Declaration

I, **Mr. Kamlesh Singh Deou**, hereby declare that research work embodied in this Ph.D. thesis titled **"Unlawful Killing by State Forces in India, with Specific Reference to Fake Encounter: A Legal Study"** has been carried out by me under the supervision of **Prof. Priti Saxena**, Department of Human Rights, School for Legal Studies, Babasaheb Bhinnrao Ambedkar University (A Central University) Lucknow. This Research work is an original work and it has not been previously submitted in part or full for any other degree or diploma in this University or any other University.

Date:

Place:

(Kamlesh Singh Deou)
Research Scholar
Department of Human Rights,
School for Legal Studies,
BBAU, Lucknow-226025

बाबा साहेब भीमराव अम्बेडकर विश्वविद्यालय

विद्या विहार, रायबरेली रोड, लखनऊ–226025

BABASAHEB BHIMRAO AMBEDKAR UNIVERSITY

(A Central University)

Vidya Vihar, Rae Bareli Road, Lucknow-226025

Accredited 'A' Grade by NAAC

Letter No: ……..
Date: …………….

Certificate

This is to certify that the thesis titled “**Unlawful Killing by State Forces in India, with Specific Reference to Fake Encounter: A Legal Study** submitted by **Mr. Kamlesh Singh Deou** is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other university.

The thesis submitted to Babasaheb Bhimrao Ambedkar University, Lucknow satisfies all the requirements as stipulated in the Doctor of Philosophy (Ph.D.) Regulation 1999 as amended in 2010 and it is fit for submission and evaluation for the award of the Degree of Doctor of Philosophy of the University.

Date:

Place:

Supervisor

(Prof. Priti Saxena)
Professor

Head
Department of Human Rights,
School for Legal Studies,
BBAU, Lucknow-226025

Acknowledgement

I owe a never ending gratitude to the God for his grace and blessings in the completion of this thesis.

I do not find appropriate words to express my deep sense of reverence, gratitude and indebtedness to my learned supervisor and esteemed **Professor (Dr.) Priti Saxena**, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar University Lucknow for her able guidance and untiring encouragement. Her valuable suggestions, unbounding affection and generosity have gone a long way in targeting this noble cause. Despite her busy academic and administrative schedule she has extended all sorts of help to me without which it would have not been possible for me to complete this work. I personally owe a lot to her. Being her student is a matter of pride for me.

I feel immense pleasure in expressing my sincere gratitude and regards to **Prof. S. K. Bhatnagar,** Department of Human Rights, School for Legal Studies, BBAU, for his benevolent guidance and invariable encouragement during my research work.

I am deeply indebted and grateful to **Dr. Preeti Misra**, Associate Professor, Department of Human Rights, School for Legal Studies, BBAU, for her inspiration and benevolent cooperation and encouragement.

I am grateful to **Dr. Sashi Kumar,** Associate professor of Dept. of Human Rights, SLS, BBAU, and **Dr. Rashida Athar,** Assistant professor of Dept. of Human Rights, SLS, BBAU, for their elderly suggestions, friendly attitudes and advice.

I express my deep sense of gratitude to **Prof. Sudarshan Verma**, Head, Department of Law, for her kind support throughout the work. Her valuable suggestions and encouragement have been of immense help to me.

I am grateful to **Dr. Anis Ahmad, Dr. Pradeep Kumar**, and **Dr. Sufia Ahmed,** Assistant professor, Dept. of Law, SLS, BBAU, for their valuable suggestions and advice.

With a sense of appreciation, I feel myself highly indebted to the Libraries of Babasaheb Bhimrao Ambedkar University, Lucknow, Dr. Ram Manohar Lohiya National Law University Lucknow, University of Lucknow, Lucknow, I.L.I. Delhi, from where I got relevant study materials for the present study.

Last, but not the least, I express my sincere gratitude to my parents for their blessings which nourished me to see this moment. I am highly indebted to my father **Shri Chandan Singh Deou** who **was** a constant source of inspiration which made me to attempt the researches without any lethargic zone, and my mother **Smt. Nirmala Deou** who took every possible pain in support of completion of this document.

I also adore here the name of my brother **Rahul Singh Deou** for extending every sort of encouragement at each and every stage. I am equally grateful to my sisters **Mrs Rashmi Padiyar** and **Mrs Monika Rautela** for inspiring me to carry out my research work objectively. Their regular help and support always prompted me to handle the research work successfully. I am speechless to express my thanks to my friends Dr. Rajeev Kumar Singh, I am thankful to **Dr. Vijay Bhaskar, Dr. Vikash Upadhyay, Lav lesh Kumar, Vivek Kumar, Munish Swaroop, Girijesh Kumar Singh, Narendra Mishra** for the support, credible expression and all sort of assistance in carrying out the legal activities throughout the research work.

I am also thankful to all my research scholars' friends who are the real moral boosters of my accomplishments.

Date :
Place : Lucknow

(Kamlesh Singh Deou)
Research Scholar
Department of Human Rights,
School for Legal Studies
B. B. A. University Lucknow.

The present Thesis entitled Unlawful Killing by State Forces in India, with specific reference to Fake Encounter: A legal Study deals with most cherished Right to Life. The Right to Life is not only Fundamental Right but is recognized as the right for preserving the humanity. Unlawful killing by State Forces or Extra judicial killing is antithesis to Right to Life & against the Rule of Law. India has various laws and external obligations on promote and protect the right to life. Despite the government's effort on ratification and enactment of these laws the pertinent issue is that, extra judicial killing is gaining momentum to the society committed by entrusted organs of the state vested power to promote and protect right to life. In the present scenario when the rule of law is well established principle and the Constitution of India establishes a coordinal principle that no person shall be deprived of his life or personal liberty except according to procedure established by law even then extra judicial execution is taking place in the society of India is very grave in nature.

In the international forum the United Nations Special Rapporteur on protection against arbitrary, summary execution drew the attention to the increase in the number of unlawful killing by state forces, identifying it as social and legal problem. The special rapporteur on unlawful killing by state forces have visited many countries and submitted its report on the response and responsibility of various state on such issue. It has been repeatedly brought to the attention of the international community by inter - governmental organizations, NGOs and various stakeholders. Numerous resolutions and reports, from Amnesty International, the UN Special Rapporteur on the promotion and protection of the right to life from unlawful killing by state forces, the Parliamentary Assembly of the Council of Europe, have identified the spread of a climate of impunity in some States as a threat to human rights and the democratic process, and called for urgent action to bring it to an end. Statistical data provided by the amnesty international and, human right watch, also indicate high numbers of unlawful killing by state forces. the right to life and the right to freedom from torture are non-derogable under all the instruments considered (Article 4 of the *International Covenant on Civil and Political Rights*, Article 15 of the *European Convention on Human Rights*, Article 27 of the *Inter-American Convention on Human Rights*, Article 4 of the *Arab Charter on Human Rights*), and therefore cannot be suspended even in times of war or other emergency threatening the life of the nation.

This research study has been modulated to examine the way to promote and to protect right to life against unlawful killing by state forces in India, by exploring on how extra judicial killing committed by state organ contravene the fundamental basic human right particular right to life contrary to Article 21 of Indian Constitution. The present research work would prove to protect & preserve Right to Life from Extra judicial killing.

Date:

Place:

Kamlesh Singh Deou

Research Scholar

Department of Human Rights,

BBAU, Lucknow

CONTENTS

LIST OF ABBREVIATIONS

ACHR	Asian Centre for Human Rights
AFSPA	Armed Forces (Special Powers) Act
AOGs	Armed Opposition Groups
AR	Assam Rifles
BSF	Border Security Force
CB-CID	Crime Branch-Criminal Investigation Department
CBI	Central Bureau of Investigation
CrPC	Code of Criminal Procedure, 1973
CRPF	Central Reserve Police Force
FIR	First Information Report
GCM	General Court Martial
GoI	Government of India
IPC	Indian Penal Code 1860
IB	Intelligence Bureau
ICCPR	International Covenant on Civil and Political Rights
J&K	Jammu and Kashmir
LWE	Left Wing Extremism

MHA	Ministry of Home Affairs
MoD	Ministry of Defence
NCRB	National Crime Records Bureau
NCST	National Commission for Scheduled Tribes
NDFB	National Democratic Front of Bodo land
NHRC	National Human Rights Commission
PHRA	Protection of Human Rights Act of 1993
RIMS	Regional Institute of Medical Sciences
SC	Scheduled Caste
SHRC	State Human Rights Commission
SIT	Special Investigation Team
ST	Scheduled Tribe
RSASTF	Red Sanders Anti-Smuggling Task Force
TADA	Terrorist and Disruptive Activities (Prevention) Act
UDHR	Universal Declaration of Human Rights
ULFA	United Liberation Front of Assam
UNO	United Nations Organization
UPR	Universal Periodic Review

LIST OF CASES

1. U.S. v. Belfast, 611 F.3d 783, 794
2. Prosecutor v. Erdemovic
3. Prosecutorv. Erdemovic, Case No. IT-96-22-A, Judgment on Appeal, 11 (Oct. 7, 1997)
4. United States v. Burns, [2001] 1 S.C.R. 283 (Can.)
5. United States v. Layton, 509 F. Supp. 212, 214 (N.D. Cal. 1981).
6. United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).
7. United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003).
8. United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983).
9. Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004)
10. Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
11. Kadic v. Karadžić, 70 F.3d 232, 246 (2d Cir. 1995).
12. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887, at 3 (S.D.N.Y. Feb. 28, 2002).
13. Murphy v. Islamic Republic of Iran
14. Kennedy v. Louisiana, 554 U.S. 407, 410 (2008)
15. Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51, 56 (D.D.C. 2010).
16. United States v. Santos-Rivera, 183 F.3d 367, 370-71 (5th Cir. 1999)
17. DK Basu v. State of West Bengal, AIR 1997 SC
18. Jigbanshu Paul v. National Investigation Agency, [2011(3) GLT615]
19. Joginder Kumar v. State of UP, (1994) 4 SCC 260
20. D K Basu v. State of West Bengal (1997) Cr. L.J. 743 (SC)
21. Kishore Singh v. State of Rajasthan AIR 1981 SC 625
22. Haricharan & Another v. State of M.P & Ors, Criminal Appeal No. 581 of 2003
23. State of Delhi vs. Saqib Rehman and Others, FIR No. 146/2005
24. Murukeshan s/o Raman v. State of Kerala, WP (Criminal) No. 13426 of 2010
25. A.K. Gopalan V. Union of India, AIR 1951 SC 27
26. Kharak Singh v State of U.P, 1963 AIR 1295
27. Maneka Gandhi V. Union, AIR 1978 SC 597
28. Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746
29. Nilabati Behera v. State of Orissa, (1993) 4 SCC 260

30. Challa Ramkrishna Reddy v. State of A. P, 1989 AIR (AP) 235:(1989)2
31. State of A.P. V. Challa Ramkrishna Reddy, AIR 2000 SC 2083
32. Nandini Sathpathi v. P.L. Dani, AIR 1977 SC 1025
33. Prakash Kadam vs Ramprasad Vishvanath Gupta, (2011) 6 SCC 189
34. Chaityanya Kalbagh V. State of U.P, (1989) 2 SCC 314
35. R.S. Sodhi V. State of U.P, 1994 Supp (1) SCC 143
36. Satyaveer Singh Rathi V. State through C.B.I., 2011 (6) SCR 138
37. B.G. Verghese V. Union of India, (2013)11 SCC 525
38. Rubabbudin Sheikh V. State of Gujarat, (2010) 2 SCC 200
39. Narmada Bai V State of Gujarat, (2011) 5 SCC 208
40. Rohtas Kumar V State of Haryana, (2013) 14 SCC 434
41. Peoples Union for Civil Liberties v. Union of India and another, AIR 1997 SC 1203
42. Extrajudicial Execution Victim Family Association and Another V. Union of India, (2013) 2 SCC 493
43. Rajesh Kumar v. Dharamvir, (1997) 4 SCC 498
44. V. Subramani v. State of Tamil Nadu, (2005) 10 SCC 358
45. Darshan Singh v. State of Punjab, (2010) 2 SCC 333
46. Matajog Dobey v. H.C. Bhari, (1955) 2 SCR 925
47. PUCL v. State of Maharashtra, AIR 2014 SCC 119
48. Raghubir Singh v. State of Haryana, AIR 1980 SC 1087
49. Gauri Shanker Sharma etc. v. State of U.P, AIR 1990 SC 709
50. Munshi Singh Gautam V. State of M.P, 2005 Cri LJ 320.
51. State of U.P. v. Mohd. Naim, AIR 1969 SC 703
52. Brijlala Pd Sinha V. State of Bihar, (1998) 5 SCC 699
53. Andhra Pradesh Civil Liberties Committees and others V. State of A.P, 2009 (1) ALD (Cri) 291
54. Paramjit Kaur V. State of Punjab and Others, (1996) 7 SCC 20
55. Devinder Singh and others V State of Punjab, Criminal appeal no 190 of 2003 S.C.
56. Rashtriya Rifles v. Central Bureau of Investigation & Another, 2012(6) SCC 228
57. Om Prakash v. State of Jharkhand, 2012 (12) SCC 72
58. Prakash Singh V Union of India, (2006) 8 SCC 1

Chapter 1

INTRODUCTION

The Constitution of India has guaranteed a wide range of human rights in the form of fundamental rights in part III of the Constitution. Article 21 which specifically focus on the protection of life and personal liberty has been extensively by the Supreme Court of India. Article 21, itself has become the umbrella of many judicially interpreted and inbuilt fundamental Articles.

The Human Right jurisprudence has been inbuilt as Fundamental Rights Articles in the Constitution of India. The Human Right jurisprudence as interpreted by the Supreme Court of India has been widely recognized and welcomed by the civilized society. Similarly another important factor in any democratic society the foundation is based on Rule of law. The Rule of law governs all aspect of our State and it is guaranteed by the Article 14 of part III of Indian Constitution.

Despite of the strong institution protecting the human rights of the people still state violence become legitimized through the dominant ideology of nationalism and patriotism and through a prevailing narrative that frame the killing as necessary for ensuring the security of state. Arbitrary and Contradiction to Rule of Law fake encounter draws to the complicated matrix of the State affairs. Impunity for violence is produced ad reproduced through the strategic manufacturing of the State Consent. In the human right discourse impunity refers to the condition in which perpetrator are immune to or exempted from punishment for their crime committed. It is also due to the consequences of the unlimited flow of sovereign power as power quasi state agent violence without accountability due to their position simultaneously inside and outside Rule of Law.

Modern State claim monopoly on the legitimate use of violence as the means of protecting law and order, controlling dissent and achieving the end of the greater common good. It is the central pardon of the state of exception. It is the point at which law provides for its own suspension and violation and thus it is preserved by something beyond it.

Encounter killing developed from the police practices in dealing with dacoits. When the Naxalites splits from Marxist in 1969 in India and began a strategy of people war, including the annihilation of class enemies, police respond to their campaign of rural and urban terrorism with the encounter killing of suspect. If the number of killing by police is a large percentage of all homicidal that suggests that the police may be using a disproportionate amount of deadly force in relation to the actual hazard of their work and of life.

State agent who kills in order to receive bounty and perks are acting not outside of the law, but within the system that effectively legitimizes violence against people to protect public safety and public order. The police use its traditional method of interrogation, investigation, torture and encounter. The unlawful killing by the state actor or agent cannot be justified by the state sovereignty the police, paramilitary forces, armed forces are the instrumentality of the State hence the state would be vicarious responsible for the act of its agent or actor . The protection given the armed forces under AFSPA cannot overcome the protection of life and personal liberty of person.

AFSPA provide wide ranging power to Indian armed forces in respect of using lethal force in various instances and fails to provide safeguard in case of excessive use of such power which eventually leads to numerous account of violation committed in area where AFSPA is applied. The power granted under AFSPA are in reality broader than that allowable under the state of emergency as the right of life may effectively be suspended under the Act and the safeguard applicable in the state of emergency are absent. The widespread deployment of the military creates an environment in which the exception becomes the rule; the use of lethal force is seen as the primary response to conflict.

The death penalty has declined or disappeared in most parts of the world, including Asia. At present, only four or five Asian nations retain capital punishment and continue to conduct judicial executions with any frequency: China, Vietnam, North Korea, Singapore, and possibly Pakistan. Many analysts contend that the widespread decline of the death penalty dramatically illustrates the spread and success of human rights norms, and some observers believe that the decline or disappearance of the death penalty stimulates improvement in other areas of state behavior, including the use of extra-judicial violence. It begins by describing the variation in state killing that exists in contemporary Asia. This cross-sectional analysis suggests there is little correlation between judicial and extra-judicial executions, but the appearance of independence largely disappears when the two forms of state killing are viewed in temporal perspective.

Judicial and extra-judicial executions have declined over time in many Asian jurisdictions, including Japan, South Korea, Taiwan, China, Cambodia, Indonesia, Burma, Bangladesh, the Philippines, and perhaps Nepal. The evidence is too thin to tell whether a similar pattern obtains in countries such as India and Thailand, where judicial executions are rare but where there has been considerable extra-judicial killing by the State in recent years. The article concludes by positing a hypothesis of “common causation” which suggests that the decline of extra-judicial executions may be explained by the same forces that explain the decline of capital punishment.

Labels such as “state killing” and “the killing state” are frequently used to discuss the legally permitted and regulated “judicial killing” that occurs in systems of capital punishment but states kill extra-judicially too, and sometimes the scale so far exceeds the volume of judicial executions that it seems reasonable to wonder whether death penalty reductions or even outright abolitions are comparatively small potatoes.

The analysis depends on a fundamental distinction between two types of extra-judicial killing:

(1) Use of lethal force in reactive, unpremeditated, and legally legitimate ways (as when the police shoot a fleeing felon), and
(2) Execution as an instrument of a government policy designed to eliminate perceived enemies of the state in a proactive, premeditated, and illegal manner.

This approach to state killing largely ignores "reactive" executions of the type one kind because history and common sense suggest that police and soldiers tend to shoot back when insurgents or fleeing felons shoot at them first. If the Tamil Tigers (the world's leading suicide terrorist organization) were operating in Switzerland instead of Sri Lanka, the rate of Swiss state killing would rise substantially.

Although the distinction between reactive and proactive extra-judicial killing seems theoretically sound, in practice it can be difficult to discern which has occurred. When states respond to insurgencies such as those that are ongoing in Sri Lanka, Nepal, and the Philippines, they often respond with both reactive lethal force and with proactive, preemptive strikes and it is sometimes impossible to tell the two apart.

The decline of judicial executions in several other Asian nations also seems to correlate with a general decrease in the practice of extra-judicial killing. In Indonesia, for example, hundreds of thousands of persons were killed in the political purges of the 1960s and in the massacres on East Timor after Portugal withdrew from its colony in 1975 but extra-judicial killing in the world's most populous Muslim-majority nation is much less common today than it was during those bloody and tumultuous periods while judicial executions have been infrequent events.

1.1 MEANING OF EXTRA-JUDICIAL KILLING:

An extrajudicial killing (also known as extrajudicial execution) is the killing of a person by governmental authorities without the sanction of any judicial proceeding or legal process. Extrajudicial punishments are mostly seen by humanity to be unethical, since they bypass the due process of the legal jurisdiction in which they occur. Extrajudicial killings often target leading political, trade union, dissident, religious, and social figures and are only those carried out by the state government or other state authorities like the armed forces or police, as extra-legal fulfillment of their prescribed role. This does not include cases where aforementioned authorities act under motives that serve their own interests and not the state's, such as to eliminate their complicity in crime or commissioning by an outside party[1].

1.2 OBJECTIVE OF THE RESEARCH

The objectives of the proposed study are as follows:

- The proposed research will explore the various factors which are responsible for the encounter killing in India.
- The proposal will highlight the vicarious and tortuous liability of state in case of fake encounter.

The study will stress on the judicial pronouncement on the unlawful killing by state forces and victim compensation scheme.

- The study will expose the nexus between the adopting culture of encounter and crime rate.
- The study will analyze the effects of unlawful killing on marginalized and vulnerable.

1.3 RESEARCH HYPOTHESIS

On the basis of above facts the research hypothesis are as follows:

I. Extra judicial execution is taking place in present set up of society in India.
II. The Crime rate is inversely proportional to encounter killing.
III. Potential law breaker has deep nexus with the political hierarchy.
IV. The state actor needs immunity to maintain law and order in our country.
V. Lack of legislation on fake encounter leaves serious lacunae in case of fake encounter.
VI. Police Act and Armed Force Special Act have to be reviewed and reformed.

On the basis of research work done in the thesis hypothesis are as proved as follows:

[1] Reyes, Ruben. "Extrajudicial Killings and Unexplained Disappearances". Court of Appeals. Accessed on dated, 10 October 2015.

1- Extra judicial execution is taking place in present set up of society in India.

The term unlawful killing by state forces or "extra–judicial killings" covers executions which violate domestic penal, or human rights or humanitarian law. Common forms of extra-judicial killings include killing caused by excessive use of force by police, indiscriminate killings of civilians during an armed conflict, and murder by state security forces or paramilitary groups, when these are not adequately investigated, prosecuted or punished. In present democratic setup of society India is suffering from the chronic disease in which the extra judicial killings are still part & parcel for controlling law & order situation in the country especially in Kashmir & North East states. The similar situation is there in naxal affected areas where the combat forces are facing charges of extrajudicial killing. Encounter killing once was important tool in maintaining law & order situation in Mumbai & other urban areas. The National Crime Record Bureau data shows that extrajudicial killing are still happening throughout the country, though there is decrease in number of extrajudicial cases in past few years. The complaint made in National Human Right Commission & State Human Right Commission is also decreasing in the past few years. The democratic fabric is destroyed by such extrajudicial killing as such killing violates rule of law. Many State Forces persons were behind the bars in the alleged cases of extrajudicial killing but the conviction rate is very low in such cases. The material which is collected and analyzed by researcher concludes that at present Encounter killing are taking place in India but not at widespread level. So this hypothesis is proved by the researcher that at present scenario the extrajudicial killing are taking place in India.

2-The Crime rate is inversely proportional to encounter killing.

The National Crime Record Bureau & National Human Right Commission &State Human Right Commission data reveals that there is no direct relationship between the crime rate & encounter killing. The report discussed by minister of NCRB 2013 in parliament showed that in Uttar Pradesh there were maximum cases of extrajudicial killing but the crime rate is also high. Encounter killings were first employed in Andhra Pradesh in the 1960s to describe extra-judicial killings because of the frequency with which officials claim that the deceased had been killed in an 'encounter' with police". In the 1960s and 1970s, custodial and extrajudicial killings of naxalites became standard police practice and still continue in naxalite affected areas today. In counter insurgency operations in the states of the Northeast, Punjab and Kashmir, fake encounters became routine as a quick way to rid society of "terrorists" and opponents of the State. The manner in which the police and armed forces were granted impunity in Punjab for fake encounters of alleged terrorists during the 1980s and 1990s has led in the emboldening of security forces and administration around the country to indulge in the illegal elimination of minorities, the disadvantaged, and those accused of criminal activity. "Our legal system doesn't work at all, If there are no legal remedies, there'll be extralegal ones", K.P.S Gill, Director of Police responsible for combating the insurgency in Punjab in the 1980s and 1990s said these words. It is disturbing that encounter carried out by state forces have the apparent support of the nation's public and its media. The media creates an impression in the minds of the general public that the people whom encounters are supposed to eliminate are gangsters, terrorists and naxalites. The reality however is that the practice of encounter killing is widespread throughout India. A view held by many law enforcement officers and members of the public is that it is acceptable to dispose of certain "disruptive" individual, those labeled criminals, terrorists and Naxalites, through encounters. But this view is not correct & it will not solve the problem of law & order situation. It is also the case with ordinary citizens who have found themselves on the wrong side of the law. Encounters are carried out in this manner by police across the country, a similar situation in which person that had previously been in trouble with the police, was later eliminated in an encounter. To examine encounter killings, carried out by the police, armed and security forces, in some specific contexts, as described by witnesses are encounters under the guise of fighting terrorism and Naxalism the encounters of so-called Naxalites in Andhra Pradesh, the encounter killing of an alleged gangster in Mumbai and encounter killings of those labeled terrorists in Gujarat and Kashmir. The analysis of material provided in the thesis that the police strategy to get rid of criminal or naxalites does not curb the illegal activities of the notorious criminal. In fact it provokes & motivates the other criminal & naxalites to fight against for the revenge. The criminal are to be booked under the rule of law. Hence the researcher concluded from his thesis that the crime rate is not inversely proportional to encounter killing. Hence this hypothesis is not proved.

