibility; a decision granting or denying release of the person being investigated or prosecuted; a decision of the Pre-Trial Chamber to act on its own initiative under Article 56, paragraph 3; a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Rome

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<sup>89</sup> American Convention on Human Rights, Art. 8(2)(h).

<sup>90</sup> *Ibid.*, Article 81(1) (b).

<sup>91</sup> *Ibid.*, Article 81(2) (a).

Statute authorizes the Trial Chamber to release the accused during the appeal if it considers it necessary; otherwise, a convicted person is to remain in custody pending an appeal.<sup>92</sup>

### **3.15 PROTECTION AGAINST CRUEL, INHUMAN OR DEGRADING PUNISHMENT, ETC.**

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. This punishment should, however, not be cruel, inhuman or degrading. Under the "Convention Against Torture"<sup>93</sup> each state party is bound to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.<sup>94</sup> It needs mention that the provisions of the convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.<sup>95</sup>

American Declaration of the Rights and Duties of Man describes that every individual who has been deprived of his liberty has the right, to humane treatment during

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<sup>92</sup> The Rome Statute, Article 81(3) (a).

<sup>93</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984). Entered into force 26 June 1987, in accordance with article 27 (1).

<sup>94</sup> Article 16 of Convention Against Torture *ibid*

<sup>95</sup> Article 16 (2), *ibid*.

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the time he is in custody.<sup>96</sup> Every person accused of an offense has the right not to receive cruel, infamous or unusual punishment.<sup>97</sup> All persons deprived of their liberty are to be treated with humanity and with respect for the inherent dignity of the human person.<sup>98</sup> All persons deprived of their liberty are to be treated with respect for the inherent dignity of the human person.<sup>99</sup>

### **3.16 SENTENCE OF DEATH NOT TO BE IMPOSED ON JUVENILES AND NOT TO BE CARRIED OUT ON PREGNANT WOMEN**

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.<sup>100</sup> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.<sup>101</sup> Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the

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<sup>96</sup> American Declaration of the Rights and Duties of Man, Article XXV.

<sup>97</sup> American Declaration of the Rights and Duties of Man, Article XXVI.

<sup>98</sup> International Covenant on Civil and Political Rights, Article 10(1).

<sup>99</sup> American Convention on Human Rights, Article 5(2).

<sup>100</sup> Article 6(5) of the International Covenant on Civil and Political Rights.

<sup>101</sup> American Convention on Human Rights 4(5).

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competent authority.<sup>102</sup> Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.<sup>103</sup>

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.<sup>104</sup>

### **3.17 EQUAL TREATMENT REGARDING FOOD, CLOTHING, READING, WRITING, PLAYING, ENTERTAINMENT, MEETING WITH FAMILY AND FRIENDS ETC UPON CONVICTION**

When a person is convicted of an offence and is sentenced according to law he is entitled to be treated at par with other convicts regarding food, clothing, imprisonment environment such as living, reading, writing, playing, entertainment, meeting with family and friends etc.<sup>105</sup> Medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.<sup>106</sup>

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<sup>102</sup> American Convention on Human Rights Article 4(6).

<sup>103</sup> American Convention on Human Rights, Article 5(6).

<sup>104</sup> International Covenant on Civil and Political Rights, Article 10(3).

<sup>105</sup> See provisions regarding equal treatment, non discrimination, and torture etc. discussed in chapter II.

<sup>106</sup> Vienna Declaration and Programme of Action, Principle 24

### 3.18 TO BE RELEASED FORTHWITH ON ACQUITTAL

When a person is acquitted he is entitled, if in custody, to be released forthwith in that case. If he is not released or set at liberty his detention becomes illegal and he is entitled to compensation for his illegal detention.

### 3.19 COMPENSATION IN CASE OF MISCARRIAGE OF JUSTICE

International Covenant on Civil and Political Rights provides that when a person is convicted of a criminal offence and subsequently his conviction is reversed or he is pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.<sup>107</sup> American Convention on Human Rights provides that every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.<sup>108</sup>

The Rome Statute provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.<sup>109</sup> When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows

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<sup>107</sup> International Covenant on Civil and Political Rights, Article 14(6).

<sup>108</sup> American Convention on Human Rights, Article 10.

<sup>109</sup> The Rome Statute of the International Criminal Court (1998) Article 85(1).

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conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.<sup>110</sup> In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.<sup>111</sup>

### 3.20 SUMMARY

A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. The ancient Latin Maxim, *nullum crimen, nulla poena sine lege* is basic to all developed Criminal Justice Systems. This principle of natural law is recognized by International law. The maxim "*Nemo debet bis vexari pro una et eadem causa*" expresses a great fundamental rule of criminal law. It is the foundation of the special pleas of *autre fois acquit*, and *autre fois convict*. Plea of *autre fois acquit* is founded on a maxim that a person should not be put in peril, for one and the same offence more than once. It is right of the accused to have

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<sup>110</sup> *Ibid.*, Article 85(2).

<sup>111</sup> *Ibid.*, Article 85(3).

adequate time and facilities for the preparation of his defense. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the Court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

The accused is entitled to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. He has a right to be present at the trial, to conduct the defence in person or through legal assistance of his choice, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

Every individual who has been deprived of his liberty has the right, to humane treatment during the time he is in custody. Every person accused of an offense has the right...not to receive cruel, infamous or unusual punishment.

Accused is entitled to a reasoned judgment in writing. The accused is also entitled to appeal the judgment to a higher court.

## CHAPTER IV

### OBLIGATIONS OF THE MEMBER STATES

#### 4.1 INTRODUCTION

In previous chapters, various rights of the accused persons have been elaborated. From what has been discussed therein, it has become crystal clear that the rights described therein are available to all persons accused of any crime/offence; regardless of the fact that they are accused of terrorism, or some other offence. This leads to the conclusion that persons accused of; terrorism or committing terrorist acts have all aforementioned minimum rights under international law.

Now the most important question, which arises, is whether States are bound to protect those rights and to make efforts to stop their violations, if any. It seems appropriate to have a look at the nature and purposes of the UN Charter<sup>1</sup>, obligations of the member States under the International law, types of these obligations and right of the member States to derogate such obligations.

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<sup>1</sup> Charter of the United Nations, 1945 as amended. Amendments to Articles 23, 27 and 61 in force 31 August 1965. Article 61 further amended, in force 24 September 1973. Amendment to Article 109 in force 12 June 1968.