3- Potential law breakers have deep nexus with the political hierarchy.

India has largest democracy in the world. While in governance the executives are subordinates to the political executives but it is limited to only under colour of office which they are holding. There is no such finding in the thesis which holds that there is deep nexus between potential law breakers with the political hierarchy. In India extra judicial killing are not state sponsored crime, it is the criminal liability of individual delinquent officer who is charged with the extrajudicial killing. Though they have been some allegation about the political motivated encounter killing but it is not proved in eyes of law. In India rule of law prevails, thus there is no autocratic government which is acting in extra judicial killing. Law of land also provides that the Superior Command is to be followed for discharge of official duty, not for commission of crime. There is no direct evidence in the history that after independence in India State sponsored crime are committed in India. The use of encounters in Gujarat to rid the state of alleged terrorists is as a cynical strategy alleged orchestrated by the State Government police officer. The responsibility for a fake encounter of the same year in which alleged underworld figure Shorahuddin Sheikh was shot dead by police, despite the fact that three senior police officers were arrested for the crime. By way of justification , the officer who believe that encounter killings are an acceptable method of disposing of criminals, but the relationship of political master & senior police officer have not been established. There is no impunity given to potential law breaker & Constitution of India provides equal protection of law to everyone. The researcher has not found any material in his thesis which proved that there is deep rooted relationship between political master & persons involved in extrajudicial killing. Neither there is any substance in the allegation that people involved in encounter killing are being provided State protection. Hence the hypothesis is not proved that there is deep nexus between potential law breaker & political hierarchy.

4- The state actor needs immunity to maintain law and order in our country.

In the thesis the researcher has analyzed the material and found that distinction must be drawn between the right of self-defence or private defence and use of excessive force or retaliation. The right of self-defence or private defence is a right that can be exercised to defend oneself but not to retaliate. To put it differently, the right is one of defence and not of requital or reprisal. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. It is essentially, as noted above, a finding of fact. It is abundantly clear that the right of self-defence or private defence falls in one basket and use of excessive force or retaliatory force falls in another basket. Therefore, while a victim of aggression has a right of private defence or self-defence (recognized by Sections 96 to 106 of the IPC) if that victim exceeds the right of private defence or self-defence by using excessive force or retaliatory measures, he then becomes an aggressor and commits a punishable offence. Unfortunately occasionally, use of excessive force or retaliation leads to the death of the original aggressor. When the State uses such excessive or retaliatory force leading to death, it is referred to as an extra-judicial killing or an extra-judicial execution. Society and the courts obviously cannot and do not accept such a death caused by the State since it is destructive of the rule of law and plainly unconstitutional. The problem tends to become vexed when the victims are alleged to be militants, insurgents or terrorists. In such cases, how does anyone (including the court) assess the degree of force required in a given situation and whether it was excessive and retaliatory or not? Scrutiny by the courts in such cases leads to complaints by the State of its having to fight militants, insurgents and terrorists with one hand tied behind its back. This is not a valid criticism since, and this is important, in such cases it is not the encounter or the operation that is under scrutiny but the smoking gun that is under scrutiny. There is a qualitative difference between use of force in an operation and use of such deadly force that is akin to using a sledgehammer to kill a fly; one is an act of self-defence while the other is an act of retaliation. This concern, both from the perspective of the State and from the perspective of preserving and protecting human rights of a citizen. While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties. It is this preservation of the rule of law, recognition of human rights and check on the abuse or misuse of power that has been the highlight of a few decisions placed before us. In the matter of grant of sanction to prosecute an official under the provisions of the Code of Criminal Procedure, 1973 the first step is to ascertain whether the act complained of is an offence and the second step is to determine whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation. Causing the death of a person is certainly an offence, but whether there was a “reasonable connection” between the death and the official act or whether excessive force or retaliatory force was used in the act has to be determined at an appropriate stage. It does not matter whether the victim was a common person or a militant or a terrorist, nor does it matter whether the aggressor was a common person or the State. The law is the same for both and is equally applicable to both. Thus the researcher by analyzing the material placed on the records in the thesis concludes that the protection is needed to the sincere State forces that are discharging their duties in good faith. Thus protection under Criminal Procedure Law & AFSPA & other law should be provided as it is. It does not give impunity to the state officials to act arbitrarily. Thus the hypothesis that state actor need impunity to maintain law & order in our country is proved.

5-Lack of legislation on fake encounter leaves serious lacunae in case of fake encounter.

The case relating to encounter killing is governed by Major Criminal Law. Since the extrajudicial killing are special species of murder in which the alleged state forces are involved therefore it is quite obvious that such cases should be handled with great care & caution. There should be Special Law relating to the extrajudicial killing as Life of a person is at a stake & State agency is at other side of allegation. India has signed the Convention but not ratified it. It has not incorporated the provision of Laws against Torture thus lacking of legislation on torture by state agency give the delinquent state officers to escape from the eyes of law due to the various loop holes in the present set up of law. The fake encounters are serious offence & leaves strict liability on the State to control the incident of fake encounter. The proper mechanism should be there for the redressal of the grievance of innocent person who became the victim of fake encounter killing. Thus the researcher concludes that the lacking of specific legislation is causing less rate of conviction in extrajudicial killing. Hence the hypothesis is proved.

6-Police Act and Armed Force Special Act have to be reviewed and reformed.

The continuance of The Armed Forces Act in Kashmir and the North Eastern states is justified. There is no need to repeal or review the AFSPA in present scenario. This Act is considered necessary to deal with serious terrorist and insurgency/ militancy situation arising in certain parts of the country and uphold the duty of the state to protect and secure its citizens. It provides necessary powers, legal support and protection to the Armed Forces for carrying out proactive operation against the terrorists in a highly hostile environment. An analysis of the ground realities shows that the violence levels and the fighting ability of terrorists have reduced over the years. Nevertheless, they still possess sophisticated weapons and modern communication equipment and the terrorist infrastructure across the borders is still active. The terrorists continue to intimidate the public. In such a challenging environment, where the very lives of its citizens and the unity and integrity of India is at stake, as long as deployment of armed forces is required to maintain peace and normalcy, AFSPA powers are required . The Army maintains continuous vigilance to prevent human rights violations by its forces. Human Rights Cell in the Army Headquarters was established in March 1993, even before the NHRC was constituted. These cells have been established at various levels. The investigations of violations are carried out swiftly and in a transparent manner and exemplary punishments are meted out to those involved. In any case of delinquency by state forces the kind of investigations mechanism operating from within the army headquarter to enquire into charges against the armed forces themselves will result into unbiased and interests and establishment of fair due process. The morale of state forces should be boosted by keep providing this protection. For few delinquent officers whole state forces should not be stripped by the necessary protection. There is no doubt that the armed forces operate in difficult and trying circumstances in the areas afflicted by internal armed conflicts. It is in these situations that the supremacy of the judiciary and the primacy of the rule of law need to be upheld. However, if the law enforcement personnel stoop to the same level as the non-state actors and perpetrate the same unlawful acts, there will be no difference between the law enforcement personnel and the non-state actors whom the government calls “terrorists”. The AFSPA does not violate basic tenets of criminal justice system in any civilized society. Most importantly, by giving impunity to the armed forces under Section 6 of the AFSPA as well as the Code of Criminal Procedure, which makes its mandatory to seek prior permission of the Central Government to initiate any legal proceedings it protects the honest & sincere state forces who are serving & sacrificing their lives for unity & integrity of the country. The ground realities which state forces are facing cannot be calculated mathematically or academically while fighting against terrorist. Though the Reddy Commission, Moily Commission & Justice Verma Committee has recommended for repeal & review of AFSPA but the researcher does not finds any necessity in repealing or reviewing of the act. The Supreme Court of India in Naga People’s Movement case has upheld the validity of AFSPA. It has given guidelines that while exercising the power conferred under section 4(a) of Central act the Officer is required to use minimum force require for effective action against the person acting in contravention of prohibitory order & forces have to follow Do's & Don'ts issued in army authority. In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act [the AFSPA] should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the State and the requisite sanction under Section 6 of the Central Act should be granted for instruction of prosecution and/or a civil suit or other proceedings against the person/persons responsible for such violation. All of us are bound by the direction of the Constitution Bench which has been given to assure the people that there is no abuse or misuse of power by the armed forces. Indian judiciary has always been considered to be proactive and equipped with adequate authority. The strength of any country claiming itself as "democratic" lies in upholding the supremacy of the judiciary and primacy of the rule of law. Thus the researcher concludes by the material on the thesis that the AFSPA should not be repealed or reviewed. As AFSPA & Police Act provide protection to the State forces who are fighting against insurgency & terrorism. It should be provided to boost up the morale of State forces. Hence the hypothesis is not proved.

1.4 RESEARCH METHODOLOGY

This research was mainly based on the method of analytical, doctrinal, and observational simultaneously, in addition to descriptive. Regarding the analysis of statutory provisions and judicial pronouncements method was analytical in nature. All the primary as well as secondary documents sources were utilized. The research was based on the various fundamental and legal rights which are provided to accused or suspect.

The judicial pronouncement which determines the state liability for the crime committed by the state actor was also held. The victim compensation scheme was also applied in the case of proved fake encounter cases, so the various judicial pronouncements were also studied for the research work. In this context various legal provisions, national and international documents, reports, articles, journals, judicial decisions, books, internet magazines and mass media reports and other similar source of data related to the research study was analyzed.

All the primary as well as secondary documentary sources were utilized. The researcher had gone through various books, journals, judicial decisions of the Supreme Court of India and other High Courts of India, and other significant decisions taken abroad. Various judicial decisions, reports, articles, international-national constitutional norms and national measures as well as government publications, earlier researches, mass media report, law journals, internet, magazines was taken as an important research tools.

Interface with the experts from the field of law, justice, administration and academia may also be made in view of garnering adequate secondary material for the research. The study will definitely enrich the existing knowledge about the legal aspects of extra judicial killings and it will also discover some unexplored aspects of extra judicial killings in India.

1.5 SIGNIFICANCE OF THE STUDY

In the recent world when nearly almost countries of the world has adopted their Constitutions and are commuted to protect the life and liberty of every individual and accepted the doctrine of rule of law then in such situation the unlawful killing is a very serious concern. So this research is of greater importance. The revive of existing literature on this shows that some work has been undertaken but no such study is available which make an attempt to discuss the unlawful killing by state actors and the cause behind this. This study will enhance the knowledge on the issue.

1.6 PLAN OF THE WORK

The researcher has divided the entire research work in six chapters. The study will broadly follow the following scheme:

Chapter I - Briefly introduces the topic and analyses the Unlawful Killing by State Forces in India with Specific Reference to Fake Encounter: A Legal Study. Despite of the strong institution protecting the human rights of the people still state violence become legitimized through the dominant ideology of nationalism and patriotism and through a prevailing narrative that frame the killing as necessary for ensuring the security of state. Arbitrary and Contradiction to Rule of Law fake encounter draws to the complicated matrix of the State affairs. Impunity for violence is produced ad reproduced through the strategic manufacturing of the State Consent. In the human right discourse impunity refers to the condition in which perpetrator are immune to or exempted from punishment for their crime committed.

Chapter II - Deals with Conceptual Analysis of Unlawful Killing by State Forces in India and it types. There are a few reasons for the difficulty in bringing individuals that have committed extrajudicial killings to justice. The biggest obstacle is that an extrajudicial killing is not criminalized under international law in as broad a manner as torture. Even though torture seems less severe than death, torture is an action that is never excusable under international law. Yet states are permitted to intentionally kill individuals in a number of circumstances. They may execute them after due judicial process, they may incapacitate them in a valid exercise of law enforcement, or they may target them pursuant to the laws of armed conflict. Even the term "extrajudicial killing" does not perfectly reflect the situations in which a state may kill—war and law enforcement operations are both extrajudicial, yet killing is and should be permitted in both cases. Nonetheless, even though intentional killing, unlike torture, can sometimes be lawfully done, there exists a vast class of killings committed by public officials of states that are done pursuant to or motivated by the same illiberal motives as torture: to suppress dissent, to eliminate political rivals, and to frighten civilian populations. These killings should be outlawed and prosecutors given the tools to fight them.

Chapter III - Discusses the International perspective of Human Rights of Life and Unlawful killing by State Forces. There are no explicit provisions in the Indian constitution regulating the incorporation and status of International law into the Indian legal system. However, Article 51(c) stipulates as one of the Directive Principles of state policy, that: "The state shall endeavor to foster respect for International law and treaty obligations in the dealings of organized people with another". International treaties do not automatically become part of national law: they must be expressly incorporated into domestic law by a legislative act. While treaty law is not directly applicable, customary international law has direct application provided that it is not inconsistent with national legislation. The UN has long acknowledged the need for a specific instrument addressing the position of unlawful killing of accused or innocent person by state forces which called upon States to take all necessary measures to put an end to violations by ensuring legislative compliance with international human rights obligations, effective implementation, and an effective remedy for the victims, and by investigating threats and acts of violence against accused thoroughly, including during armed conflict, with a view to "bringing to justice those responsible in order to combat impunity". There are lot of international legal instruments, binding and non-binding, addressing human rights in general; very few instruments are specifically concerned with the situation of unlawful killing by state forces. In recent years there has been an increasing tendency towards the adoption of legal initiatives, both at UN level and in virtually all regional level, designed to respond to the specific human rights violations experienced by accused person. The measures envisaged are all non-binding in nature. In addition to the provisions of the ICCPR, the UN system encompasses certain conventions, such as *the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984, in force since 1987) and *the International Convention for the Protection of All Persons from Enforced Disappearance* (2006, in force since 2010).

Chapter IV - Analyses the Constitutional and Legal Perspective of Unlawful Killing by State Forces. The Indian Constitution provides all citizens with the "right to equality before the law," the right to "the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth," and the "right to freedom of speech and expression." Further, it specifies that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest" and that every person arrested be presented to the nearest magistrate within 24 hours of the arrest. In 1993, India passed the Protection of Human Rights Act which created the National Human Rights Commission (NHRC). The National Commission for Minorities (NCM) is another governmental body charged with monitoring and reporting on human rights violations against minorities and ensuring that minorities are protected and treated equally.

***Chapter V* -** Discusses the Role of Indian Judiciary in protection of Life and Liberty. The role of Indian Judiciary and the scope of judicial interpretation have expanded remarkably in recent times, partly because of the tremendous growth of statutory intervention in present era. The Judiciary plays an important role in the protection of the fundamental rights of citizen. The twin safeguard of equality before law and equal protection of law and right to life and personal liberty are acknowledge as two of the important pillar of human right. India is the largest democracy in the world, a sovereign, and socialist, secular, democratic and republic with a comprehensive charter of rights written into constitution. The Indian Constitution lays down base on which the life and liberty of an individual is protected. The Supreme Court has played a significant role in interpreting constitutional provisions broadly to encompass a wide range of rights. The right to life in Article 21 as read with Article 14 right to equality of Constitution of India, for example, has been interpreted expansively by the Supreme Court to include the right to a life of dignity, freedom from exploitation and a number of socio-economic rights contained in the directive principles of the Constitution. Reasoning in this manner, the Supreme Court constructed Article 21 of the Constitution to include the prohibition of torture and inhuman and degrading treatment.

Chapter VI - Comprises conclusion and suggestions. An unlawful killing by state forces is known as extra judicial killing or extrajudicial execution. It is the killing of a person by governmental authorities without the sanction of any legal process or judicial proceedings. Extrajudicial punishments are mostly seen by humanity to be unethical, since they bypass the due process of the legal jurisdiction in which they occur. Extrajudicial killings often target leading political, trade union, dissident, religious, and social figures and it is carried out by the state government or other state authorities like the armed forces or police force, as extra-legal fulfillment of their prescribed role. This does not include cases where aforementioned authorities act under motives that serve their own interests and not the State's, such as to eliminate their complicity in crime or commissioning by an outside party.

Major human rights problems included reported extrajudicial killings of persons in custody, killings of protesters, and torture and rape by police and other security forces. Investigations into individual abuses and legal punishment for perpetrators occurred, but for many abuses, a lack of accountability due to weak law enforcement, a lack of trained police, and an overburdened court system created an atmosphere of impunity; lengthy court backlogs prolong the latter. Poor prison conditions and lengthy detentions were significant problems. Unlike in previous years, there were no instances of officials using antiterrorism legislation to justify excessive use of force; however, indiscriminate use of force by Border Security Forces was a problem. Corruption existed at all levels of government and police. There were reports of delays in obtaining legal redress for past attacks against minorities. The law in some states restricted religious conversion, but there were no reports of convictions under these restrictions. Violence associated with caste bias occurred. Domestic violence, child marriage, bonded labour, dowry-related deaths, honour crimes, and female feticide remained serious problems.

In order to eradicate extrajudicial punishments the United Nations investigates the cases of extrajudicial punishments, responds immediately to reports of such activity, negotiates and discuss the violations with the country’s government, and employs suitable international legal procedure and human rights protection.

Chapter 2

CONCEPTUAL ANALYSIS OF UNLAWFUL KILLING BY STATE FORCES AND ITS TYPES

"Crime detection has in recent years been based virtually on luckinstead of the application of scientific facts and use of reliable intelligence."

2.1 INTRODUCTION

An unlawful killing by state forces is known as "Extra Judicial Killing" or "Extra Judicial Execution". It is the act of killing a person, by governmental authorities, without the sanction of any legal process or judicial proceedings. Extrajudicial punishments are simply unethical, since they bypass the due process of the legal jurisdiction in which they occur. Extrajudicial killings often target the figures of leading political party or ideology, trade unions, dissidents, religious groups, and other social groups or organizations. It is carried out by the government or other state authorities like the armed forces or police force, as extra-legal fulfillment of their prescribed role. This does not include cases where aforementioned authorities act under motives that serve their own interests and not the State's, such as to eliminate their complicity in crime or commissioning by an outside party.[1]

According to *Section 3(a)* of the *Torture Victim Protection Act, 1991*[2] which contains a definition of *extrajudicial killing* as:

"A deliberate killing not authorized by a previous judgement pronounced by a regular constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not

[1]Reyes, Ruben. "Extrajudicial Killings and Unexplained Disappearances". *Court of Appeals*. Retrieved 25 September 2016.
[2] Enacted in United States on 12th March, 1993.

include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”[3]

There are a few reasons for the difficulty in bringing individuals that have committed extrajudicial killings to justice. The biggest obstacle is that an extrajudicial killing is not criminalized under international law in as broad a manner as torture. Even though torture seems less severe than death, torture is an action that is never excusable under international law. Yet states are permitted to intentionally kill individuals in a number of circumstances. They may execute them after due judicial process, they may incapacitate them in a valid exercise of law enforcement, or they may target them pursuant to the laws of armed conflict. Even the term “extrajudicial killing” does not perfectly reflect the situations in which a state may kill war and law enforcement operations are both extrajudicial, yet killing is and should be permitted in both cases.

Nonetheless, even though intentional killing, unlike torture, can sometimes be lawfully done, there exists a vast class of killings committed by public officials of states that are done pursuant to or motivated by the same illiberal motives as torture: to suppress dissent, to eliminate political rivals, and to frighten civilian populations. These killings should be outlawed and prosecutors given the tools to fight them

2.2 EXTRA JUDICIAL KILLINGS IN US AND INDIA

The United States and India share the common challenge of extreme police brutality against the weaker sections: racially motivated actions against the blacks in the US and communally motivated actions against the minorities in India. The August 9, 2014 shooting of a black youth by a white policeman in Ferguson, Missouri can be compared with the unlawful killing of four Muslims jointly by Hindu state and central policemen in Gujarat, 2004, a case which is caught up still in political complications.

[3] *Congressional Record, V. 147, Pt. 6, May 9, 2001 to May 21 2001, United States Government Printing Office, October 2005, p. 7897, GGKEY:2126SDPKSFJ :* The legal exclusion in the sentence that starts "Such term, however ..." covers the killing of enemy combatants and others who are not protected under international law from extrajudicial killing. The legal exclusion in the sentence that starts. "Such term, however ..." covers the killing of enemy combatants and others who are not protected under international law from extrajudicial killing.

Racist policing has been a historical problem in the US.

On August 9, the 18-year-old African-American Michael Brown was shot dead by a white policeman in Ferguson (Missouri), which led to major civilian protests. Brown received six gunshots, including two fatal ones on his head, while walking down a street with a friend. The white policeman probably admonished them for walking on the middle of the street. A witness said the policeman fired several shots at the unarmed Brown without provocation. A video released by the police did not establish an alleged miscreant to be Brown. The six gunshots on Brown enraged the local community. Police reluctance to name the offending policeman who was later suspended further infuriated the crowd. The investigation report by a grand jury will be out only by October, 2014 to be followed by criminal action, if any. The refusal of the Ferguson police to arrest their guilty compatriot was also offensive.

Ferguson, a city of some 20,000, situated north of St. Louis was once predominantly white, but later began to be dominated by African-Americans. The city council is white-dominated and has a white mayor. Only three of the 50 police officials in Ferguson are African-Americans. A probe by the Federal Bureau of Investigation (civil rights) was initiated into police misconduct. Attorney-General, Eric Holder, a victimised black himself, visited Ferguson to oversee the police response and calm the feelings of the black majority. He addressed a lengthy press conference answering questions.

Observers have noted massive militarisation of the US police since 9/11. The response to the peaceful protests in the aftermath of Brown's killing in Ferguson was marked by an appalling display of a militarised police force with the look of an invading army training its weapons on unarmed citizens. A lot of anger was seen over the way the laws were enforced in the African-American community. The racial question, a serious one in the US, has engaged citizens and elites alike. The response to racial profiling by the police in the US has been sensitive and the police attitudes are strongly deplored.

Communal, anti-minority policing has been a historical challenge increasingly deriving political approval in contemporary India. The police facilitated and participated in the massive anti-Sikh riots in Delhi in 184, anti-Muslim violence in Gujarat 2002 and followed it up with a series of extrajudicial executions of minority Muslims given the perceived ‘national security’ threat. A spectacular instance was the shooting of the young girl Ishrat Jahan and her three companions near Ahmedabad, Gujarat in July 2004. The case is caught up in political complications with the date of resolution receding ever further. The Central Bureau of Investigation (CBI) which has a legal framework is investigating the case under the supervision of the Supreme Court of India. Convincing evidence of culpable guilt on the part of the part of some Gujarat policemen working in combination with some central Intelligence Bureau (IB) officials has been found in the planning and execution of the killings.

Politicisation of the criminal justice system (CJS) in India has increasingly come in the way of human rights protection. Police officers are increasingly preoccupied with politics, penetrated by politics and participate in it individually and collectively. The central police Intelligence Bureau (IB), unlike the CBI, does not have any police powers; nor a legal framework and charter of duties. It seems to function mainly as the hand maiden of the ruling party of the day. The ruling politicians seem to wish to immunise the guilty IB officials from arrest and prosecution and have attempted distorting and misuse of the provisions of the Code of Criminal Procedure. A few former Directors of the CBI, the IB including the Governor of a state (former Director of the IB) have unacceptably opposed the arrest of the IB officials in spite of the credible evidence against them. They deem such action would hinder ‘national security’ concerns. They ignore that they thus unwittingly undermine the foundational principles of India’s Constitution and the canons of the rule of law, criminal justice and human rights. Unfortunately, the union Ministry of Home Ministry (MHA) has joined the campaign relying on the section 197 of the Indian Penal Code (IPC) which has colonial roots[4]and which insists on prior government permission before prosecution of serving officials. They also ignore section 187 of the Indian Penal Code (IPC), which provides that ‘obstructing a public official from the performance of his duties’ is a cognisable offence. While the

[4]Legislated in 1860 by the British Empire.

government has administrative authority over the CBI, the power to interfere with its investigative process rests with a higher official in the investigative hierarchy as provided for in section 36 of the Cr.P.C. Moreover, a successful petition under Section 319 of the Cr.P.C. in the Supreme Court of India can place the concerned IB officials under the clutches of the law to the embarrassment of these officials.

In contrast to the US which faces a major crisis of confidence over its racial policing, India presents a more complex and complete breakdown of the Criminal Justice System (CJS). Thousands of Kashmiris have been reported to be killed by Indian security forces in custody, extrajudicial executions and enforced disappearances and these human right violations are said to be carried out by Indian security forces under total impunity.[5] Civilians including women and children have been killed in "reprisal" attacks by Indian security forces. International NGO’s as well as the US State Department have documented human rights abuses including disappearances, torture and arbitrary executions carried out during India's counter-terrorism operations.[6]

United Nations has expressed serious concerns over large number of killings by Indian security forces.[7] Human Rights groups have also accused the Indian security forces of using child soldiers,[8] although the Indian government denies this allegation.[9] The Indian Government claims that even though children can join the armed forces, they are not formally enrolled into regular service before the age of 18.

In Jammu and Kashmir, the Indian army has armed local Village Defence Committees (VDC) – primarily Hindus – in Doda, Udhampur and the border

---

[5] *“Document – India: Jammu/Kashmir government should implement human rights program | Amnesty International”. Amnesty.org. 27 October 2002. Retrieved 2016-09-06.*

[6]Tolley, Howard B., Jr. (2009), "Kashmir", in David P Forsythe, *Encyclopedia of Human Rights, Volume 3*, New York: Oxford University Press, p. 306, ISBN 978-0-19-533402-9, retrieved 2017-06-08.

[7]Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, E/CN.4/1994/7, paragraph 327.

[8]United Nations High Commissioner for Refugees (19 February 1997). “Refworld | Child Soldiers Global Report 2001 – India”. UNHCR. Archived from the original on 16 April 2013. Retrieved 2016-06-08.

[9]Hartjen, Clayton; S. Priyadarsini (2011). *The Global Victimization of Children: Problems and Solutions* (2012 ed). Springer. p. 106. ISBN 978-1-4614-2178-8.

districts to assist security forces in anti-insurgency operations.[10] So far more than 15,000 inhabitants, reportedly including teenagers, have joined these self-defence groups.[11]

At the Asia-Pacific Conference on the use of Children as Soldiers in May 2000 the representative of the state government of Jammu and Kashmir denied the involvement of children in VDCs. He acknowledged that there may have been some instances of young boys taking up arms to defend themselves under attack, but that there was "no policy to encourage young boys to become members of the Village Defence Committees." Torture, widely used by Indian security sources, whose severity is described as beyond comprehension by Amnesty International, has been responsible for the huge number of deaths in custody.[12]

The Telegraph, citing a WikiLeaks report, quotes the International Committee of the Red Cross (ICRC) that Indian security forces were physically abusing detainees with beatings, electrocutions and sexual interference. These detainees weren't Islamic insurgents or Pakistani-backed insurgents but civilians, in contrast to India's continual allegations of Pakistani involvement. The detainees were "connected to or believed to have information about the insurgents". According to ICRC, 681 of the 1296 detainees whom it interviewed claimed torture. US officials have been quoted reporting "terrorism investigations and court cases tend to rely upon confessions, many of which are obtained under duress if not beatings, threats, or in some cases torture."[13]

2.3 THE WORLD PERSPECTIVE

Labels such as "state killing" and "the killing state" are frequently used to discuss the legally permitted and regulated "judicial killing" that occurs in

[10] HRW, Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue, op. cit.; Bukhari, S., "Militants kill 19 in Jammu", The Hindu, 21 July 1999.

[11] "Jammu & Kashmir: the new vigilantes: despite lack of proper training and sophisticated arms, Village Defence Committees are proving invaluable in the fight against militancy in the state", India

[12] https://www.amnesty.org/en/library/asset/ASA20/033/1995/en/28f7013b-f893-11dd-b378-7142bfbe1838/asa200331995en.pdf

[13] *Allen, Nick (17 December 2010). "WikiLeaks: India 'systematically torturing civilians in Kashmir". telegraph.co.uk. London: Telegraph Media Group Limited. Retrieved 2016-06-09*

systems of capital punishment.[14]But states kill extra-judicially too, and sometimes the scale so far exceeds the volume of judicial executions that it seems reasonable to wonder whether death penalty reductions or even outright abolitions are comparatively small potatoes. extra-judicial killing that is "proactive" in the type two sense and the judicially authorized executions that occur in systems of capital punishment. This approach to state killing largely ignores "reactive" executions of the type one kind because history and common sense suggest that police and soldiers tend to shoot back when insurgents or fleeing felons shoot at them first. If the Tamil Tigers (the world's leading suicide terrorist organization) were operating in Switzerland instead of Sri Lanka, the rate of Swiss state killing would rise substantially. Although the distinction between reactive and proactive extra-judicial killing seems theoretically sound, in practice it can be difficult to discern which has occurred. When states respond to insurgencies such as those that are ongoing in Sri Lanka, Nepal, and the Philippines, they often respond with both reactive lethal force and with proactive, preemptive strikes – and it is sometimes impossible to tell the two apart. Even at Tiananmen Square in 1989—when "the whole world was watching"—it can be difficult to tell whether Chinese forces were responding to a riot or engaging in deliberate massacre[15]

Moreover, many jurisdictions lack reliable counts of extra-judicial killings over time. Data difficulties such as these inhibit confident conclusions, but the available evidence does seem to suggest that the trajectories of capital punishment and proactive extra-judicial killing tend to track each other. This finding is important because it indicates that Asia's recent death penalty declines may reflect improvement in other spheres of state activity, and because it means Asian governments tend not to "compensate" for reductions in their use of capital punishment by conducting more extra-judicial executions.[16]

Extrajudicial killings have been relatively common since the end of World War II. However, they are not criminalized as broadly as torture despite

[14](Amnesty International 1989; Amnesty International 2007; Sarat 1999; Sarat 2001; Sarat and Boulanger 2005; Kassymbekova 2005; Zimring 2003; Johnson 2006

[15]Calhoun 1997; Gitlin 2003; Clark 2008

[16]Johnson and Zimring 2009

their similar history and prevalence. They are intertwined with the fate of people who have been "disappeared" by their governments. For example, in Argentina, liberals and communists who opposed the ruling military junta were executed or simply "disappeared."[17] From the 1970s to the1990s, during Operation Condor, Chile and other countries with military rule also participated in systematized extrajudicial killings.[18] Extrajudicial killings are scarcely in the past, and are ongoing in a number of countries.

One of the most widely reported modern cases of extrajudicial killing is taking place in the Philippines currently. Human Rights Watch reports that, despite the current president's campaign to end violence, there have been seven recent extrajudicial killings and three recent forced disappearances.[19] Hundreds of people, mostly political activists and journalists, have disappeared or been killed.[20] At least one human rights lawyer has suggested that the killings are widespread enough to constitute a crime against humanity.[21] In a Congressional hearing on the subject, Senator Barbara Boxer commented: "for too long the Government of the Philippines has not taken sufficient action . . . to address extrajudicial killings and bring those responsible to justice."[22]

2.4 STATE KILLINGS IN TEMPORAL PERSPECTIVE

The appearance of independence between the two types of state killing largely disappears when one considers the temporal dimension. Indeed, when judicial and extra-judicial executions in Asia are examined over time, the initial impression of independence turns out to be misleading because as judicial

[17]Argentina Dirty War 1976-1983, GLOBALSECURITY.ORG, http://www.globalsecurity.org /military/world/war/argentina.htm (last visited June. 10, 2017) (explaining, among other details, that the disappeared were known as the "desaparecidos"

[18]Robert Plummer, Condor Legacy Haunts South America, BBC NEWS, http://news.bbc.co.uk /2/hi/3720724.stm

[19]Philippines: Extrajudicial Killings, Enforced Disappearances, and Impunity, HUMAN RIGHTS WATCH (July 14, 2011), http://www.hrw.org/features/philippines-extrajudicial-killings-enforceddisappearances-and-impunity

[20]http://www.bbc.co.uk/news/world-asia-pacific-14196401

[21]http://www.gmanetwork.com/news/story/233810/news/nation/phl-policemilitary-may-face-extrajudicial-killing-raps-before-icc-lawyer

[22]Extrajudicial Killings in the Philippines: Strategies to End the Violence, Hearing Before the Subcomm. on East Asian and Pacific Affairs of the Comm. on Foreign Relations of the S. Comm. on Foreign Relations, 110th Cong. 2 (2007), available at http://www.gpo.gov/fdsys/pkg/CHRG- 110shrg40811/pdf/CHRG-110shrg40811.pdf.

executions have declined in many Asian countries, so have extra-judicial killings.

Before illustrating this temporal correspondence with some examples, there are two observations about the distribution of Asian nations across the two categories of state killing. First, there are at most five nations that conduct judicial executions at a "high" level of frequency (China, North Korea, Vietnam, Pakistan, and Singapore, and the last three of those could be considered borderline in some recent years), and four of the five also rank "high" on the index of extra-judicial killing. The only exception is Singapore, where judicial executions are common but extrajudicial killings are all but unknown. Were it not for this city-state, I would be tempted to conclude that governments that kill a lot legally have little compunction about killing illegally as well. Second, even though the large majority of Asian nations conducts few or no judicial executions, extra-judicial killing remains common in many parts of the region, including nations that have formally abolished the death penalty, such as the Philippines and Cambodia, and nations that seldom conduct judicial executions, such as Bangladesh,[23] India,[24] Indonesia[25], Myanmar,[26] Papua New Guinea[27], Thailand,[28] and Sri Lanka[29].

Consider first the Philippines and Nepal, the two largest abolitionist nations in Asia, with populations of 91 million and 29 million, respectively. Both countries have abolished the death penalty twice in recent years. Both conducted few judicial executions during the years before their first abolition. Both rarely carried out judicial executions after the death penalty was reintroduced (there were only 7 executions in the Philippines and none at all in Nepal). Both re-abolished the death penalty shortly after its reintroduction (the interval was 12 years in the Philippines and 14 years in Nepal). Both have continued to conduct extra-judicial killing on a large scale after the second death penalty abolition.

---

[23]Amnesty International 2007
[24]Mehta 2004; Eckert 2005
[25]Nevins 2005; Friend 2005
[26]Thant Myint-U 2006
[27]Human Rights Watch 2006
[28]Mydans 2003; Fritsch 2004
[29]Tamil Nation 2007; Human Rights Watch 2008

And in both nations the state's extra-judicial killing mainly seems to target "communist" insurgents and their sympathizers and supporters.

In the Philippines, hundreds of people have been killed extra-judicially by police or by members of the Armed Forces, but as of March 2007 there had not been a single criminal conviction. The number of attacks on leftist activists and community workers also "rose sharply" during the years immediately preceding the second abolition that occurred in 2006. Similarly, there have been no judicial executions in Nepal since 1979, but observers describe "the routine torture and extrajudicial killing of suspected Maoists," which "had risen to a startling average of eight a day" by 2005. Nepal also may have "the highest number of unexplained disappearances in the world," and the institution believed responsible for most of them – the army – enjoys "massive impunity". The Philippines and Nepalese cases illustrate how state killing can survive and even thrive after capital punishment ends. In temporal perspective, however, the volume of extra-judicial executions in both of these nations seems to have declined over the course of the last several decades (though there have been occasional resurgences). The evidence for a reduction in extra-judicial killing is clearest for the Philippines, where even the most conservative counts indicate that at least 3000 victims were killed in the Marcos years between 1965 and 1986 – an average of 150 per year.

The decline of judicial executions in several other Asian nations also seems to correlate with a general decrease in the practice of extra-judicial killing. In Indonesia, for example, hundreds of thousands of persons were killed in the political purges of the 1960s and in the massacres on East Timor after Portugal withdrew from its colony in 1975, but extra-judicial killing in the world's most populous Muslim majority nation is much less common today than it was during those bloody and tumultuous periods while judicial executions have been infrequent events for more than 20 years, with only 33 executions between 1985 and 1995 and no executions at all in seven of the next eight years.

Similarly, the rate of judicial execution in Bangladesh is only 1/20th what it is in the United States (and less than 1/100th the rate in Texas), and though extra-judicial killing remains a problem, the volume seems to have declined significantly since the former East Pakistan declared independence in 1971.

Extra-judicial killing is still a problem in Bangladesh. According to the Asian Legal Resource Centre, “extra-judicial killing has been adopted as a policy of maintaining law and order in Bangladesh,” and official policies to justify “blatant extra-judicial killings were first developed in their latest, most terrible incarnation in October 2002, when the government of Bangladesh launched Operation Clean Heart,” ostensibly to crackdown on crime. This operation resulted in the deaths of 58 persons in 86 days, in addition to the arbitrary arrest and detention of about 12,000 others. In 2003, the government of Bangladesh passed legislation known as the Joint Drive Indemnity Act, which granted total immunity to all members of the military, police, and other security forces who participated in Operation Clean Heart. And in 2004, the government of Bangladesh created a body of paramilitary units called Rapid Action Battalions (RAB), comprised of both soldiers and members of the police (Asian Legal Resource Centre 2006). Over the next four years, RAB forces killed an estimated 536 people, most in circumstances euphemistically known as “encounters” or “crossfire.

In Myanmar, which with China, North Korea, and Vietnam has one of the most repressive regimes in the region, the onset of a de facto moratorium on judicial executions in 1989 corresponded with an apparent decline in the military junta’s willingness to kill its own civilians. Military generals have ruled Myanmar for the past 45 years, ever since tyrant, numerologist, playboy, and ex-postal clerk Ne Win took control of government in 1962.

If the temporal evidence on judicial and extra-judicial executions seems patchy for some of the countries just discussed – the Philippines, Nepal, Indonesia, Bangladesh, and Myanmar – the evidence from other case studies points more unambiguously in the same direction: the two forms of state killing frequently fall together (Johnson and Zimring 2009). The huge decline in judicial executions that accompanied Meiji Japan’s opening to the West in the last half of the 19th century occurred during the same period in which several other forms of domestic state violence were tamed (Botsman 2005; Beasley 1990).

In South Korea and Taiwan, the most marked declines in execution are more recent, and they reflect a much increased and more generalized reluctance to use killing as a tool of governance after democratization began than in the preceding decades (Choe 2007; Roy 2003). In China, where judicial executions seem to have dropped by about two-thirds since 2000, there is evidence that extra-judicial killing has remained an important tool of the communist party-state during the reform period (Matas and Kilgour 2007; Buruma 2001), but there is vastly less state killing now than there was under Chairman Mao, who was responsible for millions of violent deaths during his nearly three decades as the "Great Helmsman." My final illustration of the apparently positive correlation between judicial and extra-judicial executions concerns Cambodia, where between 1975 and 1978 Pol Pot's vicious regime probably killed a larger percentage of the national population than any modern regime ever has (Rummel 1994). Cambodia abolished capital punishment in 1989, one decade after the end of a genocide that killed at least 15 percent of a total population of seven million people (Kiernan 2002; Cambodian League for the Promotion and Defence of Human Rights 2007). The main point of the abolition was to "mark with a powerful symbol" the end of the killing fields (Hood 2002:43; Dunlop 2005). As of 2008, Cambodia has not conducted any judicial executions for at least 20 years, and though extra-judicial killing still occurs, it is far less commonplace than it was when the Khmer Rouge's lethal logic was aimed at "manufacturing difference" and achieving "disproportionate revenge" (Hinton 2005:45, 211). There have also been sharp declines in vigilante and police killings in Cambodia since 1998.

In Bangladesh, the law says minimum force should be applied to arrests and every person has the right to seek a trial. I the cases of "crossfire" and "encounters", however, we find that these legal provisions are being totally ignored. Article 31 of the constitution of Bangladesh states.

"To enjoy the protection of law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property person of any person shall be taken except in accordance with the law".

What is implicit in Articles 31 and 32 is the right to access to justice, and it cannot be said that this right has been dealt with in accordance with the law unless a person has a reasonable opportunity to approach the court in vindication of their right or grievance. Even a fugitive is entitled to a legal defense when the death penalty is involved.

A law providing for the deprivation of life or personal liberty must be objectively reasonable, and the court will inquire whether for an ordinary prudent person such a law is reasonable, having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the state or of society necessitates the deprivation of one's life and personal liberty.

When the recent incidents of crossfire are studied, a common pattern that can be found is that victims were arrested and killed in what is termed as "crossfire", an "encounter" or a shootout during crackdowns on illegal firearms or the arrest of criminals in deserted places, mostly in the early hours. This trend has become a cliché?

Still, according to the police regulations of Bengal (PRB), firearms should not be used other than in emergencies. The uses of firearms are applicable in three situations: for self-protection and possessing of property, for foiling an illegal gathering and, in some cases, for making an arrest. The PRB mandates a full executive probe regarding any use of firearms. Investigators are required to send the report to the government and submit a copy to the police's top leadership.

Now people, who supported crossfire at the beginning, now are furious about current occurrence. RAB are now been reported to force people to give them money or they have been shot at spot. Now the faith of people on our law is now going down towards the bottom and it will continue going down if no measure taken soon.

Extra-judicial killing persists in several Asian nations that have abolished capital punishment or nearly abandoned the practice of judicial execution. One result is that there appears to be little correlation between a state's level of extra-judicial killing and its death penalty policy, at least when the two types of killing are examined at a single point in time. But a different pattern emerges in temporal perspective, for judicial and extrajudicial executions seem to have declined over time in several Asian jurisdictions, including Japan, South Korea, Taiwan, China, Cambodia, Indonesia, Burma, Bangladesh, the Philippines, and probably Nepal.

The evidence is too thin and the relationship between judicial and extra-judicial killings too fuzzy to tell whether a similar historical pattern obtains in countries such as India and Thailand. Over the past several years there has been considerable proactive state killing in both of these nations.

In Thailand, for example, the police and other authorities summarily killed more than 2500 people during the "war on drugs" ordered by Prime Minister Thaksin Shinawatrain 2003—a crackdown that was supported by 90 percent of the public even though 40 percent said they were afraid of being falsely accused and 30 percent said they were afraid of being killed.

2.5 THE SCENE IN INDIA

In India, too, extra-judicial killings (also known as "fake encounters") appear to be widespread[30]. An Indian policeman in Mumbai who confessed to participating in "about fifty" extra-judicial killings claimed this number is "not very many" compared to some of his colleagues, and he also said that "freelance" encounter killings are "very rare."[31] "I have never been involved in a killing that hasn't either been approved or requested by the senior commissioner of police," explained this so-called "encounter specialist." And he stressed: "We do not break the chain of command".[32]

[30]Mehta, Suketu. 2004. *Maximum City: Bombay Lost and Found*. New York: Vintage Books.
[31]Luce, Edward. 2007. *In Spite of the Gods: The Strange Rise of Modern India*. New York: Doubleday.
[32]Ibid

But if agents of the Indian state continue to kill on a large scale even while the nation's level of judicial execution has remained close to zero for nearly a decade, it is also true that fake encounter killings date back at least to the violent repression of the Telangana peasant movement (1945-1951) in the post-war and early post-independence period, while in the 1960s and 1970s, when judicial executions in India were more numerous than they are today, the extra-judicial execution of Naxalites – members of the radical, revolutionary communist groups that were born out of the Sino-Soviet split – "became standard police practice".[33] What is more, technology and media have advanced so rapidly during the last few decades that there is today vastly more information available about the previously hidden and isolated parts of countries such as India and Thailand, making it difficult to discern how much of the salience of proactive extra-judicial killing in the present is a function of better information and reporting. The relationship between judicial and extra-judicial killing is an important but understudied area of criminology.[34]

Therefore, with a call for other researchers to explore more systematically than has been done here the relationships between different forms of state killing both in the Asian contexts that is the focus of this essay and in other regions and societies. For now, at least, the evidence from Asia seems to suggest that at least in this part of the world, the relationship between judicial and extra-judicial killing tends to be one of neither independence (as the distribution of countries in Table 1 might seem to suggest) nor of substitution effects (as seems to be the case in some Latin American contexts.[35]

Instead, these two forms of state killing appear to be connected mainly through a process of common causation, with the same forces that predict and explain the decline of judicial executions also accounting for the fall of proactive extra-judicial killing in a variety of Asian environments.

---

[33]Pratirodh. 2007. "The Indian State's Killing Squads." August 9. ://pratirodh.blogspot.com/2007/08/indian-states-killing-squads.html.

[34]Botsman, Daniel 2005. Punishment and Power in the Making of Modern Japan. Princeton, NJ: Princeton University Press.

[35]Godoy, Angelina Snodgrass. 2006. *Popular Injustice: Violence, Community, and Law in Latin America*. Stanford: Stanford University Press.

India is grappling with an important question: at which point can a potential threat be reason enough to compromise on the right to life? India's premier federal investigation agency, Central Bureau of Investigation has recently charged seven police officers in the western state of Gujarat for the killing of four individuals, including a 19-year-old woman named Ishrat Jahan. The police claimed they were shot in an armed exchange in June 2004 and that all four were terrorists conspiring to target Narendra Modi, the chief minister of Gujarat.

There now appears to be little doubt that the police account is make-believe. The armed exchange did not take place at all. According to the C.B.I., all four were picked up separately, killed in custody, and weapons arranged to make it look like there was shooting on both sides. Yet some pundits are actually debating whether the killings were justified. What if all four, or even one or two of them, were indeed terrorists? Isn't it better, they say, that they were killed before they committed a terrible crime?

It is disappointing that India is having this debate. In any society in which human rights and the rule of law are respected in practice and not just on paper, the clear and unequivocal answer must be no. Under both Indian and international law, police officers who conspire and then execute individuals have engaged in premeditated murder. It's that simple.

Some have argued precedent. After all, it is fairly well known that some of the most "successful" security operations in India have resulted from large-scale extrajudicial executions. Hundreds were killed in Mumbai in the late 1990s as the police took on the organized crime syndicates. In the northern state of Punjab, a violent separatist movement that claimed thousands of lives was finally quelled with a heavy security response, including premeditated killings.

What is too easily forgotten is that serious human rights violations occurred during these operations. A Mumbai court recently convicted 13 police officers for the killing of a suspected gangster in a faked armed encounter. In 1995, Jaswant Singh Khalra, an officer at a bank in Amritsar in Punjab, who became an activist, used government crematoria records to expose more than

6,000 secret cremations by the police in just one of then-13 districts of the state. Mr. Khalra was killed in October 1995 and, 10 years later, a judge finally convicted six Punjab police officers for their role in his murder. In 1996, the Supreme Court of India ordered the country's National Human Rights Commission to investigate the human rights violations raised by the Punjab mass cremations case. It also entrusted the C.B.I. to look into the culpability of police officials. That investigation remains incomplete.

Last week, Surjit Singh, a police official from Tarn Taran in Punjab, said that he had been involved in the killing of 83 people in faked encounters on orders from his superiors. He did not know if they were actual suspects or just randomly picked up because they fit a profile.

The role of the police is to identify suspects, gather evidence against them, and make arrests. Security agencies, by the very nature of their law enforcement role, treat everyone as suspects. The police should not be allowed to act as judge and executioner. This is why an independent judiciary examines the evidence and pronounces a verdict. And why there is an appeals process to challenge all convictions.

When security forces are given a free hand, there are bound to be abuses. In Mumbai, the celebrated "encounter specialists" soon became mired in corruption allegations. In Srinagar, the summer capital of Jammu and Kashmir, a father explained to me how he bribed the police to get his son out of detention after he was warned that the young man would be shot and wrongfully identified as a Pakistani militant.

The recent successes in holding perpetrators accountable are because of relentless efforts by activists and victim families. But most give up, because the army and law enforcement agencies usually are protected by laws and policies that provide a widespread culture of impunity. That is why so many have been demanding the repeal of the Armed Forces Special Powers Act, which has become a much despised symbol of that lack of accountability. While police officers are from time to time prosecuted, it is almost impossible to bring perpetrators to justice if they belong to the army.

The army has cited the Armed Forces Special Powers Act to block an independent investigation and prosecution in the northeastern state of Manipur in the case of Manorama Devi, who was suspected of being a member of Manipur's banned insurgent group People's Liberation Army. Ms. Devi was taken into custody in July 2004 and found dead in a paddy field the next morning. According to the army, Ms. Devi was shot because she tried to escape. Her family members said that when she was taken into custody, Ms. Devi was handcuffed and wearing the traditional Manipuri sarong, which would have made it difficult for her to outrun several soldiers.

Like Mr. Khalra, a renowned human rights lawyer and activist Jalil Andrabi was killed in Jammu and Kashmir in 1996. The courts repeatedly asked the army to produce Maj. Avtar Singh, the man accused, who was also a suspect in a number of fake encounters. The army refused. His name surfaced again in California when his wife reported him for domestic violence. On June 9, 2012, Mr. Singh killed his wife, three children and then shot himself. He had never been prosecuted for human rights violations as a soldier, and despite the serious allegations against him, was allowed to emigrate.