## 4.2 UN CHARTER AND OBLIGATIONS OF THE UN MEMBER STATES

The United Nations are an inter-governmental organization, whose constituent instrument is its Charter (UNCH), signed at San Francisco, USA, on 26 June 1945. Article 1 includes, among its purposes to achieve international co-operation..... in promoting and encouraging respect for human rights and for fundamental freedom for all...<sup>2</sup>

Since UN Charter is a constituent statute of the United Nations, an intergovernmental organization, therefore it has the status of a multilateral treaty, imposing on its State Parties binding obligations under International law. Article 56 clearly reveals that all members have pledged themselves to take joint and separate action to achieve the purposes set forth in Article 55. One of those purposes is to promote universal respect for, and observance of, human rights and fundamental freedoms for all.<sup>3</sup> Although most of the UN member states have ratified or/and acceded to the later human rights treaties which impose their own, more specific and detailed, state obligations, yet the UNCH obligations remains important for those UN members States which have not yet become bound by any of such other treaties and it is still for them, the only treaty obligation relating to Human Rights. Some argue that the obligation is only to “promote” and not to protect Human Rights and fundamental freedoms while others say that the legal duty to promote respect

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<sup>2</sup> Article 1(3) of the United Nations Charter.

<sup>3</sup> Article 55 (c) of the UN Charter.

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for Human Rights includes the legal duty to respect them.<sup>4</sup> The latter view is fortified by the fact that the State parties pledge themselves to take action and achieve universal respect for, and observance of Human Rights and Fundamental Freedoms. It needs mention that UN Charter contains no definition, or catalogue, of the Human Rights & Fundamental Freedoms. However, this omission had been made good by the adoption of the Universal Declaration of Human Rights.<sup>5</sup> The conduct of the majority of the United Nations members States show that this UN charter obligation is binding in International law on all the UN's members, and is direct and unqualified.<sup>6</sup>

The juridical status of the Universal Declaration of Human Rights, however, remains controversial. The debates in which UDHR found its genesis and its Preamble reveals that, at the time of its adoption by the UN General Assembly in 1948, it was not by itself intended to create binding legal obligations for the UN's member states therefore some commentators hold that, however great its moral or political authority, UDHR cannot by itself create binding obligations under international law.<sup>7</sup> It will be of great benefit to examine the Preamble which ends with the following words:

“Now therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures national and international, to

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<sup>4</sup> H. Lauterpacht, *International Law & Human Rights*, p. 152. Also see *Human Rights: Concepts and Standards*, pp. 11-12.

<sup>5</sup> See Preamble of UDHR which expressly refers back to the UN Charter obligation, as the agreed and authentic UN catalogue.

<sup>6</sup> For detailed refutation, see H. Lauterpacht, *International Law & Human Rights* Ch. 10, 166.

<sup>7</sup> *Ibid.*, Ch. 17, 394.

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secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the people of territories under their jurisdiction.”

This supports the other view i.e. that, over the fifty nine years since its adoption, Universal Declaration of Human Rights has acquired the status of *jus cogens* in International Law through consistent practice of the States<sup>8</sup> as well as of international institutions<sup>9</sup> in invoking its provisions as evidence of the content of International Law. Being a part of customary International Law it is binding on all states<sup>10</sup>. Be that as it may, it seems safe to say that the Universal Declaration of Human Rights has created binding obligations for the Member States of the UN, not because it has become part of customary International Law, but because they have expressly accepted these obligations. Even otherwise the Proclamation of Tehran 1968 has made it so.<sup>11</sup> In the South West African Cases (Second Phase)<sup>12</sup>, Judge Tanaka in his dissenting opinion wrote that “the expression ‘human rights and fundamental freedoms’ in Article 55 (C) of UN Charter must now be interpreted to mean the rights and freedom enumerated in UDHR”.

It may be said with ease, that UDHR gave a new meaning to the human rights strategy in Criminal Justice Administration and the defence of the rights of the accused

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<sup>8</sup> See UN Action in the field of Human Rights, New York, 1980, p 21-22.

<sup>9</sup> See UN Action in the field of Human Rights. P 14-18, 22.

<sup>10</sup> See J. P. Humphrey, ‘The Universal Declaration of Human Rights: Its history, impact and juridical character’ in *Human Rights 30 years after the universal declaration*, p. 21; H. Waldock, ICLQ, Supplementary publications No. II, 1965,15.

<sup>11</sup> The representatives of 84 states adopted a solemn proclamation containing the following clause: “the Universal Declaration of Human Rights, states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.”

<sup>12</sup> ICJ Reports, 1966, pp.289-93.



came to be recognized, for the first time as the legitimate objective of the international and national communities. Gradually these guiding principles relating to the administration of justice as expounded by International instruments UDHR, ICCPR etc. permeated the legal systems of both common-law and non-common law countries of the world. Such rights were included (as fundamental rights) in most written constitutions of the world.<sup>13</sup>

### 4.3 TYPES OF OBLIGATIONS

Under the International Law, there are various types of obligations on the member states. Some are absolute and immediate while others are qualified and progressive. Before making any comment, it seems necessary to have a look on the texts.

International Covenant on Civil and Political Rights describes that each State Party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,<sup>14</sup> and where not already provided for by existing legislative or other measures, each State Party to the ICCPR undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the ICCPR, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the ICCPR.<sup>15</sup>

Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms describes that the High Contracting Parties shall secure to

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<sup>13</sup> See UN Action in the field of Human Rights, New York, 1980, pp. 21-22.

<sup>14</sup> International Covenant on Civil and Political Rights, Art. 2 (1).

<sup>15</sup> *Ibid.*, Art. 2(2).

everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.<sup>16</sup> American Convention on Human Rights describes that the State Parties to the Convention<sup>17</sup> undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms<sup>18</sup> and where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State Parties undertake to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.<sup>19</sup> It needs mention that for the purposes of American Convention on Human Rights, 'person' means every human being.<sup>20</sup> African Charter on Human and Peoples' Rights describes that the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them<sup>21</sup> and the States Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in their present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.<sup>22</sup>

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<sup>16</sup> Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms, Art. 1.

<sup>17</sup> i.e. American Convention on Human Rights

<sup>18</sup> American Convention on Human Rights, Art. 1(1).

<sup>19</sup> *Ibid.*, Art. 2.

<sup>20</sup> *Ibid.*, Art. 1(2).

<sup>21</sup> African Charter on Human and Peoples' Rights, Art. 1.

<sup>22</sup> *Ibid.*, Art. 25.



Each of these Articles imposes upon their respective State parties the obligation to secure and respect the Human Rights and fundamental freedoms defined elsewhere in these treaties/ covenants. These obligations have two principal features:

- a) They are absolute, they are not expressed as being limited either by the resources available to the state, or by reference to the means to be employed in performing them.
- b) They are immediate i.e. each state is bound to take the necessary steps to secure the human rights and fundamental rights concerned from the moment the treaty enters into force for that state.