Fake encounters are a symptom of the failure to hold security forces accountable for their crimes, but they are also a consequence of other problems. An overloaded justice system makes each trial a very long, drawn-out process. Witnesses are often threatened, yet there is no effective system of witness protection. Repeated and lengthy hearings mean that many witnesses no longer want to testify. Without proper training and equipment to secure evidence, the police rely on torture to secure confessions. The police often admit privately that they engage in fake encounters because they are frustrated that criminals captured after much effort simply walk away.

All too often in India, the government does nothing about abuses until there is broad public outrage. We have seen this with the response to sexual violence. But just as people are feeling squeamish about their private communications stored and available for scrutiny, so, too, they should be worrying about security forces that kill at will, simply because they can, in the guise of national security.

The continuing practice of extra-judicial killings (“encounter killings” in police parlance) has once again come to the fore in India with reports of the killing of one Suhrabudheen Sheikh, followed by the killing and burning of his wife Kausarbi in Gujarat, where a BJP government is in power, led by Narendra Modi. The Gujarat state government has already admitted these deaths in court. Now it has also come out that three top police officials, led by the Deputy Inspector General of Police D. G. Vanzara, also eliminated another person, one Tulsiram Prajapathi, who was a witness to the killing of Suhrabudheen Sheikh and the elimination of his wife Kausarbi. Charges have been filed against them. The liquidation of three individuals for reasons best known to the police has already added one more sordid chapter to the history of the Indian police force.

Several organizations and groups concerned with violations of human rights have become more and more aware of the extent and gravity of inhuman practices perpetrated by governments, arms of government, and other forms of organized power in many parts of the world against the lives of large numbers of people. In India extra-judicial killings are conveniently called ‘encounter killings’ by police. This euphemism has been used there since the 1960s. Although most of these killings go unnoticed, the recent incidents that have taken place in Gujarat have attracted an unusual degree of public scrutiny. Gujarat is the Indian state where nearly 3,000 bodies of Muslims littered the streets, lanes and by-lanes in 2002, when Narendra Modi presided over a pogrom against Muslims.

The people of Ahmadabad, the capital of Gujarat, saw four blood-spattered bodies sprawled in the road on June 15, 2004. They were the remains of four Muslim youths, one of them a teenage girl. They were officially described as “terrorists” involved in a conspiracy to “assassinate Narendra Modi”. They were shot dead in an “encounter” with the police near the residence of the chief minister of Gujarat. The police ensured that there were no witnesses to the killings so that they could go scot-free. But to the killing of Suhrabudheen there were two witnesses, one his wife Kausarbi and the other Tulsiram Prajapathi, and they had to be eliminated. It was done promptly in the hope that it would close the entire episode. Once a case is described as an "encounter death", there is no need for the lawless law-enforcers to provide explanations.

There was popular sympathy for the victims, especially the girl, named Ishrat Jahan, from Mumbai who was the breadwinner of her family. According to her mother, Shameema, Ishrathad been supporting her large family by tutoring students since her farther died two years ago. Income from tuition had stopped because of the closure of educational institutions for the summer vacation, forcing her to take the job of an accounting assistant in the firm of a man named Javed from Kerala, who was one of the four killed by the police. Javed was originally named Pranesh Kumar Pillay; his conversion to Islam and his working in the Gulf for some years were all used to cast suspicion on him and imply that he must have had links with anti-Indian terrorists. His father, Gopinathan Pillai, has repeatedly ascertained that his son accepted Islam while working in Pune almost ten years ago primarily to marry a Muslim girl named Sajitha, and not to join any terrorist group. Ishrat's neighbors have confirmed that her family was so poor that at the time of Ishrat's death they owed seven months' rent. The media have pointed out that if she had been an operative of a terrorist outfit, as claimed by the police, she and her family would not have been so poor.

"Encounter killings" are not occasional incidents in India. In Kashmir they are a continuing saga. Several incidents of "encounter killings" have taken place in various parts of the country. In October 2002 the Gujarat police killed a man named Samir Khan Pathan who was alleged to have planned to kill Narendra Modi. On November 3, 2002, the police shot and killed two men at New Delhi's Ansal Plaza shopping complex, claiming that the two men were Pakistani terrorists. A local doctor who claimed to have witnessed the event alleged that the encounter was engineered, and filed a petition before the High Court in Delhi, seeking an independent investigation into the killings. On December 28, 2002, the police killed three youths in Patna, the capital of Bihar state, in a similar encounter. Following widespread protests, the Bihar state government ordered an investigation by the Criminal Investigation Department into the killings. On January 23, 2003, the Indian police shot dead one Sadique

Jamal Mehtar, 25, in Ahmedabad, the capital of Gujarat. The police alleged that Mehtar had been on a mission to kill Modi.

The latest investigation into the killings of Suhrabudheen Shaikh and his wife near Ahmedabad has again focused public attention on extra-judicial killings in India. According to a report in the Hindustan Times, an explanation for the prevalence of extra-judicial killings might be found in a confidential letter written over 15 years ago by the head of the Intelligence Bureau (IB). The report said that the letter, written by the then Director of the Intelligence Bureau, V. G. Vaidya, to then Director General of Police K. P. S. Gill on December 30, 1991, serves as a de facto blueprint for police forces on how to carry out extra-judicial killings and avoid public attention. The report says: “It dealt with the subject of some police officers revealing to Western journalists how they had killed terrorists without legal sanction. One officer even gave the journalists access to a militant who had been illegally detained and was later shot. Their professional compulsions in executive action should not get reflected in their public utterances, which should be correct and responsible,” Vaidya wrote in the letter. In effect, he was condoning the killings, and objecting only to their being revealed to journalists.

International human-rights law prohibits the arbitrary deprivation of life under any circumstances, and Article 3 of the Universal Declaration of Human Rights states that “everyone has the right to life, liberty and security of person.” Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 4 of the ICCPR states that this right cannot be waived “even in times of public emergency threatening the life of the nation.” Moreover, under Article 2(3)(a) and (b) of the ICCPR, state parties have the obligation to ensure that remedies are made available to the victims of human-rights violations, and that those remedies are effective. Extra-judicial killings clearly contravene the right to life.

The Indian government ratified ICCPR in 1979. By ratifying an international treaty that enshrines the right to life, India is obliged not only to respect that right in principle, but also to take effective measures to ensure that extra-judicial killings do not occur in practice. Although the right to life is enshrined in Article 21 of the Indian constitution, the increasing incidence of extra-judicial killings in the country demonstrates that the government has failed to take effective measures against the police force, or to bring them to book. It must be remembered that respect for human rights is the sine qua non of any civilized society, and that disrespect for human rights is equal to denying civil liberties guaranteed to citizens by the state.

Recent killings at Nandigram in West Bengal have shown that violations of human rights occur in states ruled by the Communist Party also. Amnesty International's report dated August 10, 2001 brought to light the methods of torture practiced in West Bengal. The report said: “Police are being urged to use whatever means necessary to deal with crime and are often allowed to use torture as a substitute for investigations, while action is rarely taken against the perpetrators. This system of policing is having little if any impact on crime.” CPI (M) leader Benoy Konar, defending police brutality, once said, “It must be viewed whether police is carrying out torture with a correct aim or an incorrect aim...In a class divided society, the police has the duty of carrying out repression.... You [journalists] have the pen in your hands, the police has the stick.”

Several human-rights organizations have conducted studies of extra-judicial killings by the police in India. A study conducted by the Asia Pacific Human Rights Network has noted that “encounter killings” are not isolated incidents but occur throughout India. They are part of a “deliberate and conscious state administrative practice” for which successive Indian governments must bear responsibility. Indeed, successive Indian governments have adopted a de facto policy of sanctioning extra-judicial killings by members of the police forces, army and security personnel, the study say.

The operations against the Naxalite movements in West Bengal and Andhra Pradesh, and the operations against Punjabi extremists, are some of the most horrific examples. The paramilitary operations in Jammu and Kashmir, Manipur and Assam cause grave concern as human-rights activists report widespread instances of “encounter killings”, rape and torture of suspects. The

Vimadlal Commission has taken the lid off the so-called encounter killings in Andhra Pradesh during the mid-1970s. Uttar Pradesh state is noted for its encounter deaths, which have assumed alarming proportions in recent years.

There are several methods of torture in India that are used by the police and security forces against suspects belonging to poorer sections of society to extract confessions, and sometimes bribes. According to a report, in areas such as Jammu and Kashmir, suspects in detention cells are beaten and electric shock is meted out as routine punishment to extract confessions and information. The report says: “The methods of torture vary. For instance, in Assam, Jammu & Kashmir and Punjab (particularly in areas where the Punjab police or Punjab paramilitary units operate) dislocation of ball and socket of the suspect appears to be the preferred mode of torture. Sometimes the choice is more eclectic with a judicious combination of aero plane treatment (tying the hands of the suspect behind his back and suspending him over a beam, leading to shoulder dislocation), electric torture with cattle prod and roller treatment (crushing the muscles of the suspect with a wooden log being rolled on his leg). Of course, beating of suspects with belts and lathis [sticks] is standard fare in most police lockups. Human Rights groups have recorded cases involving rape and sexual humiliation of woman suspects.” This is all happening despite the fact that India has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT for short).

On September 25, 2006, the Committee on International Human Rights of the New York City Bar Association released a report, Anti-Terrorism and Security Laws in India. It urges the Indian government to limit its application of anti-terrorism laws. The report says that attentiveness to these human rights concerns is not simply a moral and legal imperative, but a crucial strategic imperative.

The report concludes with the remarks that the sweeping powers given to the authority in such enactments as the Terrorist and Disruptive Activities (Prevention) Act (also known as TADA), the Prevention of Terrorism Act (POTA) and Unlawful Activities (Prevention) Act (UAPA) were used predominantly not to prosecute and punish actual terrorists, but rather as a tool that enables pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture. It is also noteworthy that the Armed Forces (Special Powers) Act has come under sharp criticism by the Justice B. P. Jeevan Reddy Committee because of its "oppression and high-handedness", and the Committee has asked for the scrapping of this draconian law because it is "too sketchy, too bald and quite inadequate in several particulars". Laws such as the Public Safety Act (in Jammu and Kashmir), the Disturbed Areas Act and the Armed Forces (Special Powers) Act have led to abuses in various parts of the country. Section 197 of the Criminal Code of Procedure gives security forces effectively complete immunity for crimes committed in the course of duty. The Armed Forces (Special Powers) Act has been the object of widespread protest in Manipur and in other parts of North East India because it offers immunity to army personnel guilty of killing people indiscriminately.

Because of the increasing number of "encounter killings", it would be wise for the government and its organs to note what the Supreme Court of India observed some time back. The apex court pointed out that "terrorism often thrives where human rights are violated", and that "the lack of hope for justice provides breeding grounds for terrorism."

2.6 METHODS AND TOOL ADAPTED

I. Mercy killings
II. Cluster Bombs
III. Principles of distinction and proportionality; obligation to take precautions
IV. "Drone" killings
V. Airstrikes
VI. Raids
VII. Use of perfidy and effects on civilians
VIII. Suicide attacks
IX. Human shields
X. Killing of persons hors de combat
XI. Urban counter-insurgency

I. "Mercy killings"[36]

The expression "mercy killings" has recently been used to characterize certain killings by the military in the context of armed conflicts. One example concerns the court martial of Capt. Rogelio Maynulet for the shooting of an Iraqi man in Baghdad in May 2004. A "mercy killing" argument was central to the defence.[37] Although originally charged with murder for shooting twice at point-blank range,[38] Maynulet was ultimately convicted of assault with intent to commit voluntary manslaughter and sentenced to dismissal from the army and no confinement.[39] "Dispute broke out among a handful of soldiers standing over one severely wounded young man who was moaning in pain.

Despite the extent to which military officials, commentators, and even military judges seem willing to entertain a "mercy killing" defence, it is clear that such a characterization is entirely unacceptable under the applicable rules of international humanitarian law. In international armed conflicts, article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) is clear that the wounded or sick "shall be respected and protected in all circumstances. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered."[40]

The ICRC Commentary on this provision, based on the travauxpréparatoires, considers such "derelictions of duty … [to be] the gravest a belligerent can commit in regard to the wounded and sick in his power".[41] It notes that "the heinous crimes in question were already prohibited in the 1929 text, which established the principle of respect and protection in all circumstances - a principle which is general and absolute in character".

[36] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions
[37] "Charges Reduced in Iraq Killing", Los Angeles Times, Dec. 8, 2004; "U.S. Officer Calls Killing an Act of Mercy", New York Times, 9 September, 2004.
[38]Ibid
[39] "Army Officer Convicted in Iraqi's Death Is Freed", New York Times, April 2, 2005
[40]Geneva Convention I, 1949, Art. 12. Article 12 of Geneva Convention II contains an equivalent prohibition concerning wounded or shipwrecked at sea
[41] 5 ICRC Commentary to the First Geneva Convention of 1949, p. 138.

Although the Geneva Conventions of 1949 limited most protection of the wounded and sick to a narrow class of "protected persons", the First Additional Protocol to the Geneva Conventions expanded the scope of protection to cover all persons affected by international armed conflict. Article 75 of Additional Protocol I extends protection to those persons who do not qualify for the status of "protected persons" under the 1949 Conventions; this article includes protection against "violence to … life, health, or physical or mental well-being … in particular, murder."[42] It include civilians as well as soldiers.[43] Such persons would also benefit from the protection of common article 3 to the Geneva Conventions, as discussed below, which constitute "a minimum yardstick" applicable to all armed conflicts.[44]

II. Cluster bombs

The principal concern of many of the mission's interlocutors in Lebanon was the massive use by IDF of cluster munitions and the ongoing impact of unexploded sub-munitions (bomblets) on the civilian population. The justification given by the Government of Israel for the use of cluster bombs is that they were the most effective weapon against Hezbollah rocket launch sites. This is compatible with a military rationale for the use of anti-personnel cluster bombs, as the radius of damage extends to the size of a football field and thus is able to neutralize mobile rocket launchers.

The IDF interlocutors of the mission did not provide any information that would confirm that these weapons were in practice used in a manner consistent with this military rationale. Regardless of whether the military rationale was sound, the use of cluster munitions was inconsistent with principles of distinction and proportionality. Israel could not reasonably have been ignorant of the fact that the sub-munitions dispersed by cluster munitions have a high failure (dud)

[42]Congo v. Uganda, I.C.J. Reports 2005, Judgment of 19 Dec. 2005, Separate Opinion of Judge Simma, para. 26

[43] Protocol I, Art. 8(a). As the ICRC Commentary makes clear, the Protocol therefore "does not retain the distinction made between these two categories by the Conventions as regards the wounded and sick. On this basis a wounded soldier and a wounded civilian are entitled to identical protection." Commentary to Protocol I, p. 117, para. 304.

[44](Nicaragua v. United States of America), 1986 I.C.J. Reports, p. 114, para. 218

rate. In effect, then, the decision was taken to blanket an area occupied by large numbers of civilians with small and volatile explosives.

The impact of these bomblets would obviously be indiscriminate and the incidental effects on civilians would almost certainly be disproportionate. Nothing the mission heard from IDF suggests that their long-term effects on the civilian population was considered problematic before the decision to use cluster munitions was made. The mere fact that cluster munitions are not a banned weapon should not have led Israel to overlook other requirements of international humanitarian law. Moreover, one government official acknowledged that cluster bombs were used in part to prevent Hezbollah fighters from returning to the villages after the ceasefire.

III. Principles of distinction and proportionality; obligation to take precautions

First, under the principle of distinction, the parties to a conflict must at all times distinguish between civilians and combatants,[45] and attacks may be directed only at military objectives, defined as those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The only circumstance in which civilians may be targeted is for such time as they take a direct part in hostilities. Thus, attacks on civilian objects are unlawful unless at the time of the attack they were used for military purposes and their destruction offered a definite military advantage.

Indiscriminate attacks are similarly prohibited.[46] They are those which (i) are not directed at a specific military objective; (ii) employ a method or means of combat which cannot be directed at a specific military objective; or (iii) employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a

[45] International Committee of the Red Cross, Customary International Humanitarian Law, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"), pp. 3-8

[46]Ibid

nature to strike military objectives and civilians or civilian objects without distinction.[47] Attacks by bombardment, including with rockets, which treat as a single military objective a number of clearly separated and distinct military objectives located in an urban area or rural village are prohibited.

Second, under the principle of proportionality, attacks on legitimate military objectives which may be expected to cause incidental loss of civilian[48] life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited.

Third, an attacker must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. A number of specific precautionary measures are prescribed by humanitarian law in relation to the planning and conduct of attacks.[49] In addition, an attacker is required to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.

IV. "Drone" killings

The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under International Humanitarian Law because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.[50]

It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.[51] However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a

---

[47]Ibid

[48] International Committee of the Red Cross, Customary International Humanitarian Law, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"), pp.48-49

[49]Ibid pp.62-65

[50] Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, The Telegraph, 6 July 2009

[51] The general prohibition under IHL is against weapons that violate the principle of distinction or cause unnecessary suffering. See HPCR Commentary, section C.

helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.[52]

The greater concern with drones is that because they make it easier to kill without risk to a State's forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed – i.e., who is a lawful combatant, or what constitutes "direct participation in hostilities" that would subject civilians to direct attack – do not differ based on the choice of weapon.

Drones' proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

Drones may provide the ability to conduct aerial surveillance and to gather "pattern of life" information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability enhances the ability of a State's forces to undertake precautions in attack.[53]But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

V. Airstrikes

According to Israel, buildings were targeted in the "air war" primarily on the basis that they served as launching or storage sites for rockets or other materiel, and secondarily on the basis that they hosted Hezbollah fighters. Video

[52] Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 Int'l Rev. Red Cross 445 (Sept. 2005).
[53]Ibid

footage provided by Israel shows instances of rockets being fired from residential buildings and thus confirms instances of Hezbollah abusing civilian objects in its military operations. But this cannot be dispositive justification for the destruction of hundreds of civilian houses in South Lebanon, nor other distant houses or infrastructure.[54]

In order to show that the attacks did not violate the principles of distinction and proportionality and the prohibition of indiscriminate attacks Israel would need to provide substantially more and qualitatively different information relating to questions such as the kind of information on the basis of which specific houses and villages were targeted, the time lapse between the firing of a rocket from a house or village and the IDF attack in response, and the estimate by IDF of civilian presence in and around the target at the time of the strike. In the absence of such information the mission cannot conclude that the widespread targeting of civilian houses by IDF complied with international humanitarian law. In the absence of systematic evidence of any type, however, it is impossible to confirm the validity of the claim that every target was a legitimate military objective or that the principle of distinction was respected.[55]

VI. Raids

Night-time raids on housing compounds are routinely used by the international forces to capture individuals suspected of links to the Taliban. The international forces generally conduct a raid in one of two ways. During raids, the international forces are often accompanied by ANA units, and, in many cases, ANP forces will secure the perimeter. In some areas, the NDS will perform prior surveillance. There are also raids conducted directly by the Afghan security forces, including the NDS. While the NDS collects and analyses intelligence, it also has as operational dimension. NDS officials informed me that they are authorized to conduct arrest operations and do so, especially in the areas of counterterrorism, organized crime, and counter-espionage. I did not gather information on the conduct of these raids.

[54]Articles 53 and 147 of the Fourth Geneva Convention and article 52 of Additional Protocol I.
[55]Ibid.

The most common method, employed without any prior warning or request to enter, is to blow off a housing compound's door with explosives. The other method is to land on a roof in a helicopter and then climbs down into the house on ladders. Night raids are always dangerous for civilians. Many Afghans keep guns for personal protection from criminals, and to assure their self-protection within their own homes and compounds. Given that it is common for people to sleep with guns due to fear of intruders and local attackers, there is a high likelihood that they will fire on anyone, including troops, breaking down the compound's door at night. The results can be devastating. The most common complaints that I heard regarding night raids fall outside my mandate – that they are an invasion of privacy and the sanctity of a family's home, and result in women being treated inappropriately by foreigners. Many Afghans with whom I spoke indicated that these were some of their greatest concerns with respect to the conduct of the IMF, and expressed a strong desire for more cross-cultural training for the IMF, and for raids to be led by Afghan forces. Raids must be conducted in accordance with the stringent safeguards required by international human rights and humanitarian law.

VII. Use of perfidy and effects on civilians

Many Taliban attacks also involve perfidy, a prohibited method of warfare.[56] The Taliban regularly violate the prohibition against perfidy by feigning a civilian or other protected status for the purpose of carrying out suicide attacks. The Taliban's perfidious acts render everyday activities for Afghan civilians highly dangerous. In addition to the deaths caused directly, perfidy affects the behaviour of international and Afghan troop's vis-à-vis Afghan civilians. In this way, violations by one side make it more difficult for the other side to comply with its legal obligations. Thus, in many situations the IMF will have no reliable way of assessing whether an unknown person approaching is a civilian, or a Taliban member intending to attack.[57]This heightens the caution with which IMF soldiers approach ordinary Afghans, and necessitates the IMF taking precautions to protect themselves.

---

[56] J Ashley Roach, "Ruses and Perfidy Deception During Armed Conflict", 23 U. Tol. L. Rev. 395 (1991-1992).
[57] Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009)

The risk posed to the lives of IMF/Afghan soldiers by perfidious attacks has led the international forces to instruct civilians to keep at a distance from convoys and patrols. Defensive measures by soldiers will generally not be taken against vehicles and civilians who maintain the required distance and who do not otherwise pose a threat. Self-defensive measures may be taken against those who get too close. However, even when force is used in self-defense, it must comply with IHL norms, and, although perfidious attacks may increase the likelihood of mistakes, they do not justify any lowering of these standards for resorting to lethal force.

VIII. Suicide attacks

In the four months prior the estimated 381 civilians killed by the Taliban were killed in suicide attacks.[58] Both the number of suicide attacks and the number of civilians killed during such attacks have increased as the conflict has progressed: 2006 (123 attacks; 237 killed), 2007 (160 attacks; 321 killed), first four months of 2008 (34 attacks 214 killed).[59]

Taliban suicide attacks are often employed in a disproportionate or indiscriminate manner,[60] and large numbers of civilians are injured or killed as a result. Because they are carried out through a suicide body-borne or vehicle-borne IED (“incendiary explosive device”) by insurgents who feign civilian status, Afghan and international forces are hard pressed to distinguish potential suicide bombers from civilians, leading to the accidental killing of civilians.

Suicide bombing, as a method of attack during an armed conflict, is not prohibited per se. But a suicide attack violates IHL when it targets civilians, may be expected to result in disproportionate civilian casualties, or is carried out in a perfidious manner.

Data on suicide attacks from January 2007 to March 2008 indicates that 15% of attacks targeted civilians, including government officials, and thus violated IHL. In addition, many of the attacks on legitimate military objectives

[58]UNDSS recorded 381 civilian casualties during the first four months of 2008 (214 of these were a result of suicide attacks).
[59] UN, UNDSS Afghanistan (8 May 2008).
[60] Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009)

disregarded the principle of proportionality by taking place in public areas where there are large numbers of civilians. Thus, although the suicide attack may target an IMF convoy or a member of the ANA, large numbers of civilian bystanders are often wounded and killed in a manner wholly excessive to any possible anticipated military advantage. The organizers of such attacks simply fail to take all feasible precautions to minimize incidental loss of civilian life. The manners in which suicide attacks have been employed also appear to have become more reckless in recent years.

Many Taliban attacks also involve perfidy, a prohibited method of warfare. The Taliban regularly violate the prohibition against perfidy by feigning a civilian or other protected status for the purpose of carrying out suicide attacks.

IX. Human shields

IHL also requires each party to the conflict to take certain steps to limit the risk to civilians of attacks by the opposing party. Customary international humanitarian law prohibits "the use of human shields"[61] meaning the "intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives."[62] These requirements are routinely disregarded by the Taliban. While there are cases in which Taliban fighters have warned civilians to leave an area prior to an attack, I received multiple witness accounts of the Taliban intentionally using civilians as "human shields" to deter attacks on their forces. In some instances, the Taliban have launched rocket-propelled attacks at IMF bases, convoys or other military targets from civilian compounds and villages, thereby making it difficult for international forces to respond militarily - via return fire or air strike - without causing civilian casualties or damaging civilian objects.

Human shielding is also employed when the Taliban are in direct military engagement with international ground forces, and fire upon soldiers from homes or compounds. In this situation, the presence of civilians within the compound

[61] (ICRC Study, Rule 97)
[62](ICRC Study, Rule 97, discussion p. 340).

generally a family or group of families - has been used by the insurgents to deter return fire from international or ANA ground forces located nearby.

The Taliban also sometimes hide from the IMF in civilian homes. Witnesses in Kandahar, for example, told me that it was common in certain areas for the Taliban to ask families to hide them within their homes and compounds. One woman recounted how her relatives refused to do so, and asked the Taliban not to enter, saying that they feared being killed in potential cross-fire. But the Taliban entered the home by force. In the absence of direct military engagement such actions are less likely to lead to civilian casualties, but in other circumstances endangerment will occur and various binding IHL obligations will be violated.

The Taliban should end the use of human shields and avoid locating its forces in areas populated by civilians. Nonetheless, Taliban usage of human shields does not affect the international forces' obligation to ensure that air strikes do not cause a loss of civilian life excessive in relation to the military advantage of killing the targeted fighters.

International humanitarian law also imposes obligations on defenders. The use of human shields is prohibited.[63] Violation of this rule may be understood to require the defender's specific intent to use civilians to immunize otherwise legitimate military objectives from lawful attack.[64] In addition to this prohibition, the defender also has affirmative obligations to protect civilians by keeping them[65] away from military targets.[66]

A violation of the obligation to take precautionary measures vis-à-vis the civilian population or their use as human shields by one side to a conflict does not change the obligations incumbent on the other party to the conflict to weigh what constitutes an excessive attack in relation to concrete and direct military advantage.

---

[63] International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"). pp. 337-340 (Rule 97).
[64]Ibid, p. 340 (Rule 97).
[65] Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006,
[66] ICRC Study, p. 340.

X. Killings of persons hors de combat[67]

The same conclusion must be drawn regarding the reports of 12 destroyed and 38 severely damaged health facilities, notably in Bent Jbeil, Marjayoun and Nabatieh.[68] Ambulances and medical convoys were, according to ICRC, also hit during the conflict.[69] In the absence of concrete evidence to the contrary, it must be assumed that the health facilities and ambulances attacked were not legitimate targets. In this context it is important to stress that killing persons placed hors de combat is prohibited at any time and in any place whatsoever.[70]

XI. Urban counter-insurgency[71]

These rules also apply in situations such as that in Kunar province, where the Taliban fires rockets from residential areas directed at international forces bases and the latter then respond by firing back at the source. The international forces deliberately held the civilian population accountable for these attacks, but the perception was that their responses displayed insufficient concern for civilian casualties. One official opined that while the local people did not "support" the AGEs they were in no position to interfere when armed men decided to fire from the area. He stated that for the international forces to return fire served no useful military purpose inasmuch as the AGEs would slip away immediately after firing and return across the border to Pakistan. The international forces have procedures for vetting targets and selecting an appropriate method of attack. I was not provided specifics on procedures, and am in no position to assess their formal compliance with international law. But regardless of the written procedures, it is not clear that sufficient caution is shown in practice to ensure

[67] Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006
[68]article 18 of the Fourth Geneva Convention, article 12 of Additional Protocol I and Rule 28 in the ICRC Study.
[69] articles 21 and 22 of the Fourth Geneva Convention, article 21 of Additional Protocol I and Rule 29 in the ICRC Study
[70]Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). I.C.J. Reports 1986, para. 218. See also ICRC Study,
[71] Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009

that attacks are not indiscriminate and that civilian casualties will not be excessive in relation to the military advantage anticipated.[72]

2.7 CATAGORIES OF EXTRA JUDICIAL KILLINGS

I. Killings by law enforcement officials or other security forces:

Killings by law enforcement officials and other security forces can take many forms. Very common form is intentional murders where police shoot to kill alleged criminals without proper implementation of appropriate measures. In countries where the security forces may be directly controlled by politicians, security officials may conduct politically motivated killings, including of political opposition members or supporters, and election related killings.[73] In many other countries, police kill people while they are in off duty, for profit even.

II. Killings during armed conflict:

In recent times, in many countries, unlawful killings are committing during armed conflicts. Countries including Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Israel, Lebanon, the Philippines and Sri Lanka are facing such unlawful executions. Means of such unlawful execution of war include air strikes; cluster bombs; raids; perfidy; suicide attacks; human shielding; issues arising in urban counter-insurgencies; and killings of person shores decombat.[74]

III. Killings during counter-terrorism operations & targeted killings:

Some refer to targeted killings of suspected terrorists as extra-judicial executions; others claim they are legitimate acts of war[75] and counter-terrorism responses must not themselves human rights and humanitarian law. Nowadays except for the extensive use of car bombs, especially around the Arab World, our attention needs to be focused on the use of Unmanned Aerial Vehicles (UAVs),

[72]Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). I.C.J. Reports 1986, para. 218.
[73](Alston, 2010)
[74](HRC, 2004).
[75](Kretzmer,2004)

the so-called Drones as a means of target killing.[76]A drone is generally an aircraft that flies without a human crew on board and can be controlled from a certain remote location or can fly autonomously based on a pre-programmed flight plan. The machine serves the purposes of reconnaissance, target and decoy, research, electronic attack and combat. The combat drones are used in high risk operations and through their detective systems, map a region. Subsequently, they move into missile operations destroying wide areas and killing a multitude of individuals. This is a clear image of target killing operation.[77]

According to the Special Rapporteur of Human Rights Council, Philip Alston's report, there are about 40 States that possess drone technology. Some of them have already used it and some are waiting to use in the combat purposes. The United States of America is the prime user of drones. Significantly they used drone in the operation Enduring Freedom[78] as well as in the Operation Iraqi Freedom. Drone was used by America in the lawless tribal territories of Pakistan, in operations under George W. Bush administration as part of the Global War on Terror. Drone was used as well under the President Obama's administration.

Drones seem to be the weapon of choice of the Obama administration against the Taliban and Al-Qaeda. Between January and October 2009there were 43 drone attacks, compared to a total of 34 in 2008.[79] Such attacks are characterized by the US as a "lawful" military action authorized by the Congress after the terrorist attack on September 11, 2001.

In June 2010 the United Nation identified the United States of America as the prime user of targeted killings. The United Nation warned the United States to follow properly the international rules governing warfare. The United Nation also stated to provide the rationale behind the direct killing of individuals instead of capturing. In October 2009, Philip Alston, the UN special Rapporteur on extra-judicial, arbitrary, or summary executions Report, declared that the use of combat drones will be regarded as a fundamental breach of international law unless the United States can demonstrate that appropriate prosecutions and

[76](Thessismun, 2013)
[77]Thessismun, 2013
[78]In Afghanistan, Philippines, Africa and Sahara
[79]Thessismun, 2013

accountability mechanisms are in place. He stated that the growing use of armed drones by the United States undermined global constrains on the use of military force, expressing his fear that this example would lead to a chaotic and dark world.

He also asked the "key military powers" to organize a summit and set some limits to the use of such weapons. Warning that the technology facilitates targeted killings, the report raised concerns that drone operations, based away from the battlefield may develop a "PlayStation" mentality towards killing". The Rapporteur's report reflects the general concern that war has taken on a, "video Game" quality.

IV. Killings by non-state actors:

Killings by non-State actors involve killings by rebel and insurgent groups, paramilitary groups, militias, vigilantes, death squads, criminal gangs, bandits, mobs, family members and private individuals. Such killings may occur for the purpose of "social cleansing", to "restore honour" or to punish suspected criminals. They might also occur for profit, domestic violence and inter-communal violence.

In 2004, Philip Alston, the Special Rapporteur of Human Rights Council identified four general categories of non-State actors and explained the legal implications:

- The State has direct responsibility for the actions of non-State actors that operate at the behest of the Government or with its knowledge or acquiescence. Examples include private militias controlled by the Government (which may, for example, be ordered to kill political opponents) as well as paramilitary groups and death squads;
- Government are also responsible for the actions of private contractors (including military or security contractors), corporations and consultants who engage in core State activities (such as prison management, law enforcement or interrogation);

- Where non State armed groups are parties to an armed conflict, such groups have their own direct legal responsibilities for any killings they commit in violation of international humanitarian law;
- The State is directly responsible for “private” killings, such as murders by gangs, vigilante justice, “honour killings” or domestic violence killings. In most cases, an isolated private killing is a domestic crime and does not give rise to State responsibility. However, where there is a pattern of killings and government’s response (in terms either of prevention or of accountability) is inadequate, the responsibility of the State is engaged. Under human rights law, the State is not only prohibited from directly violating the right to life, but is also required to ensure the right to life, and must meet its due diligence obligations to take appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators.

V. Deaths in custody

Suicides, deaths resulting from prison conditions, including poor health care, over-crowding and inadequate food, death resulting from torture, killing of prisoners by guards, inter-prisoner violence etc. are common in most of the countries. The responsibility of the State is not only to stop and prosecute the death by guards but also to find out the cause of the deaths and its prevention. Obligation of the State include: providing adequate health care to the detainees,[80] ensuring appropriate prison oversight and monitoring; providing appropriate budgets to prisons,[81] stopping practices of prisoners running prisons, ensuring accurate records of detainees and their sentences and to prevent inter-prisoner violence.

VI. Death penalty

Most of the countries of the world still follow death penalty as highest punishment. Also no prohibition is imposed over it by international laws. However, considering the fundamental right of right to life, the lawful

[80](HRC, 2004)
[81]Ibid

application of death penalty has some limits. Death penalties carried out in violation of those limits are unlawful killings. Various reports examining the legal limits on the application of death penalty show that:[82]

- The death penalty is only lawful if imposed after a trial conducted in accordance with fair trial guarantees, including judicial independence, the right to counsel, an effective right to appeal, and the right not to be coerced to tortured to give evidence;
- States that impose death penalty must provide transparency in relation to the specifics of the processes and procedures under which it is imposed. This obligation is firmly grounded in existing law. States retaining the death penalty should undertake periodic reviews to determine whether international standards have been complied with, and report to the council on their findings;
- International law prohibits the application of death penalty to juveniles;
- International law prohibits the mandatory imposition of the death penalty;
- International law only permits the death penalty for "the most serious crimes".
- A person sentenced to death has the right to seek pardon or commutation of the sentence.

VII. Sexual violence and unlawful killings

Gender-based violence is increasing day by day in most of the countries. Situations in which women are literally raped to death have actually been significantly unreported, and the links between rape and killings have been under-studied. While men are also subject to sexual violence linked killings, women have been subject to such killings in situation after situation around the world.

- Women are killed if they resist rape or murdered immediately after it
- Women are taken into sexual slavery and then killed;
- Family members (generally men) or others, who attempt to stop a rape, or refuse orders to rape their female relatives, are killed;

[82](Alston, 2010)

- Women who have been attacked die as a result of rape related injuries, or contracting HIV/AIDS or other sexually transmitted diseases; Rape/killings may be particularly brutal when conducted as a reprisal attacks for alleged cooperation with an opposition group.

VIII. Non-State armed actors and their use of death penalty

Countries including Afghanistan, the Central African Republic, Colombia, and Kenya etc. without the presence of the state, non-State armed actors have set up "tribunals" to hear cases of civilian wrong-doing. These tribunals have the power to impose death sentence even. Philip Alston, the Special Rapporteur of Human Rights Council rightly observed it as "black market criminal justice"

IX. Civil defence groups

One particular subgroup of non-State civilians who band together to form "civil defence groups" or "village self-defence forces" with a view to exercise force against other armed actors, such groups are most likely to exist when:

- Civilians face daily threats to their lives and property in situations of armed conflict, high levels of lawlessness, or similar heightened in security
- The States security presence is minimal or entirely absent because, for example, territory is remote, or held or contested by rebel groups or criminal gangs;
- State forces are themselves a source of threat. The international community has long been concerned about the existence of such groups, and the risks they pose,[83] but there has been little analysis or understanding of how best to mitigate the risks, and when or how such groups should be supported or disbanded.

[83]Commission on HR resolution, 1992

X. Corruption and unlawful killings

Corruption can be both of a cause and a consequence of killings and of impunity. Inmost of the countries there has a strong link between corruption and killings. For example corruption can constitute unlawful killings through violence by police against civilians who refuse to pay a bribe. Countries may reduce corruption and their impact of killing by implementing some effective measures. Such measures include requiring audits of government institution; obligating senior officials to declare their assets; instituting zero tolerance policies on investigation and prosecution; strengthening police oversight mechanisms; or instituting radical structural reforms.

2.8 INTERNATIONAL LEGAL FRAMEWORK

Governments have failed to describe the legitimacy of above mentioned categories of extrajudicial and unlawful killing of individuals and to explain why the attacks are in conform it to international law. The usual justification is that these policies are a necessary and proportionate response to terrorism and warfare and that the terms “illegal assassinations” and “legal efforts to kill specific individuals” are different.

Human rights law, humanitarian law and international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations.[84] International law requires that States must ensure that victim’s families are able to enforce their right to compensation, through judicial remedies where necessary.

2.8.1 Legal Framework In

I. Armed Conflicts

According to the Geneva Convention of 1949 and Hague Regulations, attacks are permissible only against military objectives or civilians if they “directly participate in the hostilities”. That directs the conclusion that attacks against civilians are not always unlawful and may be considered as self-defence.

[84](HR Committee, 2004)

II. Cases Outside The Armed Conflicts

If we are not dealing a case of armed conflict, the UN Basic Principles on the use of force and firearms by the law enforcement officials clearly state that the "international lethal use of fire arms may only be made when strictly unavoidable in order to protect life".

The principles of necessity and proportionality are required and impose the minimum use of force. We should underline, however, that State does have the right, with respect to international law and the aforementioned principles, to exercise its authority and due diligence‟ in order to protect its civilians from terroristic attacks and criminals.[85]

III. The Right to Self Defence

According to United Nations Charter (1945), "All Members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State, or in any other manner in consistent with the Purposes of United Nations". In cases of extraterritorial use of force, a State may justify its actions only by invoking the right to self-defence, which is defined in if the UN Charter (1945), as following:

> *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of his right to self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."*

[85](Thessismun, 2013).

Furthermore, the majority of ICJ judgments support that the right to self-defence cannot be invoked against non-State actors. The Caroline Doctrine can also be considered as a subsidiary source of the general principle of self-defence its general applicability has been doubted by many States. The Caroline Doctrine is the product of an incident in the 1840s where British soldiers crossed into the United States to destroy a Ship ferrying arms to insurgents in Canada. Both the United Kingdom and the United States agreed that anticipatory action was allowed only when the "necessity of that self -defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation." After World War II, the Nuremberg Tribunal reaffirmed the Caroline Doctrine.

IV. UN Response Towards Extra Judicial Killings

Constitutions of almost all the countries or legal systems have prohibited death penalty without the fair trial and the decision of a competent judge. *The United Nation's International Covenant on Civil and Political Rights (1966)* has declared the same:

> *"Every human being has the inherent right to life. The right shall be protected by law. No man shall be deprived of his life arbitrarily."*

"[The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court".[86] In 1982, United Nations have created the post of Special Rapporteur on extrajudicial, summary or arbitrary executions. His job is to search and evaluate the cases of extrajudicial killings around the world while at the same time holding Governments to account the extent of their or their agents‟ responsibility and the cases where the preventive measures of the state towards unlawful killings or its response towards the same actions were inadequate.

The United Nations currently deploys more peacekeepers than ever. Some peace keeping missions, like the one in Democratic Republic of the Congo, have very strong mandates to protect civilians. Missions are also

[86] (ICCPR, 1966)

increasingly mandated to perform range of activities, from active combat to development, justice reform and human rights monitoring.

To minimize or stop extrajudicial killings the United Nation and other international organizations have implemented so many rules and regulations as well as several techniques to minimize the unlawful or extrajudicial killings. However, the situation of the most of the countries including Arab territories, Republic of South Africa, Pakistan, Afghanistan etc. raises a question in front of us: are those measures of international organizations sufficient to give protection to the innocent individuals?

Dealing with the inter-State armed conflict situations, United Nations must be stricter to make States follow its regulations. In recent times, the United States and Israel are the prime user of drone technologies and UN has been quite unable to show effective measures to stop them or held them responsible for the killing of innocent individuals. In case of inter-State armed conflict, UN is in the better position to impose war regulations towards the States and held states responsible to justify its every war conduct. Also States should value the life and securities of civilians of other State as its own.

In case of killings by non-State actors, deaths in custody, death penalty, killings with sexual violence, killings because of corruption, State must be more cognizant to punish the offender so that it creates an example for others. Fair trial and justice must be ensured in every States to reduce the amount of intra-State unlawful killings.

Victim's family must have adequate access to information about investigations, prosecutions and their outcomes. Transparency must be ensured by the State of its Governmental bodies like police department, judges and other security forces. To prevent deaths in custody prison condition must be improved and the international standard of minimum rights of the prisoner must be provided by the State.

States undertaking targeted killings and extrajudicial, arbitrary or summary executions should hold accountable under international law and they must justify the basis of their actions. Furthermore, before taking any action towards suspects or criminals they should respect their rights and take measures to eliminate the use of force and seek ways to bring them under fair trial rather the ultimate thought of killing. Executions by governmental authorities' without the proper judicial proceedings are unlawful and constitute a violation of international humanitarian law, as well as numerous human rights principles. To minimize or stop extrajudicial killings the international Organizations and States should take collective measures respecting the rights of the innocent civilians, suspects or criminals.

The death penalty has declined or disappeared in most parts of the world, including Asia. At present, only four or five Asian nations retain capital punishment and continue to conduct judicial executions with any frequency: China, Vietnam, North Korea, Singapore, and possibly Pakistan. Many analysts contend that the widespread decline of the death penalty dramatically illustrates the spread and success of human rights norms, and some observers believe that the decline or disappearance of the death penalty stimulates improvement in other areas of state behaviour, including the use of extra-judicial violence. Therefore, the relationship between judicial and extra-judicial killing in the Asia region. It begins by describing the variation in state killing that exists in contemporary Asia. This cross-sectional analysis suggests there is little correlation between judicial and extra-judicial executions, but the appearance of independence largely disappears when the two forms of state killing are viewed in temporal perspective. Judicial and extra-judicial executions have declined over time in many Asian jurisdictions, including Japan, South Korea, Taiwan, China, Cambodia, Indonesia, Burma, Bangladesh, the Philippines, and perhaps Nepal. The evidence is too thin to tell whether a similar pattern obtains in countries such as India and Thailand, where judicial executions are rare but where there has been considerable extra-judicial killing by the state in recent years.

Chapter 3

INTERNATIONAL PROSPECTIVE OF HUMAN RIGHTS OF LIFE AND UNLAWFUL KILLING BY STATE FORCES

3.1 INTRODUCTION

The provisions protecting the right to life, personal liberty and integrity, freedom from torture, freedom of expression, and the right to an effective remedy exist in all general human rights instruments. All human rights treaty-based bodies have interpreted these provisions as imposing a broad range of positive obligations upon the contracting parties. The right to life and the right to freedom from torture are non-derogable under all the instruments considered[1], and therefore cannot be suspended even in times of war or other emergency threatening the life of the people of the nation. Moreover, save for express derogations from conventional obligations, the remaining (derogable) rights continue to be applicable in conflict situation alongside the provisions of international humanitarian law

There are no explicit provisions in the Indian constitution regulating the incorporation and status of International law into the Indian legal system. However, Article 51(c) stipulates as one of the Directive Principles of state policy, that: "The state shall endeavor to foster respect for International law and treaty obligations in the dealings of organized people with another". International treaties do not automatically become part of national law: they must be expressly incorporated into domestic law by a legislative act. While treaty law is not directly applicable, customary international law has direct application provided that it is not inconsistent with national legislation. The UN has long acknowledged the need for a specific instrument addressing the position of unlawful killing of accused or innocent person by state forces which called upon States to take all necessary measures to put an end to violations by ensuring

[1] Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights, Article 27 of the Inter-American Convention on Human Rights, Article 4 of the Arab Charter on Human Rights

legislative compliance with international human rights obligations, effective implementation, and an effective remedy for the victims, and by investigating threats and acts of violence against accused thoroughly, including during armed conflict, with a view to "bringing to justice those responsible in order to combat impunity". There are lot of international legal instruments, binding and non-binding, addressing human rights in general; very few instruments are specifically concerned with the situation of unlawful killing by state forces. In recent years there has been an increasing tendency towards the adoption of legal initiatives, both at UN level and in virtually all regional level, designed to respond to the specific human rights violations experienced by accused person. The measures envisaged are all non-binding in nature. In addition to the provisions of the ICCPR, the UN system encompasses certain conventions, such as *the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984, in force since 1987) and *the International Convention for the Protection of All Persons from Enforced Disappearance* (2006, in force since 2010).

If those who committed torture abroad come to the United States, they can be prosecuted as torturers,[2] or deported under human rights provisions of U.S. immigration law.[3] For example, if a state official commits an extrajudicial killing by torturing and ultimately killing an individual, and later comes into the jurisdiction of the United States, punishment options are limited to those described above.[4] Why is this?

There are a few reasons for the difficulty in bringing individuals that have committed extrajudicial killings to justice. The biggest obstacle is that an extrajudicial killing is not criminalized under international law in as broad a manner as torture. Even though torture seems less severe than death, torture is an

[2] 18 U.S.C. § 2340(a)-(b)(2) (2001).

[3]*See* 8 U.S.C. § 1182(a)(3)(iii) (2010) ("Inadmissible aliens"):

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of -

(I) Any act of torture, as defined in section 2340 of title 18; or

(II) Under colour of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note), is inadmissible.

See also 8 U.S.C. § 1227(a)(4)(D) (2010) ("Deportable aliens") (invoking the same descriptions from § 1182 to remove already admitted aliens).

[4] For another example of an immigration prosecution, *see, e.g.*, 18 U.S.C. § 1015(a) (2001).

action that is never excusable under international law. Yet states are permitted to intentionally kill individuals in a number of circumstances. They may execute them after due judicial process, they may incapacitate them in a valid exercise of law enforcement, or they may target them pursuant to the laws of armed conflict. Even the term "extrajudicial killing" does not perfectly reflect the situations in which a state may kill war and law enforcement operations are both extrajudicial, yet killing is and should be permitted in both cases.

Nonetheless, even though intentional killing, unlike torture, can sometimes be lawfully done, there exists a vast class of killings committed by public officials of states that are done pursuant to or motivated by the same illiberal motives as torture: to suppress dissent, to eliminate political rivals, and to frighten civilian populations. These killings should be outlawed and prosecutors given the tools to fight them.

Considering the differences between torture and extrajudicial killings, but taking account of their many similarities, this article analyzes whether the structure of the CAT can be adopted to suit the new, heretofore neglected, purpose of criminalizing extrajudicial killings through the creation of a new convention.

3.2 THE STATUS QUO: THE CRIME OF TORTURE AND THE FACT OF KILLINGS

Both extrajudicial killing and torture had a place in the ancient world. Towards the end of the 20th century, however, there emerged a consensus that torture was not a legitimate tool of the state, and corresponding legal regimes followed. However, such legal regimes have not emerged in regards to extrajudicial killings. A brief history of these crimes is useful in determining whether extrajudicial killing can be criminalized similarly in the future.

3.2.1 Criminalizing Torture

In the ancient world, torture was common. Practices ranged from stoning to crucifixion to disgusting devices such as the "brazen bull" from Ancient Greece by which victims were burned and boiled to death while their screams were converted into music by a specially designed instrument.[5] Torture lasted into the middle ages of Europe. For example, one of the first times torture was used to suppress political opinion took place during the Inquisition.[6] Medieval trials were by "ordeal" rather than testing a conviction with evidence, defendants suffered certain pain to prove their innocence, and torture was considered an effective, and legitimate, means to elicit truth and confessions from defendants.[7] Like so many others of the ancient time, these barbarous practices had difficulty withstanding the emergence of the modern era: the dawn of the Enlightenment,[8] of democracy, and of greater social justice and technological progress.[9] Torture, as a common practice, seemed to be going by the wayside.

Yet, strangely, some governments began to utilize torture as a tactic of modern warfare. Twentieth century democracies, which by definition agree to be bound to the rule of law and the importance of writing un-crossable lines for governmental power, discovered a utility for torture. While democracies have generally chosen not to go to war with each other,[10] post-colonial wars and wars of national liberation in the modern era created an uncertain role for the law of armed conflict in intrastate conflicts.[11] This uncertainty has allowed some democracies to use torture, relying on facilities for detention and harm that their unconventional enemies could not replicate.[12]

France admitted to the use of torture in the Algerian War for the independence of the French colony.[13] Some of the commonly reported practices included: sleep, food and water deprivation; exposure to extreme heat or cold;

---

[5]Jean kellaway, the history of torture and execution 10-18 (Warren Lapworth ed., 1st pbk.Ed. 2000).