The beneficiaries are “all individuals within its territory and subject to its jurisdiction” in ICCPR 2(1), and all persons ‘subject to their jurisdiction in EHR 1 and AMR 1(1). This shows that protection is available to all individuals subject to jurisdiction of a member State and it could not be limited by reference to any nationality. The word used is *all individuals* and not all citizens.

The qualified and progressive obligations are usually of an economic and technical nature which could only be achieved in due passage of time as per resources available to the state parties e.g. International Covenant on Economic, Social and Cultural Rights says that ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all

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appropriate means, including particularly the adoption of legislative measures.<sup>23</sup> And 'The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.<sup>24</sup>

American Convention on Human Rights describes that 'The States Parties undertake to adopt measures, both internally and through international cooperation. Especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full scientific realization of the rights implicit on the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.'<sup>25</sup>

Texts show that such obligations are not absolute but qualified i.e. as per Art 2(1) ICESCR, they are limited to the maximum of the resources available to the State Parties, in American Convention on Human Rights, and African Charter on Human and Peoples' Rights they are limited to "appropriate means". These are also not immediate rather progressive i.e. in ICESCR these obligations call for steps to be taken or in American Convention on Human Rights, for measures to be adopted 'with a view to achieving progressively the full realization" of the rights concerned. However, qualified

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<sup>23</sup> International Covenant on Economic, Social and Cultural Rights, Art. 2(1).

<sup>24</sup> *Ibid.*, Art. 23.

<sup>25</sup> American Convention on Human Rights, Art. 26.

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and progressive though they may be, all these are still binding obligations in International Law. Art. 2 of UDHR says that "... Furthermore no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.' The provision of ICCPR and ICESCR extend to all parts of federal states without any limitations or exceptions.<sup>26</sup> In Federal States, the Federal Government is responsible for external relations and is therefore the subject of International Law. They (ICCPR & ICESCR) simply declare that their provisions 'shall extend to all parts of Federal States' leaving it to Federal States Parties to carry out that injunction within constituent units of the federation.

#### **4.4 PROVISION OF DOMESTIC REMEDIES**

Most of the International instruments require their State Parties to provide effective domestic remedies for violations of Human Rights. UDHR declares that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'<sup>27</sup> ADRDM describes that every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple brief procedure whereby the courts will

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<sup>26</sup> See International Covenant on Civil and Political Rights, Art. 50; Art. 10 of Optional Protocol to International Covenant on Civil and Political Rights. Also see Art. 28 of International Covenant on Economic, Social and Cultural Rights.

<sup>27</sup> Universal Declaration of Human Rights, Art. 8.

protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.<sup>28</sup> ICCPR describes that each State Party to the ICCPR undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>29</sup>

Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>30</sup> American Convention on Human Rights describes that everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.<sup>31</sup> And the States Parties undertake:

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<sup>28</sup> American Declaration of the Rights and Duties of Man, Art. XVIII.

<sup>29</sup> International Covenant on Civil and Political Rights, Art. 2(3).

<sup>30</sup> Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms, Art. 13.

<sup>31</sup> American Convention on Human Rights, Art. 25(1).

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- (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
  - (b) to develop the possibilities of judicial remedy; and
  - (c) to ensure that the competent authorities shall enforce such remedies when granted.<sup>32</sup>

African Charter on Human and Peoples' Rights declares that every individual shall have the right to have his cause heard.<sup>33</sup> This right comprises, the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force<sup>34</sup> and the States parties to the Charter have the duty to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.<sup>35</sup>

In order to be effective a remedy must be accessible and sufficient. In other words, the victim must be in a position to initiate or set into motion a procedure that will result in a decision from the relevant authority, having the power to redress the alleged violation if it is in fact established. If such redressal order had no likelihood of being accepted or is mere repetition of a remedy which has already been used then it is not an effective remedy.

Since the most frequent violators of such rights and freedoms are the governments or other executive/administrative authorities of the State, effective redress can only come

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<sup>32</sup> *Ibid.*, Art. 25(2).

<sup>33</sup> African Charter on Human and Peoples' Rights, Art. 7(1).

<sup>34</sup> *Ibid.*, Art. 7(1)(a).

<sup>35</sup> *Ibid.*, Art. 26.

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through institutions that have the necessary independence and impartiality, such as courts and tribunals.

Although it is preferable that redress for violations of Human Rights and Fundamental Freedoms should be available to victims within their own States, yet there should be some International institutions for redress, in case their own states fail to do so.

#### 4.5 DEROGATION

Derogation is an extraordinary restriction of the right beyond what is normally allowed by its terms. Derogations allow a severe limitation of a treaty right that would otherwise constitute a violation of the treaty, therefore, derogation clauses tend to be restrictive, and are strictly construed. Most of the human rights instruments also specify the non-derogable rights. The government concerned can exercise its powers of derogation if there is a war or a 'public emergency threatening the life of a nation'. But it should be kept in mind that all human rights cannot be suspended even if such power is exercised to the maximum permissible extent because there are several rights from which no derogation of any kind is allowed in any circumstances e.g. right to life, freedom from torture and cruel, inhuman and degrading punishment, *ex post facto* criminal liability and punishment, slavery, recognition as person before law; and freedom of conscience and religion etc.<sup>36</sup> This list is not exhaustive; there are additionally non-derogable aspects of rights that in other respects may be subject to derogation, e.g. Article 14 of ICCPR which enumerates

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<sup>36</sup> See International Covenant on Civil and Political Rights, Art. 4(2).

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fair trial guarantees, is not among the list of non-derogable rights yet the United Nations Human Rights Committee has found that the fundamental requirements of fair trial must be respected by a State party deciding to derogate/ derogating from the Covenant, during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected, and the courts must be enabled to protect the non-derogable rights and to redress their violations, if any, especially to decide without delay on the lawfulness of detention.<sup>37</sup> It would be advantageous to have a glance at the relevant provisions of International law.

In time of public emergency which threatens the life of the nation<sup>38</sup> and the existence of which is officially proclaimed, the state parties to the International Covenant on Civil and Political Rights, may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.<sup>39</sup> No derogation from Articles 6, 7, 8 (paragraphs 1 and

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<sup>37</sup> UN HR Committee, General Comment No.29, States of Emergency (Article 4), para 16, CCPR/C/@/Rev.1/Add.11,31 August 2001.

<sup>38</sup> The first requirement is that there should be a "public emergency" that "threatens the life of the nation." According to the experts who drew up the Siracusa Principles on the Limitation and Derogation provisions in international law, a threat to the life of a nation is one which: "(a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant." These are in fact the criteria to which human rights protection mechanisms refer in assessing the threat. (The Siracusa Principles were drawn up in 1984 during a two-day conference of 31 distinguished experts in international law, with a view to defining more precisely the international law approach to derogations and limitations) The Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights, Human Rights Quarterly, vol. 7, No. 1 (1985), principle 39.