[6]Associationinternationale de droit pénal, revue internationale de droit pénal: la prévention et la suppression de la torture 29 (1977) [hereinafter revue internationale].

[7]*Id*. At 26-27.

[8]*See generally* Marchese Beccaria, of crime and punishment (Edward D. Ingraham trans., 1764) (consisting of the first modern work of criminology and criminal justice, and one that strongly advocated torture as both barbarous and completely ineffective).

[9] J. Jeremy Wisnewski, Understanding Torture 24-25 (2010) (giving political, humanistic, juridical, and socio-anthropological views on why torture went into disfavour at this time); *see also* Amnesty Int'l, Report on torture 29 (2nd ed. 1975) [hereinafter Amnesty].

[10]*See* Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 Philosophy & Pub. Affairs 205, 213 (1983).

[11]*Id*. At 216.

[12] Wisnewski, *supra* note 8, at 38.

[13] General paulaussaresses, services spéciaux, algérie 1955–1957 11-13 (2001); *see also* the battle of algiers (Rialto Pictures 1966) (a seminal film publicizing the use of torture in Algeria).

electric shock; loud noise; forced maintenance of "stress" positions for long periods of time; water torture; beatings; sexual abuse; humiliation and degradation; use of drugs; and, threats against relatives.[14] Likewise, the republican constitutional monarchy of the United Kingdom used torture or at the very least, "cruel and unusual treatment,"[15] in dealing with Irish separatists of the Irish Republican Army. Tactics included: "hooding"; wall standing and stress positions; sleep, food and water deprivation; and, constant loud and unpleasant noise.[16]

The United Kingdom, like many colonial liberal societies, was especially cruel abroad. The scale of violence used against colonized peoples may seem more like crimes against humanity than isolated acts of torture that a statute intends to prevent. However, tactics used by the United Kingdom against Kenyans during the 1950s included: beatings; electric shock; use of cigarettes on the body; skin searing; use of pliers on sensitive body parts; rape, including penetration with foreign objects; and dragging people behind cars.[17] Likewise, Spain did little to reform its law enforcement and military apparatuses for dealing with terrorists even as it emerged from the Franco dictatorship.[18] As a result, members of the Basque separatist terrorist group, Euskadi Ta Askatasuna ("ETA"), continued to be tortured in the new democratic regime. For example, allegations against the ETA during the 1980s and 1990s state that 84 percent of Basque activists in prison were tortured, and large numbers of men in the Basque country were arrested and tortured, but never charged with crimes.[19] In one case, members of a Basque newspaper accused police forces of asphyxiating them with plastic bags, and of forcing them to participate in a simulated execution.[20]

---

[14] *See* dariusrejali, torture and democracy (2009) (explaining different torture techniques); *see also* john t. parry, understanding torture: law, violence, and political identity 99 (2010); revue internationale, *supra* note 5, at 59-60.
[15] Ireland v. United Kingdom, App. No. 5310/71, Eur. Ct. H.R. 59 (1978) (comparing acts rising to torture and lesser intrusions on personal dignity that might constitute other cruel, inhuman, or degrading treatment).
[16] *Id*. At 35 (explaining that these tactics were so prolific and controversial they came to be known as the "five techniques").
[17] PARRY, *supra* note 13, at 108.
[18] *Id*. At 117.
[19] *Id*.
[20] *Id*. At 118.

With even democracies finding a utility for torture, it can scarcely be surprising that illiberal societies, dictatorships, fascist regimes, and communist states have engaged in even more extreme measures in order to ensure control of the people, or to force a great societal change based on ideology.[21] Whereas democracies seem driven to use torture under the stress of separatists, terrorists, or crumbling empires, dictatorships must ply violence constantly in order to maintain control. Every day is a part of an ongoing, dire national security emergency.

In the later part of the 20th century, a clearer consensus emerged that torture was not legitimate and that derogation from democratic principles in emergencies such as the famous "ticking time bomb" scenario undermined the rule of law.[22] It was also accepted that torture was not especially effective as it produced false intelligence and false confessions.[23] Yet defining and criminalizing torture internationally did not take place until decades after World War II, a period of time when torture-like abuses were part of a decolonization strategy. An inability to qualify and define the phenomena as a discrete legal concept was certainly part of the problem.[24] Many documents declared the broad belief that "torture" should not be permitted, whatever the concept might mean.[25]

After a number of torture cases became public in the 1960s and 1970s in

[21] Nazi Germany, an emblematic example of an illiberal dictatorship with cruel methods of repression, used torture against its own citizens. Joseph Stalin, Soviet dictator in the years after the Second World War, proved little better. Secret police with the power to torment ordinary citizens were key elements of repression, emulated in many illiberal societies since, such as Iran. Pol Pot, a Cambodian dictator who massacred thousands in "killing fields," and forced the entire country to migrate from cities to rural areas, was famous for the use of pulling fingernails off, or driving shoots of bamboo under fingernails, to compel persons to give information in an interrogation.

[22] International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights art. 27, July 18, 1978, 1144 U.N.T.S. 123 [hereinafter ACHR].

[23] AMNESTY, *supra* note 8, at 24; Gary D. Solis, The Law of Armed Conflict: Int'l Humanitarian Law in War 449-53 (2010).

[24] AMNESTY, *supra* note 8, at 33-38.

[25] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217A, art. 5 (Dec. 10, 1948) [hereinafter UDHR]; American Declaration on the Rights and Duties of Man art. 26, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining To Human Rights In Inter-American System OAS/Ser.L/V/I.4 Rev. 9 (2003) [hereinafter Rights of Man]; ICCPR, *supra* note 21, art. 7; ECHR, *supra* note 21, art. 3; ACHR, *supra* note 21, art. 5. Some treaties are also non-derogable. *See e.g.*, ICCPR, *supra* note 21, art. 4; ECHR, *supra* note 21, art.15; ACHR, *supra* note 21, art. 27.

Algeria, Latin America, and elsewhere, human rights groups launched campaigns and begin to scrutinize the problem.[26] At this time, there was a wave of new U.N. General Assembly resolutions reaffirming these principles.[27] Most significantly, in 1977 the General Assembly requested that the Commission on Human Rights draft a binding convention against torture based on the General Assembly's 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[28] In 1978, an ongoing working group continued the drafting process.[29] Between 1978 and 1984, numerous drafts circulated and there was fierce debate that led to volumes of drafting history. In 1984, the final version of the working group was approved by the Commission on Human Rights and transmitted to the General Assembly, where it received relatively speedy signature and ratification by a number of states.[30]

This treaty, the Convention against Torture ("CAT"), has become one of the most important human rights treaties because it criminalizes illiberal assaults on the human body and human dignity.

3.2.2 The Fact of Extrajudicial Killings

Extrajudicial killings have been relatively common since the end of World War II. However, they are not criminalized as broadly as torture despite their similar history and prevalence. They are intertwined with the fate of people who have been "disappeared" by their governments. For example, in Argentina, liberals and communists who opposed the ruling military junta were executed or simply "disappeared."[31] From the 1970s to the 1990s, during Operation Condor, Chile and other countries with military rule also participated in systematized

[26] Manfred Nowak & Elizabeth McArthur, the United Nations convention against torture: a commentary 3 (2008).

[27] G.A. Res. 3059 (XXVIII), 4, U.N. Doc. A/RES/3059 (Nov. 2, 1973); G.A. Res. 3218 (XXIX), 6, U.N. Doc. A/RES/3218 (Nov. 6, 1974); G.A. Res. 3452 (XXX), pmbl., U.N. Doc. A/RES/3452 (Dec. 9, 1975); G.A. Res. 3453(XXX), 5, U.N. Doc. A/RES/ (Dec 9, 1975); G.A. Res. 31/8, 6, U.N. Doc. A/RES/31/8 (Dec 13, 1976).

[28] Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention against Torture].

[29] Nowak & McArthur, *supra* note 25, at 3-4.

[30] *Id*. At 5.

[31] *Argentina Dirty War 1976-1983*, Global Security.Org, http://www.globalsecurity.org /military/world/war/argentina.htm (last visited June. 19, 2016) (explaining, among other details, that the disappeared were known as the "desaparecidos").

extrajudicial killings.[32]

Extrajudicial killings are scarcely in the past, and are ongoing in a number of countries. One of the most widely reported modern cases of extrajudicial killing is taking place in the Philippines currently. Human Rights Watch reports that, despite the current president's campaign to end violence, there have been seven recent extrajudicial killings and three recent forced disappearances.[33] Hundreds of people, mostly political activists and journalists, have disappeared or been killed.[34] At least one human rights lawyer has suggested that the killings are widespread enough to constitute a crime against humanity.[35]

In Ethiopia, the threat of separatists from the Ogaden National Liberation Front ("ONLF") has increased reports of torture and extrajudicial killings.[36]

Estimates put between 1,000 and 2,000 civilians killed by members of the Ethiopian police force or military.[37] In the Ivory Coast, the United Nations discovered mass graves in a center of opposition thinking in the country's business capital.[38] The U.N. documented at least twenty-six cases of extrajudicial killings, as well as eighty-five known arbitrary arrests and eleven cases of rape by government actors.[39]

In Bangladesh, Amnesty International has reported that the Rapid Action Battalion ("RAB"), a special police force, has committed at least 700

[32] Robert Plummer, *Condor Legacy Haunts South America*, BBC NEWS, http://news.bbc.co.uk /2/hi/3720724.stm (last updated June 8, 2005).

[33]*Philippines: Extrajudicial Killings, Enforced Disappearances, and Impunity*, HUMAN RIGHTS WATCH (July 14, 2011), http://www.hrw.org/features/philippines-extrajudicial-killings-enforced-disappearances-and-impunity.

[34] Kate mcgeown, *Philippines Extrajudicial Killings Continue, Says HRW*, BBC NEWS (July 19, 2011), http://www.bbc.co.uk/news/world-asia-pacific-14196401.

[35]*PHL Police, Military May Face Extrajudicial Killing Raps Before ICC – Lawyer,* GMA NEWS (Sept. 29, 2011, 8:42 PM), http://www.gmanetwork.com/news/story/233810/news/nation/phl-police-military-may-face-extrajudicial-killing-raps-before-icc-lawyer.

[36]*See* Jason mclure, *Ethiopia's Dirty War*, THE DAILY BEAST (June. 20, 2017, 7:00 PM), http: //www.thedailybeast.com/newsweek/2008/01/21/ethiopia-s-dirty-war.html.

[37]*Id*.

[38] Daniel Howden, *Troops Blamed for Mass Graves in Ivory Coast,* The Independent (Aug. 13, 2011),http://www.independent.co.uk/news/world/africa/troops-blamed-for-mass-graves-in-ivory-coast-2336887.html.

[39]*Id*.

extrajudicial killings since the group's creation in 2004.[40] Amnesty International reports that the RAB falsely claims a number of these killings were in gun battles or accidents, rather than intentional killings of civilians.[41] There are powerful organized criminal groups in the country; however, many of the killings do not appear to be pursuant to law enforcement needs, but rather the actions of a force that has impunity, and kills after aggressive questioning post-arrest. Torture victims of the RAB have reported that they were told if they did not falsely confess, they would be "cross-fired," or, in other words, killed by the police who would claim they had done so pursuant to a gun battle.[42]

Showing even further that torture and extrajudicial killings are inextricably related, death is often a part of torture. A state actor could kill, or threaten to kill, third parties in order to coerce a person into talking. In fact, in many reports of torture from victims across the world, the torture victim observed a killing, or a killing was a part of the torture. Additionally, torture is often so intense that it results in death, or death is contemplated as the inevitable yet perhaps not fully sought out, consequence of severe physical torture. In fact, Amnesty International found that from 1997 to 2000, there were at least eighty known deaths from torture in addition to the fact that instances of torture were present in 150 countries and widespread in seventy countries.[43]

A U.S. case shows that there are instances of killings that simply are not addressed, leaving the torture statute as one of the only tools for suppressing illiberal behavior. In *United States v. Belfast*, the first CAT prosecution in the U.S., refugees from Sierra Leone that sought refuge Liberia were interrogated by Liberian soldiers and killed if they did not answer questions satisfactorily.[44] As one defendant shot some of the refugees, he told the others that they would be next.[45] One soldier killed one of the refugees by slowly sawing off his head as he begged for his life.[46] Yet only the torturing of two refugees who survived the

[40]Amnesty Int'l, Crimes Unseen: Extrajudicial Executions in Bangladesh 2 (Aug. 2011), *available at* http://www.amnesty.org/en/library/asset/ASA13/005/2011/en/c18ad74b-75fe-4b15-b043-5982eebdb27d/asa130052011en.pdf.
[41]*Id*.
[42]*Id*.
[43] PARRY, *supra* note 13, at 16.
[44] U.S. v. Belfast, 611 F.3d 783, 794 (11th Cir. 2010).
[45]*Id*.
[46]*Id*. At 795.

encounter could be prosecuted in a U.S. court—the killings they witnessed were not and could not be prosecuted.[47]

These figures demonstrated the pervasiveness of extrajudicial killings in the modern world. While murders by government officials are prosecuted zealously in countries with a high adherence to the rule of law, such as the United States, other countries often commit extrajudicial killings with impunity. The need to eliminate safe havens and make a definitive statement that illiberal killings are just as wrong as illiberal assaults on the body shows why a convention on the prohibition on extrajudicial killing is needed at this time. It also shows why the United States should adopt a statute—perhaps based on such a treaty, but even without one—that can punish those killers who come within the jurisdiction of the United States.

3.2.3 The Incomplete Law of Killing

There can be no doubt that in various parts of the world, governments have killed and "disappeared" their own people to maintain power and squelch dissent. In some instances, they are prosecuted under currently defined international law paradigms of war crimes, crimes against humanity, and enforced disappearances.

However, an examination of each crime's framework demonstrates that they are defined too narrowly to provide a sufficient liability framework for extrajudicial killings, and as a result, a convention specific to extrajudicial killings should be adopted.

3.2.3.1 War Crimes and Crimes against Humanity

While international criminal liability is not comprehensive in terms of covering all forms of large-scale illiberal killings, there are two well-defined international criminal law paradigms that could provide liability for extrajudicial killing war crimes and crimes against humanity. War crimes proscribe certain kinds of conduct, including summary execution of civilians or combatants, as

[47] *See id*. At 799-800.

illegal when they occur pursuant to the law of armed conflict.[48] Crimes against humanity proscribe certain kinds of conduct, including murder, as illegal when done as part of a widespread attack on a civilian population.[49] However, these paradigms are too narrow to encompass all contexts in which extrajudicial killings may take place.

The idea of international criminal liability, including war crimes and crimes against humanity, stems from the notion that the state may be unable or unwilling to dispense justice. This idea dates back to the Second World War and, specifically, to the crimes of the Nazis who perpetrated genocide on behalf of the state, as well as other crimes against humanity, war crimes, and crimes of aggression.[50] Thus, when the state is the perpetrator of crimes—such as is the case with extrajudicial killings criminal liability can no longer be prosecuted by the state.

While states cannot be held directly liable for criminal activity, the germination of international criminal law begins with the idea that the state can do wrong.[51] There are some actions, taken by a state or its agents, which should be and can be sanctioned regardless of the laws and policies of that state. Long

[48]Dating back to the 15th century, war crimes have been tried and punished longer than any other international crime. *See* SOLIS, *supra* note 22, at 28. Currently the four Geneva Conventions of 1949 give the most definitive account of the commonly accepted war crimes. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 87 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. War crimes along a similar formulation are also proscribed in Article 8 of the Statute of the International Criminal Court. *See* Rome Statute of the International Criminal Court art. 8, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Statute of the ICC].

[49] http://www.icrc.org/ihl.nsf/FULL/150?Opendocument. Crimes against humanity were then criminally proscribed for the Nuremberg trials by Control Council Law No. 10. Allied Control Council, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Law No. 10 (Dec. 20, 1945), *available at* http://avalon.law.yale.edu/imt/imt10.asp [hereinafter Control Council Law No. 10]. They now are also proscribed in Article 7 of the Statute of the International Criminal Court. Statute of the ICC, *supra* note 48, art. 7.

[50]*See* Control Council Law No. 10, *supra* note 49.

[51] States themselves cannot have direct criminal liability. *See* Rep. Of the Int'l Law Comm'n, 53d Sess., April 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10, at 43-51 (2001).

before Nuremberg, war crimes were punishable international crimes.[52] Wars have been a long-recorded feature of human existence and generally, war results in the incapacitation of one state's government by while the victor occupies it. Thus, those who have broken the international customs of fair play in wartime were subject to tribunals run by the victor.

Historically, there has also been international criminal liability for "peremptory norms," or actions deemed so wrong by all the international community that they are universally punishable as crimes.[53] Usually these crimes have some nexus to international concerns, such as the fact that they commonly occur across international borders or on the high seas. Paradigmatic examples include piracy and slave trading, which both occurred on the high seas and relied on international cooperation to ensure the existence of no safe havens for such criminals.[54]

The current international criminal law paradigms of war crimes and crimes against humanity are not sufficient to criminalize extrajudicial killings. Both paradigms prevent state actors from killing their people, but do not do so broadly enough. Under the war crimes doctrine, civilians are protected as improper objects of attack.[55] This holds true in cases of a civil war or a war of national liberation.[56] Thus, when a state is engaged in an internal armed conflict, its power to kill its citizens might be circumscribed.[57] This means that extrajudicial killings can be prosecuted as a war crime, but only if committed in an armed conflict setting. Murder is both prohibited in Common Article III of

---

[52]*See* SOLIS, *supra* note 22, at 28.
[53]*See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligations Erga Omnes*, 59 Law & Contemp. Probs. 63, 67-68 (1996).
[54]*See id*.
[55] This is called either "non-combatant immunity," or the "principle of distinction." *See* SOLIS, *supra* note 22, at 251.
[56]*See* Protocol Relating to the Protection of Victims of International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3 (stating that wars of national liberation are considered international for the purposes of the applicability of the Geneva Conventions regime).
[57]Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts*, 91 INT'L REV. OF THE RED CROSS 35, 45 (2009). First Geneva Convention, *supra* note 48, art. 3; Second Geneva Convention, *supra* note 48, art. 3; Third Geneva Convention, *supra* note 48, art. 3; Fourth Geneva Convention, *supra* note 48, art. 3. Many also contend that customary international law places increasingly strong demands on states (and non-state actors) in conforming their internal war behavior to the requirements of the international law of armed conflict. *See, e.g.*, SOLIS, *supra* note 22, at 169.

the Geneva Conventions the minimum baseline of prohibitions for armed conflict as well as in the Third Geneva Convention, with regard to prisoners of war, and in the Fourth Geneva Convention, with regard to civilians.[58] It is a crime under the Geneva Conventions, as "grave breaches" that all parties must agree to prosecute or extradite to another country that will prosecute. The same protections yet again appear in Additional Protocol I to the Geneva Conventions, which expands the 1949 Geneva Conventions regime with new humanitarian protections.[59]

More narrowly, crimes against humanity may occur only in the context of widespread attacks on the civilian population. This is a proscribed criminal definition that has appeared in the charters of international criminal tribunals from Nuremberg to the present International Criminal Court, but which, unlike other international crimes, does not have a general treaty that states can sign onto and agree to criminalize in their domestic law.[60] As a result, many countries, including the United States, lack crimes against humanity criminal statutes, while many have war crimes statutes based on the Geneva Conventions, a genocide statute based on the Genocide Convention, and so on.[61]

The crimes against humanity offence are a reasonable way to proscribe states from killing their own citizens. However, crimes against humanity are useful as a legal tool only in a narrow setting: when a "widespread" attack on the civilian population is in progress.[62] This requirement is one that only gets the

---

[58] Fourth Geneva Convention, *supra* note 48, art. 3; Third Geneva Convention, *supra* note 48, art. 3.

[59] Michael J. Matheson, Deputy Legal Advisor, U.S. Dep't of State, Session Two: The U.S. Position on the Relation of Customary International Law to the 1977 Additional Protocols to the 1949 Geneva Conventions, Remarks at The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Additional Protocols to the 1949 Geneva Conventions (1987), *in* 2 AM. U. J. INT'L L. & POL'Y 419, 423-29 (1987).

[60] Both war crimes and genocide are crimes for which there are treaties defining the crime and requiring implementation in the states parties' domestic criminal law. *Compare* First Geneva Convention, *supra* note 48, art. 50, Second Geneva Convention, *supra* note 48, art. 51, Third Geneva Convention, *supra* note 48, art. 130, Fourth Geneva Convention, *supra* note 48, art. 147, *and* Convention on the Prevention and Punishment of the Crime of Genocide art. 5, Dec. 9, 1948, 78 U.N.T.S. 277 (identifying their respective grave breaches), *with* Genocide Implementation Act of 1987, 18 U.S.C. § 1091 (2006), *and* War Crimes Act of 1996 § 2401, 18 U.S.C. § 2441(1996) (implementing them in U.S. law).

[61]*See id*.

[62]*Compare* Statute of the ICC, *supra* note 48, art. 7 ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or

international community involved when governments killing their people, and when the scale is so grave that the massacre has risen to the level of international concern. This seems to be a compromise intended to keep the international community out of a state's affairs when the scale of violence is sufficiently small such that the state may be capable of suppressing it, even if the state does not. On the other hand, a widespread attack on the civilian population in a state suggests a massive breakdown in the state's administration of justice, one of its central functions, and thus, suggests why a mechanism for prosecution of such crimes by the international community would be needed.

Consequently, while both the proscription on war crimes and the proscription on crimes against humanity provide individual criminal liability for singular persons who participate in wide-scale violence, neither catches the kind of behavior that is criminalized in the Convention Against Torture: single, illiberal wrongs by actors in a position of state authority. Neither crime penalizes torture committed by a single member of a secret police force who interrogates a suspected terrorist or separatist by administering a severe beating. Nor does either crime punish extrajudicial killing by a soldier who takes a number of political activists from their home in the night, kills them, and buries them as a means of silencing them. The international community may want to limit the "small scale" crimes that it takes an interest in, but extrajudicial killings should be one of the acts for which direct international criminal liability is imposed, even in a single instance. For example, torture, as criminalized by the CAT, demonstrates how such a crime may be prosecuted outside of the realm of crimes against humanity or war crimes. Torture can be a crime against humanity when a number of tortures are committed on a wide scale, but unlike war crimes or crimes against humanity,[63] it can also exist in a single instance under the

systematic attack directed against any civilian population, with knowledge of the attack . . . ."), *with* Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, art. 5, U.N. Doc. S/RES/827 (May 25, 1993) (demonstrating that as it was the first international court since Nuremberg, this Statute does not require the widespread quality it instead requires that the list of acts be done to civilians in an armed conflict setting), *and* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) (demonstrating that similar to the Statute for the Special Court of Sierra Leone, there is reference to the widespread requirement instead of the armed conflict requirement—which seems to be the preferred prerequisite and showing that this issue is now more settled in favor of the definition that was adopted in the Rome Statute).

[63] Statute of the ICC, *supra* note 48, art. 7(f).

CAT. Without such a treaty for extrajudicial killings, the breakdown in the state's ability to dispense justice is great. The state's very own representative has stolen away a person's right to live with impunity, and perhaps, at the very encouragement of an illiberal government.

3.2.3.2 Enforced Disappearances

Torture and enforced disappearances are both acts that can, along with murder, be visited widespread on a civilian population and thus, can be crimes against humanity. However, unlike extrajudicial killings, both crimes are criminalized through adoption of conventions. A discussion of the International Convention for the Protection of All Persons from Enforced Disappearance ("CAED"),[64] in many ways similar to the CAT, will also inform the proposed creation of a convention prohibiting extrajudicial killings.

To begin, an "enforced disappearance" is different from murder—while both murder and enforced disappearances are listed in the statute of the International Criminal Court, they are listed as distinct attacks on the civilian population that can rise to the level of crimes against humanity. Furthermore, enforced disappearances may be described as a crime of the same ilk as torture and extrajudicial killings, particularly as outlined in the recent Convention against Enforced Disappearances.

The International Convention for the Protection of All Persons from Enforced Disappearance ("CAED") is a U.N. sponsored international human rights treaty whose object is to prohibit enforced disappearances.[65] An "enforced disappearance" is a term of art in international law; specifically, it is one of the prohibited acts that, as part of a wide-scale attack against a civilian population, constitute a crime against humanity.[66] The convention began with a 1978 resolution by the U.N. General Assembly condemning secret abductions and disappearances by government and seeking further review of the problem.[67] In 1992, years after the passage of the Convention against Torture, the General

[64]*See* International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/2006/1 (Dec. 20, 2006) [hereinafter Convention on Enforced Disappearance].
[65]*Id*. Pmbl.
[66] Statute of the ICC, *supra* note 48, art. 7(i).
[67] G.A. Res. 33/173, 4, U.N. Doc. A/RES/33/173 (Dec. 20, 1978).