<sup>39</sup> International Covenant on Civil and Political Rights, Art. 4(1).

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2), 11, 15, 16 and 18 may be made under Article 4(2) by virtue of Article 4(3) of ICCPR.<sup>40</sup> Any state party to the International Covenant on Civil and Political Rights, availing itself of the right of derogation, shall immediately inform the other states parties to the Covenant, through the intermediary of the secretary-general of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.<sup>41</sup>

Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms provides that "In time of war or other public emergency<sup>42</sup> threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."<sup>43</sup> And "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."<sup>44</sup> Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-

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<sup>40</sup> *Ibid.*, Art. 4(2).

<sup>41</sup> *Ibid.*, Art. 4(3).

<sup>42</sup> The European Commission of Human Rights added that a "public emergency" cannot be considered to threaten the life of the nation" unless the following features are present: 1. It must be actual or imminent. 2. Its effects must involve the whole nation. 3. The continuance of the organized life of the community must be threatened. 4. The crisis or danger must be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate. See European Commission of Human Rights, Report of the Commission, 12a Yearbook Eur. Conv. Human Rights (1969), para. 153.

<sup>43</sup> Council of Europe Convention for the protection of Human Rights, Art. 15 (1).

<sup>44</sup> *Ibid.*, Art. 15(2).

General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.<sup>45</sup>

European Social Charter describes that “In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”<sup>46</sup> And any Contracting Party which has availed itself of this right of derogation is bound, within a reasonable lapse of time to keep the secretary-general of the Council of Europe fully informed of the measures taken and of the reasons therefor. It is also bound to inform the Secretary-General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.<sup>47</sup> “The Secretary-General shall in turn inform other Contracting Parties and the Director-General of the International Labor Office of all communications received in accordance with paragraph 2 of this Article.”<sup>48</sup> It needs mention that the term ‘in time of war or other public emergency’ shall be so understood as to cover also the *threat of war*.<sup>49</sup>

In *Lawless v Ireland*,<sup>50</sup> European Court of Human Rights observed that the natural and customary meaning of the words ‘public emergency threatening the life of the nation’ is sufficiently clear; they refer to an exceptional situation of crises or emergency

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<sup>45</sup> *Ibid.*, Art. 15(3).

<sup>46</sup> European Social Charter, 1961, Article 30(1).

<sup>47</sup> *Ibid.*, Art. 30(2).

<sup>48</sup> *Ibid.*, Art. 30(3).

<sup>49</sup> *Ibid.*, Art. 30(2).

<sup>50</sup> (322/57) Judgment: 1 EHRR (European Human Rights Reports) 15.

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which effects the whole population and constitutes a threat to the organized life of the community of which the State is composed.

American Convention on Human Rights describes that “In time of war, public danger, or other emergency that threatens the independence or security of a State-Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin.”<sup>51</sup> However this provision does not authorize any suspension of the following Articles: 3 (right to juridical personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. Any state party availing itself of the right of suspension is bound to inform the other States Parties, through the Secretary-General of the organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

The above mentioned treaties require derogation to be notified to their respective depositaries along with extent and reasons of derogation. However it is not clear

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<sup>51</sup> American Convention on Human Rights, Art. 27(1).

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whether failure to notify invalidates the derogation, or is no more than a breach of a formal obligation.

The extent of any suspension/derogation must be confined to what is 'strictly required by the exigencies of the situation'. This matter is subject to the objective supervision of the competent independent international institutions.

It needs mention that in times of armed conflicts, whether international or non-international/internal, there also comes into operation another branch of International Law known as International Humanitarian Law. International humanitarian law is comprised in a number of treaties promoted by the Red Cross Movement, The Hague Conventions of 1864 and 1907, the Geneva Protocol of 1925, the four Geneva Conventions<sup>52</sup> of 1949 and the Additional Protocols I and II to the latter, adopted in 1977. As my basic concern is with

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<sup>52</sup> First Geneva Convention "*for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*" (first adopted in 1864, last revision in 1949) Second Geneva Convention "*for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*" (first adopted in 1949, successor of the 1907 Hague Convention X) Third Geneva Convention "*relative to the Treatment of Prisoners of War*" (first adopted in 1929, last revision in 1949) Fourth Geneva Convention "*relative to the Protection of Civilian Persons in Time of War*" (first adopted in 1949, based on parts of the 1907 Hague Convention IV) In addition, there are three additional amendment protocols to the Geneva Conventions: Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries. Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries. Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of June 2007 it had been ratified by 17 countries and signed but not yet ratified by an additional 68 countries. All four conventions were last revised and ratified in 1949, based on previous revisions and partly on some of the 1907 Hague Conventions; the whole set is referred to as the "Geneva Conventions of 1949" or simply the "Geneva Conventions". Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars. Nearly all 200 countries of the world are "signatory" nations, in that they have ratified these conventions.

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the rights of accused and not PoW's (prisoners of war), therefore discussion on international humanitarian law is avoided, unless it becomes necessary. The purpose of international humanitarian law is to limit the sufferings of both combatants and non-combatants. Derogation clauses permit the suspension rather restriction of certain rights in times of war or public emergency but they do not preclude application of the ICCPR to the war on terrorism.

#### **4.6 RESTRICTIONS AND LIMITATIONS**

Most treaties contain specific provisions in various individual Articles, which specify the limitations, and restrictions that may be allowed on the particular rights or freedoms with which those Articles deal, thus circumscribing the boundaries of these particular rights and freedoms.<sup>53</sup> These provisions require that restrictions or limitations must be prescribed by law and must be objectively justified on one or more of certain specified grounds. The form of the justification requires that the restriction or limitation must be 'necessary' in a 'democratic society' to support or protect some objective. The word 'some objective' may include National Security, Public Safety, Public order, Prevention of Disorder, Prevention of Crime, Law & Order, Public Health, Public Morals, Rights and Freedoms of Others, Public Interest, General Interest of Community, Public Need, Public Utility or Social Interest, Territorial Integrity, Interest of Justice, Private

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<sup>53</sup> For instance see Universal Declaration of Human Rights, Art. 29; American Declaration of the Rights and Duties of Man, Art. XXVIII, XXIX; International Covenant on Civil and Political Rights, Art. 47; International Covenant on Economic, Social and Cultural Rights Art. 4 & 25; Council of Europe Convention for the protection of Human Rights and Fundamental Freedoms, Art. 16&18; American Convention on Human Rights, Art. 30&32; African Charter on Human and Peoples' Rights, Art. 27.

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lives, Confidentiality of information etc. These restrictions and limitations are exceptions to the general rule. The purpose of these codified “states of exception” i.e. derogation, restrictions, and limitations is to strike a balance between universal human rights norms and national interests. ICCPR prescribes that there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the ICCPR pursuant to law, conventions, regulations or custom on the pretext that the ICCPR does not recognize such rights or that it recognizes them to a lesser extent.<sup>54</sup>

UDHR, ICCPR, etc prohibit the abuse of the rights recognized therein and categorically state that these rights and freedoms should not be exercised contrary to the purposes and principles of the United Nations and no State, group or person has any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized by the UDHR or ICCPR or to limit them to a greater extent than is provided for in the ICCPR.<sup>55</sup>

#### **4.7 “GLOBAL WAR ON TERROR” OR “LAW ENFORCEMENT”: A DILEMMA**

U.S. President George W. Bush had raised a slogan that “We will bring terrorists to justice”<sup>56</sup> or “Justice to terrorists” wherever they may be.<sup>57</sup> The persons

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<sup>54</sup> A. 5(2) of ICCPR. See also A. 5(2) of ICESCR, A.60, 61 of CECHR, A.32 of ESC, A. 29 & 31 of Am.CHR.

<sup>55</sup> See A. 29(3) and 30 of UDHR, 5(1) of ICCPR, 5(1) of ICESCR, 17 of CECHR, 29 of Am.CHR, etc.

<sup>56</sup> President George W. BUSH, “State of the Union Speech.” January 29, 2002, stating, “We will... bring terrorists to justice”. Visit: <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

<sup>57</sup> President, George W. Bush, did in fact warn the international community on 29 September 2001: “Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.”

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detained in *Guantanamo Bay* are example of the first part i.e. bringing terrorist to justice, whereas invasion of Afghanistan and Iraq is example of the latter part. President Bush has declared a “Global war against terror”<sup>58</sup>. It is interesting to note that stereotype speeches are made by concerned quarters in USA on various occasions, for example, John N. Mitchell<sup>59</sup> in his speech<sup>60</sup> said regarding (typical Black American) Criminals who commit index crimes that, his/their crime is forcing us “to change the fabric of our society”, “forcing us, a free people, to alter our pattern of life”, “to withdraw from our neighbors, to fear all strangers and to limit our activities to safe areas”.<sup>61</sup> After 9/11 US authorities have been making same sort of speeches. The first question that arises is whether the “war on terror” is really a war, that is to say an armed conflict in the legal sense of the term.<sup>62</sup> The

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<sup>58</sup> ICRC says that, “The phrase ‘war on terror’ is a rhetorical device having no legal significance. There is no more logic to the automatic application of the laws of armed conflict to the ‘war on terror’ than there is to the ‘war on drugs’, ‘war on poverty’ or ‘war on cancer.’ Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialised law of corporations for its failure to address all business disputes.” See Rona, G., *When is a “war” not a “war”? The proper role of the law on armed conflicts and the “global war on terror,”* International Committee of the Red Cross, 16 March 2004, pp. 1-2.

<sup>59</sup> A former Attorney General for USA.

<sup>60</sup> “Crime Prevention: Citizen Participation” delivered before the conference on ‘Crime and the Urban Crises’ of the ‘National Emergency Committee’ of the ‘National Council on Crime and Delinquency, San Francisco, California’ on 3<sup>rd</sup> February 1969.

<sup>61</sup> Jeffrey H. Reiman, *The Rich get Richer and the Poor get Prison; Ideology, Class and Criminal Justice* 2<sup>nd</sup> edition, Macmillan, 1984. (*Reprinted in Taking Sides*, 3<sup>rd</sup> edition, ed, Richard C. Monk. The Dushkin Publishing group, inc. p. 61).

<sup>62</sup> According to humanitarian law, a fundamental element of the concept of armed conflict is the existence of warring “parties.” In an international armed conflict, the parties to the conflict are two or more States (or States and national liberation movements), whilst in a non-international armed conflict, the parties may be either a State and armed groups (for example, rebel forces), or simply armed groups. In both cases, the parties to an armed conflict have a military training as well as a more or less structured organisation and command. They are supposed to be able to respect and make others respect humanitarian law. The war engaged by the coalition led by the United States in Afghanistan in October 2001 was clearly a war in the original meaning of the term. According to ICRC, the Geneva Conventions of 1949 and the rules of customary international law were in all respects applicable to this international armed conflict between, on the one hand, the coalition led by the United States and on the other, Afghanistan. The American armed forces began an armed conflict on Afghan soil, directed not only against the Al Qaeda targets, but also against the Taliban. For this last reason at least, these hostilities are described as international armed conflict and the Geneva Conventions apply to hostilities in Afghanistan.

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second question is; whether the attacks of 11 September 2001, violent and terrible though they were, constitute acts of war triggering the start of an armed conflict. Whether a State can be at war with a terrorist group or a multinational criminal organization is a serious question of fact.<sup>63</sup> International humanitarian law recognises two categories of armed conflict--- international and non-international. Generally, when the “war on terror” involves such use of force, as in the recent US and allied invasion of Afghanistan i.e. when a State resorts to force against another State, the international law on international armed conflict applies. When the “war on terror” amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within the State, the situation may amount to non-international armed conflict in the following cases:

- a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots;
- b) if parties can be defined and identified;
- c) if the territorial bounds of the conflict can be identified and defined; and
- d) if the beginning and end of the conflict can be defined and identified. In the absence of these defining characteristics of either international or non-international armed conflict, humanitarian law is not applicable.”<sup>64</sup>

It is difficult to know with certainty, what US “war on terror” means.<sup>65</sup> However, the US actions reveal that it does not mean law enforcement.<sup>66</sup> At the same time it is not a

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<sup>63</sup> The criteria developed, through time, by the ICRC, regarding the applicability of the Geneva Conventions were worked out according to traditional conflicts and, according to U.S. the Geneva Conventions are not therefore wholly adapted to the new phenomenon of global terrorism and its repression.

<sup>64</sup> Rona, G., When is a “war” not a “war”? *The proper role of the law on armed conflicts and the “global war on terror,”* International Committee of the Red Cross, 16 March 2004, pp. 1-2.

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war in a real sense<sup>67</sup>, and excepting Afghanistan and Iraq<sup>68</sup>, there is no real armed conflict between warriors and terrorists. According to the ICRC “The phrase ‘war on terror’ is a rhetorical device having no legal significance.<sup>69</sup> .... Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialised law of corporations for its failure to address all business disputes.”<sup>70</sup> Nevertheless, the American administration denies this factual situation and claims that it is a global war against terror,<sup>71</sup> extending well beyond traditional battlefields, to which the law of armed conflicts applies and will only come to an end when terror is completely eradicated.<sup>72</sup>

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<sup>65</sup> This may be political use of the term “war”. Such use of the term “war” to describe rolling campaigns to eradicate perceived threats to U.S. security and national interests is not new but has been used before, for example, in the context of ‘the war on drugs’. According to the ICRC “Terrorism” is a phenomenon and war cannot be waged either in practice or from a legal viewpoint against a phenomenon. One can only fight against an identifiable party to a conflict.