Assembly returned with a resolution, the Declaration on the Protection of All Persons from Enforced Disappearance.[68] Following this, in 2001, the Commission on Human Rights established an open-ended working group to draft a treaty against enforced disappearances.[69] The text drew very heavily from the model of the CAT. The final text was adopted by the General Assembly in December 2006, opened for signature in February 2007, and entered into force December of 2010.[70]Although about ninety states have signed the treaty, only about thirty have ratified it so far.[71] Notably, the United States, the United Kingdom, Spain, Italy, Germany, and the Netherlands did not sign.[72]

An "enforced disappearance" is defined in Article 2 of the convention as: the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[73]

States who accede to the convention have the obligation to: investigate acts of enforced disappearance and bring those responsible to justice; ensure that enforced disappearance constitutes an offense under its criminal law; establish jurisdiction over the offense of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident; cooperate with other states in ensuring that offenders are prosecuted or extradited, and assist the victims of enforced disappearance, or locate and return their remains; respect minimum legal standards around the deprivation of liberty, including the right for imprisonment to be challenged before the courts; establish a register of those currently imprisoned, and allow it to be inspected by

---

[68] G.A. Res. 47/133, pmbl., U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

[69] Human Rights Commission Res. 2001/46, Rep. To the Economic and Social Council on the Fifty-Seventh Session of the Commission, 57th Sess., April 25, 2001, E/CN.4/2001/L.11/Add.5, at 36 (April. 25, 2001).

[70] International Convention for the Protection of All Persons from Enforced Disappearance, United Nations Treaty Series, http://treaties.un.org/pages/viewdetails.aspx?Src =treaty &mtdsg_ no= Iv-16&chapter=4&lang=en (last visited Mar. 24, 2013).

[71]*Id*.

[72]*Id*.

[73] Convention on Enforced Disappearance, *supra* note 64, art. 2.

relatives and counsel; and, ensure that victims of enforced disappearance, or those directly affected by it, have a right to obtain reparation and compensation. Like the CAT, the Convention intends to be governed by a "Committee against Enforced Disappearances" of persons elected by the member states-parties.

The Convention against Enforced Disappearances obviously provides a model for the path, which is proposed here: to use familiar structures from the CAT regime to fight a related illiberal harm. But the existence of the new Convention against Enforced Disappearances does not pre-empt the need for a Convention against Extrajudicial Killings. Importantly, the enforced disappearances treaty does not target murders specifically. In fact, it is not even so expansive as to cover all sorts of illiberal deprivations of liberty by governmental actors. The Convention addresses a singular tactic wherein thousands of persons were "disappeared" by the government that was first made very famous by the Nazi "Night and Fog" decree, or the Argentine "Dirty War." While government actors continue to use this illiberal tactic, it seems the convention could have been strengthened if it had been made to include a larger class of governmental abductions and detentions, as the torture regime attempts to cover a large class of illiberal government assaults.

Both the enforced disappearances treaty, and the treaty on extrajudicial killings that this article proposes, seek to expand protection from illiberal governmental assaults on the body (torture) to other illiberal acts (kidnapping, and killing, respectively). But both the enforced disappearances treaty and the proposed one suffer in that deprivations of liberty and life by the government can be part of the regular and proper functioning of the state, while the imposition of pain on the body is generally not. The way the enforced disappearances treaty adapted to this problem was to circumscribe the kind of illiberal kidnapping the drafters were concerned with down to the single tactic of "enforced disappearances." But, what about openly jailing dissidents for political crimes? What happens when a government tells the family of a disappeared person that that person has been imprisoned or killed? Do these actions somehow obviate the crime of the illiberal abduction? This scarcely seems to make sense simply because "disappearance" is the more common recent and historical mode of illiberal governmental abduction and detention.

Related to the questions the narrow scope of the enforced disappearances treaty is its usefulness. As it includes only one tactic for illiberal deprivation of liberty, states may simply innovate others. The Dirty War in Argentina, Operation Condor, and other historically known incidents of widespread disappearances have already come and gone. However, despite the historical condemnation the tactic has already received, similar crimes continue as governments become innovative with their tactics to make such types of disappearances less obvious. Perhaps these examples weighed heavily on the minds of the crime's innovators, who first turned attention to the problem in 1978, but not again for fourteen years, and then not again for nine years. From the first call for some proscription in this area until the actual time the treaty went into force was a period of more than thirty years. Perhaps the concept of illiberal abductions needs further normative work; this must be addressed elsewhere.

Despite the future need for development of the concept of illiberal abductions, the Convention against Enforced Disappearances does inform any potential Convention against Extrajudicial Killings: the objective in proscribing illiberal killings must be as comprehensive as possible. Unlike in the CAED, the crime enumerated in the extrajudicial killing convention must not be limited merely to the most known, common tactics. It must be defined carefully not to impinge on the rightful prerogatives and powers of the state, as the CAT and the CAED are, but it must also be written expansively, and not in a tactic-specific way.

Thus, as we have seen from studying the history above, the CAT was a normatively powerful tool that crystallized a certain method as to how to prevent governmental abuses of the person. Using the torture regime as a starting point, a similar convention prohibiting extrajudicial killings could be successful if the crime is more clearly defined. Patterning the treaty after the CAT worked for the ratification of the CAED. However, in order to have a more widely ratified and more useful treaty than the CAED, we cannot copy the CAT wholesale or narrow the definition of an extrajudicial killing so much that it is not flexible, adaptable, and useful. In order to have hope of adoption, the new crime of extrajudicial killing outlined in the treaty must also not threaten the proper powers of government, not only because of problems in the application, but also to prevent perceived threats to governmental power.

3.3 THE LEGAL REGIME OF THE CONVENTION AGAINST TORTURE AND HOW IT CAN BE ADAPTED TO EXTRAJUDICIAL KILLING

The Convention Against Torture ("CAT") provides a strong legal framework to inform the creation of a Convention Against Extrajudicial Killings as many aspects of the crime of torture are similar to extrajudicial killing. CAT's articles and objectives are used below as a baseline for suggesting the types of legal provisions needed to prosecute extrajudicial killings.

3.3.1 The Definition of Torture

To begin, the definition of torture as outlined in Article 1 of the CAT is:

For the purposes of this Convention, torture means 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 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.

The main elements of the definition of torture are the involvement of a public official, the infliction of severe pain and suffering, intent, and a specific purpose.[74] While the *actus reus* for a new crime of extrajudicial murder will of course be different, the intent element is analogous and thus, the proposed convention can include a similar type of definition. For example, extrajudicial killing would include intentionally causing the death of the victim rather than intentionally inflicting severe pain or suffering.

[74] Nowak & McArthur, *supra* note 25, at 28.

The requirement of a public official should remain the same. This is the defining characteristic of the crime of extrajudicial killing, and what separates it from ordinary, privately committed murder for which international concern should arguably not exist. However, the growth from before 1984 to present of non-state actors in the international system may give some cause to expand the definition, at least to cover non-state organizations that have *de facto* control over a territory or a population. It perhaps should also be expanded to terrorist groups and any other group with a political motive, although defining the law thusly may present some conceptual challenges.

For example, when the CAT was negotiated, some parties advocated a definition that would include public and private actors.[75] It does not seem that much thought was given to a middle way between including all actors: public and private, and public officials only.[76] What of those acting “under colour of law”?

What of contractors and private security forces? Or, organizations that exercise *defacto* control over territory, but have yet to be recognized as a government? The new convention on extrajudicial killings should address such concerns. This article’s particular recommendation is to include officials acting under “colour of law,” and those with actual authority in a territory, regardless of whether they are “public officials.” This is based on the fact that non-state actors with the power to act for the state acting illiberally also demonstrate the breakdown of the state. Therefore, international criminal liability is reasonable.

Despite the similar role of the state in the crime of extrajudicial killing as in torture, the specific purpose is likely to be different. The CAT notes that torture is utilized often to gain information, to punish, and to intimidate, and lists these motives as non-exclusive signs that a treatment is torture. Killing might be done for the second and third purpose, but not the first. A rewriting of Article 1 for extrajudicial killing purposes would note how extrajudicial killing is done to punish dissidents, to quell political rivals, and for other illiberal purposes, as part

[75] AHCENE BOULESBAA, The U.N. Convention on Torture and the Prospects for Enforcement 23-28 (1999).
[76] *Id*. (offering some suggestion to that effect from Germany regarding persons with powers of public officials even if not official).

of a similar, non-exhaustive list. The non-exhaustive nature of the list should be maintained to maximize the utility of the statute when extrajudicial killings are utilized differently in the future, but with the same purpose to further illiberal political motives.

One issue that was not fully defined in the torture regime, which becomes even more important in a convention against extrajudicial killings, is the concept of what constitutes a "lawful sanction."[77] Thus, the convention may benefit from an article that clearly defines the constitution of judicial authority. For example, this could include the famous provisions of *Additional Protocol I to the Geneva Conventions, Article 75,* which lays out judicial authority plainly, and has been accepted by many states already. This is similar to the approach of the definition in the Torture Victim Protection Act in U.S. law, which defined an extrajudicial killing not incident to lawful sanction for civil suit purposes.[78]

3.3.2 Obligation to Prevent Torture

The obligation to prevent torture found in *Article 2 of the CAT* is as follows:

a. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
b. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
c. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Immediately, there is a clear need to distinguish torture and extrajudicial killings. While there is no legitimate role for intentionally committed torture in warfare, there is a role for public officials to kill others intentionally. This article must clarify that it does not intend to impinge upon the scope of the law of

[77] *Id*. At 28-35.
[78] Alien Tort Claims Act, 28 U.S.C. § 1350 (1948) [hereinafter ATCA]. Congress subsequently defined "extrajudicial killing" in the notes of this Act by approving section 3(a) of the Torture Victim Protection Act. *See* Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (1992).

armed conflict, a vast and ever-changing body of law that determines when an individual may be targeted, and what scope of harm may come to her on the battlefield. However, war and exceptional circumstances should not be invoked as excuses to allow murders and the persecution of enemies outside of the conflict. As a result, this article must be phrased carefully to prohibit murders pre-texted on war while also protecting evolutions in the law of armed conflict. Therefore, the article should state that it does not apply to killings where the law of armed conflict is in operation, but that the mere existence of a war or other exceptional conflict cannot be invoked to justify extrajudicial killings that are not pursuant to the state's war rights and power. It is important to avoid mention of prohibiting killings "beyond the battlefield" because our technology, and the organization of enemies, is often changing. Further, the notion of a bounded geographic zone of conflict could become obsolete, it may already be obsolete enough in the U.S.'s vision of the war on terror, whether the position of the U.S. is founded or not to discourage the U.S. and others from signing the law.

As stated above, this draft Convention should attempt to include actors who operate under "colour of law" or the authority of a non-state organization that has *defacto* control over a territory. As in Additional Protocol I to the Geneva Conventions, non-state actors cannot invoke superior orders as a defence, treating them just as we would any other fighting force. Nor should they be able to invoke any defence of exceptional circumstances or public authority, just as state actors are bound. But moreover, for these actors there is also the concern that a duress defence could be used. For a public official to claim that they were forced to do the action by their organization should not be a complete excuse, particularly if the dangerousness or the conduct of the organization is known at the time the person joins, they voluntarily join, or they have opportunities to safely leave the group before or after committing the killing.

Generally, duress is not a defence in an intentional killing under current U.S. law, but this point may be worth clarifying. For example, in a case from the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Erdemovic*, a soldier argued he was forced under threat of death himself to kill others.[79] While a majority of the Appeals Chamber rejected this as a possible defence, a minority was sympathetic to it. Additionally, the U.S. Supreme Court has recently held that persecutors cannot be denied asylum under the "persecutor bar"[80] because they participated in acts of persecution under duress.[81]A similar type of clarification regarding these defences should be included in the draft convention.

3.3.3 Non-Refoulement

Article 3(1) of the CAT provides, as to *non-refoulemont*: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." It might seem at first glance that the need for a *non-refoulement* provision in a Convention Against Extrajudicial Killings would not be as important as such an article found in the CAT. One of the goals of torture in illiberal systems is to gather information. If an infamous criminal has been extradited to an illiberal state, there may be much the government wants to know about that criminal's other crimes, associates, or anything else that might endanger or embarrass the state. If the crime is a political one, like terrorism, the state may particularly want to gather information, intimidate enemies, and prevent appearances of strong internal dissension by torturing prisoners.

However, how should killing a prisoner that has just been received from an extradition be treated? If it is incident to lawful sanction for example, a procedurally fair death penalty then the convention's prohibitions should not be implicated. But what if the state simply executes the person once they have them in custody? It might seem as though this would not happen since a hasty illiberal execution of an extradited person would draw a strong diplomatic response from the sending state (whereas with torture, the fact of the torture might be unknown or disputed). Therefore, it seems an extrajudicial killing would not likely occur or need as much protection. However, it is certainly the case that states have been concerned about the mistreatment of extradites and expellees or their

[79]Prosecutorv. Erdemovic, Case No. IT-96-22-A, Judgment on Appeal, 11 (Oct. 7, 1997).
[80] 8 U.S.C. § 1101(a) (42) (2012).
[81]Negusie v. Holder, 555 U.S. 511, 514 (2009)

disappearance after being handed over from one state to another.[82]

The rule of *non-refoulement* is not directly related to the criminal enforcement of an international legal norm against torture. Rather, it is a proactive provision that prevents countries from being complicit in the torture that other states might potentially do. It is speculative, and covers a narrow range of the possible circumstances that might bring a victim into the hands of his or her torturer. Furthermore, while a *non-refoulement* provision seems necessary, it is not without problems. For example, despite U.S. President Obama's work to close down the detention facility at Guantanamo Bay, Cuba, a number of still-dangerous prisoners cannot be repatriated to their country of origin due to a history of torture in those regimes.[83] Perversely, torturers who claim asylum in the U.S. could potentially use the fact that they tortured in the past to show that they should not be repatriated to a country where they used to be a government actor.

Given the difficulties in squaring the *non-refoulement* provision with the needs of a torture or extrajudicial killing convention, could it be excluded perhaps in favor of a more voluntary provision? Could this requirement explicitly be waived in cases where the receiving state vows to the sending state that it will not execute the person? Would this requirement genuinely protect extradites or expellees from the most likely kind of killing, one that is pursuant to a hasty trial under corrupt judges, rather than a clearer extrajudicial killing?

---

[82]*See, e.g.*, Soering v. United Kingdom, App. No. 14038/88, Eur. Ct. H.R. (1989), http://hudoc. Echr.coe.int/sites/eng/pages/search.aspx?I=001-57619 (finding that a person could not be extradited if they risk mistreatment in the receiving state); Chahal v. United Kingdom, App. No. 22414/93, Eur. Ct. H.R. (1996), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?I=001-58004 (finding that a Sikh separatist could not be deported because Indian guarantees of proper treatment were insufficient); Shamayev and Others v. Georgia and Russia, App. No. 36378/02, Eur. Ct. H.R. (2005), http://hudoc.ec Hr.coe.int/sites/eng/pages/search.aspx?I=001-68790 (finding that a Chechen rebel and terrorist could not be deported to Russia); Baysakov and Others v. Ukraine, App. No. 54131/08, Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/sites/eng/pages /search.aspx?I=001-97437 (finding that Kazakh opposition activists could not be deported to their home country since the assurances of proper treatment given by Kazakh authorities were unreliable and Kazakhstan lacks an effective torture prevention regime); *see generally* European Court Of Human Rights, Factsheet-Expulsions And Extraditions (2013), Http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Ex pulsions_et_extraditions_EN.pdf (providing examples and summaries of cases involving expulsions and extraditions).

[83] Kate Jastram & Marilyn Achiron, United Nations High Comm'r For Refugees, Refugee Protection: A Guide To International Refugee Law 18 (2001), ttp://www.ipu.org/pdf/ Publications/refugee_en.pdf.

Recall that unlike torture, states may sometimes kill individuals as a part of their function, and that this makes clear legal provisions more difficult. Further, states already have agreements not to seek the death penalty as a predicate of some extraditions, and thus, this is not a likely solution to the problem.[84]

All States shall endeavour not to expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to an extrajudicial killing, or a lawfully sanctioned killing, by government that is not done pursuant to a fair and impartial judicial process.

This wording can assist by expanding the sphere of concern beyond what is criminalized, but giving states some flexibility to fashion new solutions. Unlike torture, a killing is an easier breach to observe and thus, enforcement of the provision would be easier than with torture, which could allow a less absolute standard.

History demonstrates that *non-refoulement* provisions are important and necessary, and have as much of a role with killings as with torture. The suggested changes to the provision in the draft convention in no way seek to expose extradites or expellees to an unnecessary risk of extrajudicial execution. If it was found to do so, it may be that an absolute provision on *non-refoulement*—as in the CAT—is the most suitable provision for the Convention Against Extrajudicial Killings.

3.3.4. Jurisdiction

Article 5 of the CAT outlines jurisdiction.

a. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
b. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
c. When the alleged offender is a national of that State;

84 *See*, *e.g*., United States v. Burns, [2001] 1 S.C.R. 283 (Can.) (explaining that Canada could not extradite persons to places where they might be subject to the death penalty).

d. When the victim was a national of that State if that State considers it appropriate.
e. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.
f. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

This article works in conjunction with Article 7 of the Convention.

> a. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
> b. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
> c. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

This language illustrates that the CAT is an *autdedereautjudicare* treaty or, an "extradite or prosecute" treaty. There are an increasing number of treaties in the international system that utilizes this sort of language. In international law generally, there are traditional bases under which states can exercise criminal jurisdiction acts which occur in some part in their territory (objective territorial); acts which produce effects in their territory (subjective territorial); acts which are done by their nationals (nationality); acts which affect their nationals (passive personality); acts which impinge vital national interests (protective); and, acts which are of such a concern to the entire international community that it is in the interests of all states to try and suppress them no matter where they occur (universal). *Autdedereautjudicare* treaties create a kind of agreed universal jurisdiction, giving any state that has custody of an offender the right to try him or her. Oddly, these agreements are widely construed to give jurisdiction over offenders of nationalities of non-parties, and for crimes that occurred in non-parties' territories.

The new convention against extrajudicial killings should continue to utilize *autdedereautjudicare* language like that of the CAT and numerous other successful criminal "suppression" conventions. Yet, this may be problematic for the United States. Although the language of the CAT mandates extending jurisdiction over every state parties' territory, the United States explicitly declined territorial jurisdiction in fashioning its domestic law. The U.S. criminal torture statute explicitly only applies to cases of torture that occur outside the U.S. The U.S. likely will want any new extrajudicial killings statute to be only applicable outside of U.S. territory as well. The view may be that the United States already has excellent rule of law and effectively suppresses illiberal assaults by U.S. public officials. At the federal level, there is a "Public Integrity Section" at the Department of Justice whose sole function is to root out cases of corruption; some states have similar laws. Furthermore, torture cases inside the U.S. are uncommon. Yet abroad and outside of normal law enforcement role and oversight, the U.S. has opened its nationals up to criminal liability. Although other states may complain, the U.S. may want to ratify a convention that includes this same language from the CAT about territorial, nationality, and custodial universal jurisdiction, but not implement territorial jurisdiction. As a result, the provision on jurisdiction included in the draft convention must be clearly thought-out and accepted.

3.3.5. Monitoring Committee

A monitoring regime like the Optional Protocol or the European system could be adopted, but that might drastically narrow the appeal of the treaty, and thus, its widespread ratification. The creation of a new committee for extrajudicial killings seems a bit ambitious for a crime for which there is not a movement with the impetus of the anti-torture movement. This author, though hoping not to short change her idea's success were ever it to be adopted, thus would certainly not advocate for the creation of a Committee Against Extrajudicial Killings.

As a result, if a new monitoring committee was not created for extrajudicial killings, and this convention does not directly mirror the Committee Against Torture, should it perhaps be monitored by the Human Rights Council, formerly the Commission on Human Rights, which monitored most such treaties until the Committee Against Torture decided to forge its own path? The Council already monitors extrajudicial killings. There is currently a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, organized under the Human Rights Council and created through its bureaucracy rather than by treaty.[85] The Rapporteur studies informally, and currently receives a very low response rate to its surveys according to its 2010 report. A new convention could give the Rapporteur a more official relationship with monitoring that is non-mandatory and informal, but prescribes certain best practices.

The determination of which model to utilize—the existing rapporteur and voluntary compliance, or a more rigorous regime—may depend on whether the value of monitoring compliance outweighs the benefit of widespread ratification. The Optional Protocol was not widely ratified, and if provisions like it were included in the main body of a convention against extrajudicial killings, ratifications would likely be low. One suggestion is to revamp the role of the Rapporteur with voluntary monitoring, and have a more extensive Optional Protocol to the extrajudicial killings convention for those states that wish to promote mandatory compliance. Such a compromise may eliminate the use of the less effective middle option of the Committee Against Torture, ensure more widespread compliance, and boost the norm against extrajudicial killings, while

[85] Office of the High Commissioner for Human Rights, *Special Rapporteur on extrajudicial, summary or arbitrary executions*, United Nations Human Rights, www.ohchr.org/EN/Issues/Executions/Pages/srexecutionsindex.aspx (last visited Nov. 11, 2012).

promoting a path to growth and greater monitoring in the future.

3.3.6 Other Lessons from the CAT

The CAT contains many standard provisions that did not merit substantial discussion above: the method of choosing and manner of meeting of the members of the treaty's committee, and the accession and ratification provisions. Also, the standard language regarding is significant: the investigation of the treaty's crime, the convention as a basis for extradition to supplement existing treaties, the training of government personnel about the requirements of the treaty, mutual legal assistance, and victim complaint and compensation. Some of these ideas can be adopted into a new convention against extrajudicial killings, while others may not be necessary. For example, Article 15 of the CAT states: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." As described in this article, one prominent feature of torture is that it is often used to gather information, and thus, this article has obvious relevance in the anti-torture regime. Since the object of an extrajudicial killing appears to be to silence, such a provision can most likely not be adapted from the CAT to the new convention. Likewise, CAT at Article 10 states:

a. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
b. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

This provision again applies more aptly in the anti-torture regime. It seems likely that proper interrogation techniques have to be strictly trained and enforced to ensure prevention of torture in many situations; however, law enforcement officers more readily understand that they are not at liberty to execute civilians, and thus such training is not needed in a similar manner. Nonetheless, the extrajudicial killings convention should include the recommended training on the parameters of self-defense and defense of others, and certainly should admonish law enforcement professionals in their written materials about the severe penalties attaching to committing such a killing. Thus, Article 10 should to be modified to meet the needs of the new convention.

3.3.7 The Unique Legal Requirements of the Crime of Extrajudicial Killing

An important role for the new convention, as was important for the CAT, is the elimination of safe harbours for human rights violators. This convention targets a relatively specific, illiberal, state-sponsored or state-complicit behaviour. Its jurisdiction will stem from the fact that states are not often effective at suppressing their own wrongdoing, and that some crimes with a humanitarian or political dimension are of international concern. However, while the right to life is one of the most important human rights, the convention is not intended to supply a number of special rules for how states should exercise capital punishment, if they choose to have it. It is not meant to provide exhaustive rules about how to fairly run a judicial system so that the state may take a person’s life. Such measures are important and should be considered elsewhere, such as by the International Covenant on Civil and Political Rights.

Thus, there should be a limiting article in the convention that clarifies that it is meant to address killings outside of the judicial process and those committed outside of the law of war. However, it is perhaps also worth considering adding language that killings which shield themselves in the judicial process in some way, but are clearly not conducted through the judicial process, should not be protected or at the very least are discouraged. Regulation of sham trials and hasty executions should clearly define the limited scope of intrusion into what constitutes a fairly-reached sentence of death.

Likewise, incidences of public safety killings should be carved out. For example, a police officer who shoots at a person as they are committing a violent crime or trying to escape police custody, has a duty to act in protection of public safety. This killing should receive legal protection. Although both self-defence and defence of others are forms of public safety killings, this should be clarified in the text of the convention. Additionally, as with the law of armed conflict and judicial process, there should be a provision that states that a pre-textual use of a legitimate police power such as the right to act in the public safety will not shield a potential perpetrator from liability. It must be clear that the mere fact that a public official claims that a killing was in self-defence, or to protect others, will not be sufficient to shield a potential perpetrator from inquiry.