<sup>66</sup> For example on July 22, 2002 Secretary of defence Donald Rumsfeld issued a secret directive ordering Air Force General Charles Holland, “To develop a plan to find and deal with members of terrorist organization. The objective disclosed was ‘to capture terrorists for interrogation or if necessary, to kill them, not simply to arrest them in law-enforcement exercise. It needs mention that on Nov. 2001 a Hellfire missile was fired (by an un-named American Predator) at an automobile in Yemen which was believed to be carrying an Al Qaeda leader named Qaed Salim Sinan al-Harethi. Al-Harethi and five other passengers were killed. See S.M. Hersh, “Manhunt: The Bush administration’s new strategy in the war against terrorism”, *The New Yorker*, 23 and 30 December 2002.

<sup>67</sup> In a statement to the House of Commons on 15 October 2002, British Prime Minister Tony Blair said: “The War on Terror is a war, but of a different sort than the ones we’ve been used to.” It is war in the sense that the United States believes itself to be fighting for its very survival, and perceives the terrorist threat as potentially apocalyptic.

<sup>68</sup> U.S. attack on Afghanistan, on allegations of harbouring Al Qaeda operatives, was clearly an international armed conflict. U.S. attacks against Iraq on the accusations of Saddam Hussein’s alleged possession of weapons of mass destruction, and the links to Al Qaeda, albeit in the absence of any evidence, was used by the Bush administration to link the attack to the war on terror, then this too is clearly an aspect of the war on terror which fits within the framework of the laws of war and which can be clearly understood as an international armed conflict, involving *at least* two States.

<sup>69</sup> There is no more logic to the automatic application of the laws of armed conflict to the ‘war on terror’ than there is to the ‘war on drugs’, ‘war on poverty’ or ‘war on cancer.’

<sup>70</sup> Rona, G., When is a “war” not a “war”? *The proper role of the law on armed conflicts and the “global war on terror*,” International Committee of the Red Cross, 16 March 2004 p. 1.

<sup>71</sup> Antonio Cassese has pointed out that “[w]hile it is obvious that in this case ‘war is a misnomer’, ‘the use of the term ‘war’ has a huge psychological impact on public opinion. It is intended to emphasize both that the attack is so serious that it can be equated in its evil effects with a state aggression, and also that the necessary response exacts reliance on all resources and energies, as if in a state of war.” See Antonio Cassese,



Discussing the same subject Dinah Pokempner, writes:

“Is the State engaged in “war” or “law enforcement”? The choice between these paradigms has profound implications for human rights—namely, whether we have entered the territory of derogation or not. There are implications for the use of force, powers of arrest and detention, and administration of justice. Over the long run, easy resort to the institutions and rules of war has a debilitating effect for civil institutions and norms that protect human rights. It is important, wherever possible, to avoid the easy rhetorical resort to “war talk” and defend the character of democratic societies.... In war, combatants are legally entitled to use lethal force against enemy combatants. They may not be punished for intentionally killing the enemy, nor are they even necessarily subject to reporting or review. This is known as “combatant’s privilege.” ....[Whereas] outside of war, there is no “combatant’s privilege.” Police, as well as military personnel acting in a law enforcement capacity, are held to strict standards on the use of lethal force.<sup>73</sup> Every incident of firearm use by officers in performance of their duty must be reported and subject to review, particularly where death, injury, or other grave consequences result. This divergence is of plain relevance to the practice of targeting individuals for assassination. In armed conflict, it is legal, if not always prudent, to target officials who are in the chain of command, either formally or functionally, up to and including the commander-in-chief, even when they are sleeping or undefended (but not when they lay down arms and surrender). Apart from war, the deliberate killing of a public enemy is unlawful except under the above exigent circumstances, and in any event, such a killing must be thoroughly investigated.<sup>74</sup> In the case of armed conflict, rebel forces are subject to IHL. At

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“Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, 12 *European Journal of International Law* (2001) p. 993.

<sup>72</sup> Haynes, W., J., *Enemy Combatants, Memorandum, Council on Foreign Relations*, p. 1, available on the website: [www.cfr.org](http://www.cfr.org). This being the case, it also confers the power to detain persons at least until hostilities cease, in other words, until the complete eradication of terrorism. In addition, it becomes competent to sentence them, in special military commissions, for war crimes and crimes against humanity perpetrated by them in violation of international humanitarian law. As it happens, the setting up of these special military commissions was authorised on the basis of a presidential decree (*Executive Order on Military Trials for People Accused of Terrorism*) signed by President Bush on 13 November 2001.<sup>21</sup> These commissions are equivalent to military tribunals and have jurisdiction to impose the death penalty, following a secret procedure and without any right of appeal for the defendant. Moreover, it is the President himself who has discretionary power to decide whether a person falls within the jurisdiction of these special commissions, solely on the basis of being suspected of perpetrating or participating in terrorist acts.

<sup>73</sup> These are most clearly articulated in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and are common to most legal systems. One may only shoot in self-defence, to defend others against “the imminent threat of death or serious injury,” to prevent a “particularly serious crime involving grave threat to life,” or to arrest such a perpetrator and only when less extreme measures will not suffice. One may shoot to kill only “when strictly unavoidable in order to protect life.”

<sup>74</sup> Dinah Pokempner, “*Terrorism And Human Rights: The Legal Framework*”, in *Terrorism and International Law, Challenges & Responses*, ed; Professor Michael N. Schmitt. page 25. International Institute of Humanitarian Law, Sanremo, 2002. p.25.

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another end of the spectrum are global terrorist networks that resemble loose criminal cartels more than armies, a sort of entrepreneurial model, where it is less clear whether or what IHL applies, though criminal law does.<sup>75</sup>

Without entering into the controversy of lawful, un lawful or enemy combatants or the international legal status of persons captured in Afghanistan as combatants or unlawful combatants and their entitlement to the protection of Geneva Conventions<sup>76</sup> or considering what is the most appropriate forum for prosecuting individuals responsible for 9/11 attacks, one may safely say that when the struggle against terror takes the form of an armed conflict International humanitarian law is applicable in its entirety, and it is not possible to pick and choose which of the rules are applicable. International humanitarian law does not provide a menu of options for States Parties to select from: it is binding in its entirety on High Contracting Parties. It must be remembered that the protection offered by International humanitarian law does not amount to impunity from prosecution and captured persons may be brought to justice both for violations of International humanitarian law committed during the hostilities and any previous involvement in criminal acts. However, national and international criminal laws are the appropriate legal tools for responding to terrorism where it poses a threat outside situations of armed conflict.<sup>77</sup> It seems more judicious to speak of the 'fight against terrorism' rather than the 'war on terror' as the former is multifaceted.

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<sup>75</sup> Ibid, p. 22.

<sup>76</sup> See Article 5 & 130 of the Geneva Convention No. III, 1949, and Article 147 of the Geneva Convention No. IV, 1949.

<sup>77</sup> The laws of war do not generally apply to the "war on terrorism," unless it assumes the clear characteristics of an armed conflict.



#### 4.7 SUMMARY

International Human Rights instruments confer upon every human being who is captured or arrested a status, *inter alia*, of a prisoner of war, or a suspect / an accused. When a person accused of any offence including terrorism, is captured or arrested and is brought within detention of forces or camps under control of any state, he becomes subject to the jurisdiction of that state regardless of his own national or social origin or the place from where he is captured or arrested.<sup>78</sup> Moreover, every member state, especially USA who is leading the “global war on terror” is bound to respect its legal obligations especially the minimum standards guaranteed by international law.

Derogation clauses permit the suspension rather restriction of certain rights in times of war or public emergency but they do not preclude application of the ICCPR to the war on terrorism.

The nature of international human rights law suggests that it applies in all circumstances as it defines the minimum rights protections necessary to prevent the arbitrary exercise of power. This body of law reflects the collective normative aspirations of the international community; and as such, provides an indispensable framework for evaluating specific policy options in the “war on terrorism.” When applied international human rights law establishes conclusively that all persons subject to the jurisdiction of a UN member state, as a matter of law, are entitled to certain basic rights including: the right not to be detained arbitrarily; the right to humane conditions and treatment if detained; and, the right to a fair trial on any criminal charges.

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<sup>78</sup> Being so, the question is not whether Guantanamo Bay is outside or within the jurisdiction of the US. The real question is whether U.S. Supreme Court has jurisdiction over the people who are in charge of, or have control over detainees in, camps at Guantanamo Bay.



## CONCLUSIONS AND SUGGESTIONS

The dilemma between the fight against terrorism and respect for human rights is not new, and has already given rise to numerous developments in the human rights system. These developments stress the compatibility of the two struggles through the doctrines of derogations and limitations laid down within the human rights system. In simple terms, therefore, the real question is whether one can infringe the most fundamental requirements of human rights beyond what the law permits in order to ensure respect for them. Despite the fact that the reasoning may seem prosaic, the answer is no, because otherwise the result would be the opposite of what one is trying to achieve, as the fundamental principles are meant to be universally and at all times applicable. Denying human rights in the fight against terrorism would not restore security, but would be bound to increase insecurity. The aim of the fight against terrorism should be "to protect fundamental Human Rights, not to undermine them."

The American administration continues to proclaim that its war against terror is global, extending well beyond traditional battlefields. Furthermore, the "war on terror" will only come to an end when terror is completely eradicated. Being so, it appears to be a war without end. When the law of armed conflicts is applied in the fight against terrorism, there is a considerably greater risk of sentencing innocent people in secret. The secrecy of terrorist investigations, with little opportunity for public scrutiny, only compounds the

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problem. If law enforcement rules are used, a mistaken arrest can be rectified at a public trial. But if war rules apply, the government is never obliged to prove a suspect's guilt. Instead, a supposed terrorist can be held for however long it takes to win the 'war' against terrorism---potentially for life---with relatively little public oversight. Moreover, the consequences of error are even graver if the supposed combatant is killed, as was al-Harethi. Such mistakes are an inevitable hazard of the traditional battlefield, where quick life-and-death decisions must be made. But when there is no such urgency, prudence and humanity dictate applying law enforcement rules. Governments are increasing the number of arbitrary arrests, extending the time that detainees are held incommunicado, and excluding the intervention of judicial authorities, thus showing an apparent lack of confidence in the capacity of their laws and courts to judge and condemn terrorists.

When the struggle against terror takes the form of an armed conflict international humanitarian law is applicable in its entirety and it is not possible to pick and choose which of the rules are applicable. International humanitarian law does not provide a menu of options for States Parties to select from: it is binding in its entirety on High Contracting Parties. It must be remembered that the protection offered by International humanitarian law does not amount to impunity from prosecution and captured persons may be brought to justice both for violations of International humanitarian law committed during the hostilities and any previous involvement in criminal acts.

Human rights norms, however, do not disappear on mention of war, much less the ill-defined 'war on terror'. National/domestic/municipal and international criminal laws are the appropriate legal tools for responding to terrorism where it poses a threat outside situations of armed conflict.

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No doubt the protection offered by international human rights law and international humanitarian law are coextensive, and they both apply simultaneously unless there is a conflict between them. It should be kept in mind that international human rights law applies without distinction in wartime, as in peacetime. Given the nature of the situations for which it has been created, international humanitarian law sometimes has a direct influence on assessing the requirements of international human rights law. In a case of a conflict, the *lex specialis* is applicable only to the extent of conflict between the principles applicable under the two international legal regimes. The International Court of Justice has explicitly rejected the argument that the International Covenant on Civil and Political Rights was directed only to the protection of human rights in peacetime.<sup>1</sup> Thus, the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. “The two bodies of law are in fact complementary and not mutually exclusive.”<sup>2</sup> Moreover, the existence of an armed conflict does not *per se* render the International Covenant on Civil and Political Rights inapplicable in the territory of a State party. The Human Rights Committee has held that a State party can be held responsible for violations of rights under the Covenant where the violations are perpetrated by authorized agents of the State on foreign territory, whether with the acquiescence of the Government of the foreign State, or in opposition to it.<sup>3</sup>

It is worth mentioning that the United States has ratified several Human Rights treaties, including the ICCPR. All treaties lawfully made under the US constitution are part

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<sup>1</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2005/7, 22 December 2004, para. 50.

<sup>2</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2005/7, 22 December 2004, para. 52.

<sup>3</sup> *Ibid.*, para, 46.

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of the 'supreme law of the land'.<sup>4</sup> Furthermore, Executive Order 13, 107 directs all members of the executive branch to comply with<sup>5</sup> the ICCPR.<sup>6</sup> Thus, all agencies of the US government including the department of defense are bound/ required to comply with the provisions of the ICCPR.

The United States claims that the substantive provisions of the ICCPR are 'non-self executing'. However, the treaty establishes international legal obligations binding on the executive and legislative branches of government. In addition, the 'non-self executing' declarations do not preclude defendants from invoking treaty rights defensively.<sup>7</sup> The United States, as a party to a variety of human rights and humanitarian treaties, is bound to respect its legal obligations especially the minimum standards guaranteed by Article 14 of ICCPR,<sup>8</sup> i.e. *equality before law; non discrimination during the legal process; a fair and public hearing before a "competent, independent and impartial tribunal established by law"; the presumption of innocence; due process rights; and the right to appeal a conviction to a "higher tribunal according to law"; etc.*

While living in the era of globalization it should be kept in mind that international law is the result of social, economic and political strategies of various nations. It (International law) cannot be divorced of politics.

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<sup>4</sup> See U.S. Constitution, Art. VI, § 2.

<sup>5</sup> The preamble of the Executive Order names three human rights treaties in particular: the ICCPR; the Convention Against Torture; and the International Convention on the Elimination of All Forms of Racial Discrimination. However, it also recognizes that the Executive Order shall apply to "other relevant treaties concerned with protection and promotion of human rights to which the United States is now or may become a party in the future."

<sup>6</sup> The treaty entered into force for the United States on September 08, 1992.

<sup>7</sup> The domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties, 24 Yale J. INT'L L. 129, 210- 214 (1999).

<sup>8</sup> United States has ratified the ICCPR. Hence, the argument that detainees in 'Guantanamo bay' have no such rights seems to be incorrect.

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Shortly after the Munich killings of 1972, Ambassador Charles W. Yost did some plain speaking on the Western approach to the question of international terrorism in the following words:

“What indeed of aerial bombing? When the Nazis bombed Warsaw or Rotterdam or Coventry, we called it “terror bombing” but when we bomb North or South Vietnam we call it “protective reaction”. Yet we are killing incomparably more people including more wholly innocent civilians, than the Palestine terrorists have killed in all these years. Understandable as they may be can we justly exclude from the definition of terrorism that Israeli retaliatory raids against Palestinian camps in: Lebanon and Syria last week which surely killed many wholly innocent people and which probably helped create a new crop of terrorists among their relatives and friends? Was that either human or wise?

The fact is of course, that there is vast amount of hypocrisy subject of political terrorism. We all righteously condemn it- except when we ourselves or friends of ours are engaging in it. Then we ignore it or gloss it over to attach to it tags like “liberation” or “defense of the world” or “national honour” to make it seem something other than what it is.”<sup>9</sup>

It is common observation that International instruments or phrases looking most innocent, when interpreted by super powers, turnout to be ‘the most wicked’. The terms “Inherent right of Self Defence” and “Threat to international peace and security” are typical examples of it. The United States is the most important power in the world and it has overwhelming military force and other forms of power. One should remember that in the world as it exists, only the most powerful people can do what they want. Even otherwise, there is ever existing gap between law on the books and the law as applied. Law is usually perceived and used primarily as the instrument of political power.

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<sup>9</sup> Charles W. Yost, “Forms and Masks of Terrorism”, In *Christian Science Monitor*, September 14, 1972, p. 20, col. 5, quoted at W.T. Mallison and S.V. Mallison, “The Concept of Public Purpose Terror in International Law” ed., International Terrorism and Political Crimes ed; Cherrif Bassiouni (Charles C. Thomas; Springfield, Il, 1975) p. 67, at p. 83, quoted in Verinder Grover Encyclopedia of Int. Terrorism. Terrorsim: History and Development ed. 2002 Deep & Deep Publications Pvt. Ltd. New Delhi.

World has seen a lot of changes in the meaning of different words. In future perhaps the US argument regarding criminals would be that 'since they are enemy of humanity/human beings, therefore they are not human beings, and as such are not entitled to any Human Rights'.

Ronald Dworkin says that governments must treat all their citizens with equal concern and respect.<sup>10</sup> Rawls's thesis is that "Each person possesses an 'inviolability founded on justice which even the welfare of society as a whole cannot override.'" "Justice denies that the loss of freedom for some is made right by a greater good shared by others. Therefore, in a just society the liberties of equal citizenship are steered; the rights secured by justice are not subject to political bargaining or to the calculus of social interests."<sup>11</sup>

Noam Chomsky says that the US do not enter into the annals of terror in the scholarly literature. They do enter, but not as terror. They enter as "counter-terror" or as a 'just war'. Their "principle is that if somebody carries out terror against us or against our allies, it's terror, but if we carry out terror or our allies do, may be much worse terror, against someone else, it's not terror, it's counter-terror or it's a just war."<sup>12</sup> It is policy of the US government that if other people "do something to us, the world is coming to an end. But if we do it to them, it is so normal, why should we even talk about it?"<sup>13</sup>

The terms 'war against crime' and 'war on terror' are vague. They are not war in a real sense but a rhetoric rather political use of word "war". It seems more judicious to speak of the 'fight against terrorism' rather than the 'war on terror' as the former is multifaceted.

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<sup>10</sup> Ronald Dworkin, *Taking Rights Seriously* London, Duckworth, 1978.

<sup>11</sup> John Rawls "A theory of justice" Clarendon Press-Oxford, 1972.

<sup>12</sup> *Power & Terror*, ed., John Junkerman and Takei Masakazu, Vanguard, Karachi, 2003, p. 60.

<sup>13</sup> *Ibid.*, p. 20.

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Fight against terrorism requires that the perpetrators of terrorism/terrorists must be made accountable for their crimes against humanity. The world should be told the truth about those crimes. All member States should re-affirm that such acts violate all norms of civilized society, and demonstrate that law abiding societies respect human rights by channeling retribution into criminal punishment for even the most heinous outlaws.

The battle against global terrorism requires credible justice. It is desirable that International community should establish, at international level, some credible international tribunals which should be in a position to provide credible justice. If committed in times of peace, the acts of terrorism may be brought under the jurisdiction of ICC as acts of international terrorism, by amending the Rome statute.

In order to win the battle against terrorism it is necessary to eliminate the root causes of terrorism i.e. discrimination and injustice at all levels, illiteracy, poverty, etc. "Economic Terrorism" (through concentration of wealth by the strong minority/ persons i.e. who are less than 10 percent of the total population and have 90 percent of the world wealth and resources in their control or at their disposal but are still busy in extracting, whatever is possible, from the 90 percent) needs to be prohibited and certain maximum profit rate, which should not exceed 10 percent of the cost price, must be fixed by all States through laws.

It would be wise to remember the Noam Chomsky's argument that we cannot address terrorism of the weak against the powerful without also confronting "the unmentionable but far more extreme terrorism of the powerful against the weak".

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## ANNEX "A"

### BASIC PRINCIPLES FOR THE TREATMENT OF PRISONERS

The General Assembly Resolution: A/RES/45/111, 68th plenary meeting 14 December 1990.  
Recalling Resolution 10 on the status of prisoners and Resolution 17 on the Human Rights of Prisoners, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.
2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.
4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.
5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.
6. All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.
7. Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.
8. Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.
9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.
10. With the participation and help of the community and social institution, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.
11. The above Principles shall be applied impartially.



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