Aspirational provisions can be included as to proscribe proper death penalty sentences. For example, it could admonish states not to tolerate bribery, to provide for fair trial and at least one appeal, and to provide counsel, among other recommendations included in detail in Additional Protocol I article 75. It could set the parameters of self-defence and defence of others, as well as the law of armed conflict. Finally, it could recommend required training for members of the military, judiciary, or law enforcement. However, given the enormity and diversity of thought on these issues, it is not recommended that these requirements be imposed as mandatory.

3.4 A U.S. CRIMINAL STATUTE ON EXTRAJUDICIAL KILLINGS

To enact criminal prohibitions in the United States, a U.S. statute is required whether the proposed convention succeeds or fails.[86] For the reasons mentioned above, a law allowing U.S. prosecutors to target and punish those who use the power of the state or another form of political power to kill others is desirable. Thus, even without a convention, a statute must be drafted. If a convention is successfully drafted, it will likely not be self-executing under U.S. law and it will require domestic legislation is order to criminalize the activity for those who come within U.S. jurisdiction.

The advantage to a convention is obviously its greater scope of application, as it will hopefully span many states. Its advantage in the United States is to bolster a statute that is written with “found-in” or “custodial universal” or “treaty-based” jurisdiction. This is the form of jurisdiction with the greatest ability to prevent impunity: it allows the U.S. to punish offenders

[86] However, this does not apply in the highly unlikely circumstance that the treaty is self-executing.

coming from other regimes to the United States. Currently, the United States prosecutes former torturers who seek refuge in the United States once their regime is out of power, but it has limited ability to prosecute politically motivated murders.[87] A law that allows jurisdiction over these murders when they occur abroad will have the greatest utility indeed that is the central utility. Thankfully, there are not many politically motivated murders committed by the state or guerrilla groups in the United States. The ability to end impunity in states where the rule of law is weak relies on there being no country to which criminals can go for a safe haven. This form of "custodial" universal jurisdiction is the most expansive besides the disfavoured "true" universal jurisdiction, which allows crimes committed abroad to be tried in absentia with no territorial nexus.[88] "Found in" language is time-tested and reliable, frequently used, relatively easy to litigate, and very desirable.

While it has long been established that Congress may criminalize extraterritorial conduct even in the absence of an underlying treaty or support in international law, this does not change the fact that Congress has been extremely hesitant to do so. For example, there are about twenty-one crimes for which

Congress has imposed the desirable "the alleged offender is later found in/present in the United States" language.[89] Nearly each of these crimes is connected to a suppression treaty signed by the United States, with the exception of some of the terrorist crimes, which are predicated under the passive personality bases of jurisdiction under international law.[90]

Yet, Congress has the authority to write a law with extraterritorial application, as long as that law complies with due process requirements. It is well-established that Congress can regulate conduct outside the territorial boundaries of the United States,[91] and "the courts of the United States have

[87]*See* 18 U.S.C.A. § 2441(a)-(b) (2006); 18 U.S.C. § 1091(e) (2009); 18 U.S.C.A. § 2340A(a)-(b) (2004).
[88] Stephen Macedo, et al., The Princeton Principles on Universal Jurisdiction 29, 31 (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf
[89] 18 U.S.C.A. § 32(b)(4) (2006) (destruction of aircraft or aircraft facilities); 18 U.S.C.A. § 37(b)(2) (1996) (violence at international airports); 18 U.S.C.A. § 112(e) (1996) (protection of foreign officials, official guests, and internationally protected persons);
[90] However, it certainly appears that Congress prefers to use custodial jurisdiction when bolstered by a treaty as opposed to standing on that bases alone for terrorism crimes.
[91] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

repeatedly upheld the power of Congress to attach extraterritorial effect to its penal statutes, particularly where they are being applied to citizens of the United States . . ."[92] Generally, statutes are not construed to have extraterritorial effect absent a clear statement from Congress. Where Congressional intent for extraterritorial jurisdiction of a statute is clear, that jurisdiction is not precluded by norms of customary international law.[93] Congress is not bound by international law, nor is U.S. law "subordinate to customary international law."[94] In fact, "[i]f it chooses to do so, [Congress] may legislate with respect to conduct outside the United States, in excess of the limits posed by international law."[95] The role and duty of U.S. courts' therefore is "to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."[96]

From a due process perspective, Congress can provide for jurisdiction based on its constitutional authorities "[t]o define and punish . . . [o]ffenses against the Law of Nations," "[t]o regulate Commerce with foreign Nations," and pursuant to the Necessary and Proper Clause in conjunction with the Treaty Power.[97] Some statutes thus have a firm constitutional basis on the "Law of Nations" clause where there is also universal or general jurisdiction for those crimes. When the United States enters a treaty to establish international legal basis for extraterritorial jurisdiction over a crime, Congress may enact legislation as necessary and proper to effectuate U.S. obligations under the treaty.[98]

Generally, Congress is only comfortable providing a custodial universal basis of jurisdiction if the crime is pursuant to an *autdedereautjudicare*treaty, or, a crime for which universal jurisdiction exists very clearly. If the Convention Against Extrajudicial Killings comes to be, then no more argument need be had about implementing a custodial jurisdictional trigger neither under international

[92] United States v. Layton, 509 F. Supp. 212, 214 (N.D. Cal. 1981).
[93] United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).
[94] United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003).
[95] United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983).
[96] *Yunis*, 924 F.2d at 1091; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (declining to apply alleged customary international law absent U.S. statute to effect that law).
[97] U.S. CONST. Art. I, § 8.
[98] *See id*.

law, nor U.S. due process law. But if not, then it is drastically less likely Congress will proscribe extrajudicial killings which occur outside its territorial, nationality, and passive personality jurisdiction. This would not be fatal to a statute against extrajudicial killings, as such a statute could still be written. However, a statute that only applies to killings done in the U.S., or by or against U.S. citizens, would have little value and would be redundant with the federal murder statutes the United States already has enacted. As a result, this provision is of vital importance if the United States wants to punish offenders over whom it has jurisdiction. If no convention is drafted, Congress would either need to: abrogate its previous position that it prefers not to legislate custodial universal jurisdiction crimes without universality; implement an *autdedereautjudicare* treaty, which could raise due process concerns); or, rely on the fact that extrajudicial killings are currently illegal under customary international law, and covered by universal jurisdiction.

Universal jurisdiction exists for all states to proscribe certain kinds of crimes that are so heinous and thus, of the concern of all states that they violate “peremptory norms” they are not acceptable for any reason in any culture.[99] Such crimes have been discussed, such as piracy, slavery, and perhaps terrorism.[100] Also, it is commonly maintained that torture was already a universal jurisdiction crime and violation of a peremptory norm before the CAT was written. CAT simply strengthened and outlined it.[101] The question therefore remains, is a prohibition on extrajudicial killings already a peremptory norm?

In practice, extrajudicial killings certainly seem to be roundly condemned by the international community. Numerous international agreements and guiding documents condemn arbitrary deprivations of life, including *the International Covenant on Civil and Political Rights (article6),[102]the Universal Declaration of Human Rights (article 3),[103] the American Declaration on the*

[99]*See* Bassiouni, *supra* note 53, at 67.
[100]*See* Restatement (Third) of Foreign Relations Law § 404 (1987).
[101] J. Herman Burgers & Hans Danelius, The United Nations Convention Against Torture: A Handbook On The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment 1 (1988).
[102] ICCPR, *supra* note 21, art. 6.
[103] UDHR, *supra* note 24, art. 3.

Rights and Duties of Man (article 1),[104] *the American Convention on Human Rights (article 4),*[105] *the European Convention on Human Rights (article 2),*[106] *and the African Charter on Human Rights and Peoples' Rights (article 4).*[107] Thus, it appears that arbitrary deprivations of life, at least, have been roundly condemned by human rights law internationally, regionally, and for some time.

That an extrajudicial killing is a violation of norms of international law appears to have also received some traction in U.S. law. The Alien Tort Statute ("ATS") may criminalize such acts, and its history is informative of this proposition.[108] As part of the original Judiciary Act of 1789, the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[109] The object appears to have been to provide remedies for breaches of customary international law, particularly for foreign merchants who otherwise had no standing to sue Americans in U.S. courts.[110] It was a largely unused statute for nearly two hundred years,[111] until 1980 in the case *Filártiga v. Peña-Irala*.[112] In that case, two Paraguayans sued a former police officer who tortured and killed a relative of theirs.[113] The Second Circuit held that Congress could give jurisdiction for customary international law, a matter of federal concern, and that customary international law now included a ban on torture by a government actor.[114] Notably, the court held this before the CAT was in force, looking to sources such as the Universal Declaration on Human Rights, while cautioning that not every provision in the declaration had ripened into a robust norm of customary international law. Yet summary executions are among the limited class of violations of customary international law that have been found

---

[104] Rights of Man, *supra* note 24, art. 1.
[105] ACHR, *supra* note 21, art. 4.
[106] ECHR, *supra* note 21, art. 2.
[107] African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58 (1982).
[108] *See* ATCA, *supra* note 79.
[109] *Id*.
[110] John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 236 (2004).
[111] Gary Clyde Hufbauer& Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004).
[112] Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
[113] *Id*. At 876.
[114] *Id*. At 880.

actionable under the Alien Tort Statute.[115] This is an extremely important finding to import from the civil arena to the criminal one. If U.S. courts have already found that extrajudicial killings violate customary international law for the purposes of being vulnerable to civil suit, this strongly suggests a basis for universal criminalization of extrajudicial killings.

About a decade after the ATS was reinvigorated with this human rights purpose, Congress elected to expand the reach of the statute by passing the Torture Victim Protection Act ("TVPA").[116] The TVPA is appended as a statutory note to the ATS. It was enacted in 1992 to provide a cause of action in cases of officially sanctioned torture and extrajudicial killing. [117]It states:

An individual who, under actual or apparent authority, or colour of law, of any foreign nation:

a. Subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
b. Subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[118]

The Torture Victim Protection Act, unlike the ATS, is not a jurisdictional statute.[119] The purpose of the Act is to "work in conjunction with the [ATS], expanding the [ATS's] reach to torts committed against United States citizens (not just 'aliens') who, while in a foreign country, are victims of torture or 'extra-judicial killing.'[120] Thus, this act demonstrates something very interesting. First, Congress wished to extend protections for human rights suits from aliens to U.S. citizens. But, only in limited cases—those of torture and extrajudicial killings. These areas of governmental misconduct are of particular concern. As the seminal case *Kadic v. Karadžić* noted, certain violations of the law of nations

---

[115] Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L. J. 1, 5 (2007).
[116] Torture Victim Protection Act of 1991, Pub. L. No. 102-256 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350).
[117]*Id*.
[118]*Id*. At § 2(a), (b).
[119]Kadic v. Karadžić, 70 F.3d 232, 246 (2d Cir. 1995).
[120]Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887, at 3 (S.D.N.Y. Feb. 28, 2002).

are illegal whether they are conducted by state actors or by private actors, including: piracy, genocide, war crimes, or participation in the slave trade.[121] However, this is not true of torture and summary execution. Those two crimes can only be violations of international legal norms if public actors conduct them.[122] Thus, we see that in U.S. law there is already recognition of the shared nature of torture and extrajudicial killings and that extrajudicial killings appear to grow naturally from, and bear a strong relationship to, prohibitions on torture.

Nor has the United States only acknowledged ATS tort suits against singular actors. In the case *Murphy v. Islamic Republic of Iran*, plaintiffs brought suit against Iran for sponsoring a terrorist attack against American service members under the Foreign Sovereign Immunities Act ("FSIA").[123] The FSIA[124] is the only legal basis under which a lawsuit can be brought against a foreign sovereign in the United States, and provides strict limitations.[125] Under the FSIA terrorism exception, sovereign immunity is waived when

(1) a foreign state (2) committed an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or [provided] material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency,(3) which "caused" (4) "personal injury or death" (5) for which "money damages are sought."[126] Again, an extrajudicial killing is appended to a U.S. statutory list or impermissible international crimes. This time, still lumped with torture, it is invoked with a "terrorism" exception.[127] In *Murphy*, the plaintiffs alleged torture and extrajudicial killing (as well as provision of material support to terrorists), but the attack on a Marine Corps barracks to kill its inhabitants was not found to be

[121]*Kadic*, 70 F.3d at 239.
[122]*Id*. At 243.
[123] Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51, 56 (D.D.C. 2010).
[124] 28 U.S.C.A. §§ 1330, 1332(a)(4), 1391(f), 1441(d), and 1602-1611 (2006).
[125] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 38-39 (D.D.C. 2009).
[126] 28 U.S.C. § 1605(a)(5) (2006).
[127] Indeed, until 2008, under 28 U.S.C. § 1605, states lacked immunity for any one of these crimes even when not occurring in the context of state sponsored terrorism. *See* National Defense Authorization Act for Fiscal Year 2008, PL 110-81, § 1083, 122 Stat. 3 (2008) (providing for a lack of jurisdictional immunity in certain cases in which money damages were sought against a foreign state for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act).

custodial torture, but rather an extrajudicial killing, using the definitions of the TVPA.[128] Even in the tort realm, the need for a distinct extrajudicial killing cause of action, rather than overreliance on showing torture occurred, is demonstrated.

Thus, it seems there is some cause to believe that the view that persons should not be arbitrarily deprived of life by their governments has emerged as a customary law concept. There also seems to be a great deal of recognition in U.S. statutory and case law that extrajudicial killings violate customary international law. In civil suits, extrajudicial killings are prohibited alongside crimes based on peremptory norms, for which universal jurisdiction exists.[129] These U.S. statutes and cases strongly suggest that the U.S. has acknowledged the growth of international law to define this specific crime. The existence of the Special Rapporteur in the area also shows its recognized coalescence in the international arena. While it seems it could successfully be argued that the crime exists and is sufficiently defined in international law, it may still be in an early stage of recognition. A convention against extrajudicial killings might serve to flesh out the concept, and make it a peremptory norm for once and for all, as the CAT appears to have helped to do for the crime of torture. Without that service, it may be difficult to definitively say extrajudicial killings are covered by universal jurisdiction and proscribe the crime in the United States. Nonetheless, this paper strongly argues that the norm has emerged specifically enough for Congress to proscribe extrajudicial killings without a treaty on a universality basis.

If no consensus or impetus for a convention can be reached, and Congress decides to nonetheless move forward and enact a statute proscribing extrajudicial killings, the United States will be writing a statute with a clean slate. Writing such a statute without the basis of an *autdedereautjudicare treaty* may lessen some support for found-in jurisdiction, though as previously observed, the courts have held that Congress nevertheless has the capacity to write such a law. Universality should nonetheless be proficient for due process and prudentially concerns.

[128]*Murphy*, 740 F. Supp. At 70-71.
[129] Torture Victim Protection Act of 1991, *supra* note 121, § 2(a), (b).

Title 18 U.S.C. § 2340A is the U.S. statute that effectuates our obligation under the CAT to criminalize acts of torture:

a. Offense—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
b. Jurisdiction - There is jurisdiction over the activity prohibited in subsection (a) if :-
- The alleged offender is a national of the United States; or
- The alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

c. Conspiracy - A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

Following the logic given above that the CAT pattern is being used to limit controversy and run a well-worn path to punish a much related crime it makes sense to model the statute criminalizing extrajudicial killings by using similar language and penalties. Even if the convention were not to be written, signed, or ratified, the following statute could still be used as a pattern. The author proposes the following statute criminalizing extrajudicial killing:

Chapter 113C of the U.S. Code should be renamed from “Torture” to “Torture and Extrajudicial Killings.” 18 U.S.C. § 2340D should be added after 18 U.S.C. §§ 2340A-C (the statute above, criminalizing torture, and its supplementary provisions), and titled “Extrajudicial killing”:

a. Offense—Whoever outside the United States commits or attempts to commit an extrajudicial killing shall be fined under this title or imprisoned for any term of years or for life, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

b. Jurisdiction - There is jurisdiction over the activity prohibited in subsection (a) if:

- the alleged offender is a national of the United States; or
- the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

c. Conspiracy- A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

Similarly, this provision identifies that the United States will likely decline to use territorial jurisdiction for the statute. While the U.S. position is certainly not that torture is acceptable when it occurs inside the United States, there appears to be great fear by American lawmakers that torture allegations will be used incorrectly against law enforcement. That concern is not great enough in the eyes of this author to have merited extraterritorial-only jurisdiction. It should be removed from the crime of torture, and certainly should not be added to the crime of extrajudicial killings.

This provision varies from language matching the U.S. statute criminalizing torture by increasing the penalty to life for attempts of murder to death where the killing occurs. For example, 18 U.S.C. § 1113, the general federal murder statute, provides that any person who commits first degree murder is subject to the death penalty, and any person who commits second degree murder, being of a less premeditated style, faces a maximum punishment of life imprisonment. The federal attempted murder statute provides that attempted murder cannot be punished by more than twenty years.[130] These prohibitions also echo the torture statute that carries a maximum punishment of twenty years, or the death penalty if death results from the act. It seems the extrajudicial killing statute could easily mimic both. However, the humble suggestion of this paper is that an extrajudicial killing is a more severe crime than murder in the ordinary course because of the betrayal by a public official, and more severe than torture because it is intended to end the life of the person

[130] 18 U.S.C. § 1113 (2006).

permanently. Thus, the formulation of the crime recommended by this paper proposes a maximum of lifetime imprisonment for attempt. Since extrajudicial killings are intended to cause a more significant harm—the death of the victim—a life punishment, as with other intentional homicide crimes in the U.S. code where death does not result particularly 18 U.S.C. § 956, conspiracy to murder U.S. nationals abroad is appropriate.[131]

Many may debate the appropriateness of a death sentence as the death sentence is increasingly unpopular worldwide, is increasingly scrutinized as a whole by the highest court in the United States, and the federal death penalty has been rarely recently used. Nonetheless, this punishment is in keeping with the severity of punishment for similar crimes in the U.S. Code, and particularly, the Supreme Court of the United States has always preserved the use of death penalty for a successful, intentional homicide under U.S. law.[132]

The actual act of an extrajudicial killing must be carefully written, as was the torture statute. In keeping with the plan to model the extrajudicial killings statute on the torture statute, and house them together in the same portion of the United States Code, the two definitions could appear together:

In 18 U.S.C. § 2340, "Definitions" paragraph (3) defining the term "United States" should be renumbered to paragraph (4), and inserting a new paragraph (3) defining extrajudicial killing:

As used in this chapter:

I. "torture" means an act committed by a person acting under the colour of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
II. "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from:

[131] 18 U.S.C. §§ 956(a)(1), (a)(2)(A) (2006).
[132] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 410 (2008) (striking down the death penalty for rape of a child while explicitly stating that the court was not striking it down for a number of other offenses).

- the intentional infliction or threatened infliction of severe physical pain or suffering;
- the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- the threat of imminent death; or
- the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

III. "extrajudicial killing" means an act committed by a person acting under colour of law, or under the direction or control of a non-state political group which exercises *de facto* control over the territory or population in a territory in which the crime occurred, specifically intended to end the life of another person, when that act is not incident to lawful sanction, public necessity, self-defence or the defence of others, or the law of armed conflict;

IV. "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

The definition of extrajudicial killing, unlike the current statutory definition of torture, includes our earlier observation that protections against extrajudicial killing should be expanded when the victims are also harmed by political groups with *de facto* political control over a territory or a population to which the victim belongs.[133] The definition also includes our observations that the proscription of extrajudicial killing includes some elusive considerations, such as the fact that law enforcement, military, and other government officials are sometimes rightfully permitted to intentionally take the life of a person on behalf of the state. Importantly, the form of the proposed statute does not change depending on whether there is a source convention or not. These features are legal and prudent under domestic law either way, per the earlier conclusion

[133] In fact, in reforming the statute, drafters should consider expanding the potential violator in torture as well, to cover these non-state actors. Although this paper is not so presumptuous as to do it here, there seems no reason not to have symmetry between them in the code.

about universality for the emergent crime of extrajudicial killings.

This proposed statute is only the criminal statute for the crime of extrajudicial killing. Many issues taken up in the larger Convention Against Torture include considerations of civil liability and evidentiary constraints. Immigration law issues, civil law issues, procedural and evidentiary legal issues are all significant issues that are not discussed here, but should be carefully considered whether a treaty is negotiated or it is undertaken to suppress extrajudicial killings as a nation.

One prosecutorial and practical issue related to this formulation is that it tries to be expansive, and carve out those governmental killings that are permissible, leaving the rest that are not criminalized. This approach is intended to avoid the fate of the Convention Against Enforced Disappearances, which proscribes only one technique and does not cover all kinds, or even many kinds, of illiberal governmental abductions, kidnappings, and detentions. It would seem in reading the text that each of these proper purposes must be proved not to have occurred, which is difficult for a prosecutor. Yet in reality, other kinds of crimes deal with this same problem by having the carve outs be considered affirmative defences, provable by the defendant if they apply.[134] For example, the federal murder statute proscribes "unlawful killing" leaving the defences of public authority or self-

In fact, in reforming the statute, drafters should consider expanding the potential violator in torture as well, to cover these non-state actors. Although this paper is not so presumptuous as to do it here, there seems no reason not to have symmetry between them in the code.[135] (Noting the well-established rule of criminal statutory construction that an exception set forth in a distinct clause or provision should be construed as an affirmative defence and not as essential element of crime). Defence to be alleged by the defendant.[136] Likewise, considering the carve outs to extrajudicial killings as affirmative defences is an acceptable compromise to give defendants fair notice of what is illegal while

[134] United States v. Santos-Rivera, 183 F.3d 367, 370-71 (5th Cir. 1999) (noting the well-established rule of criminal statutory construction that an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not as essential element of crime).
[135] United States v. Santos-Rivera, 183 F.3d 367, 370-71 (5th Cir. 1999)
[136] *See* 18 U.S.C. § 1111(a) (2006).

defining a crime in such a way as is practical and useful to prosecutors.

Similarly, it may be questioned why the definition of extrajudicial killing advocated by this paper is not directly lifted from the definition that already exists in the TVPA. The TVPA, in defining extrajudicial killings and torture alongside each other, provides:

a. Extrajudicial Killing—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.
b. Torture—For the purposes of this Act—
1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
a. the intentional infliction or threatened infliction of severe physical pain or suffering;
b. the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
c. the threat of imminent death; or
d. the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of

mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[137]

The first consideration to remember is that the TVPA is civil and therefore its purpose is different. A criminal statute needs to be careful on elements, careful to give notice, and must properly consider the prosecutorial burden of evidence. Defining a similar phenomenon differently for different purposes is not new in the U.S. Code. For example, there are more than one dozen definitions of terrorism in the U.S. code for various criminal, tortious, immigration, and other purposes.[138]

Looking to a comparison between the criminal torture statute, § 2340A, and the definition of torture in the TVPA, they appear to be similar. But there are some differences. The criminal statute makes clear that only "severe" mental pain and suffering is enough to trigger prosecution. The criminal statute also omits references to the exact purpose of the torture, hoping to broadly capture torture crimes. Importantly, the civil definition of torture omits the element of an official actor, although the requirement that the offender be acting under "colour of law" in order for the claim to be actionable is elsewhere in the TVPA.[139]

The civil extrajudicial killing definition captures a broader range of behaviour than the criminal statute may want to do. Based on the definition, the statute places great emphasis on the requirement that the killing be authorized by standards that are sufficiently civilized. It may not be desirable to try to litigate cases criminally in which poorly functioning legal regimes gave death sentences that did not meet international standards. The real spectre is killings not that fall short on due process, but that are clearly committed with an illiberal purpose. While tackling both may be desirable, it is questionable whether raising judicial standards in other countries is a suitable goal to pursue through the criminal law as opposed to civil suit. This paper discussed whether sham processes and pre-textual hearings should be prosecuted with this new crime of extrajudicial killings; that question reappears in this context. However, if the criminal law is

[137] Torture Victim Protection Act of 1991, *supra* note 121, § 3(b)(2)(A)-(D).

[138] *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249-50 (2004).

[139] Torture Victim Protection Act of 1991, *supra* note 121, § 2(a)(1).

kept out of that trickier area, then much of this statute falls away.[140] The TVPA definition of extrajudicial killing includes the catchall of what a state has authority to do under international law. This is a fine caveat and not one that this article is opposed to *per se*; it observes the same concern about wanting to define the crime broadly and list the caveats instead.

Yet this caveat, sufficient for a civil statute, may simply not give criminal defendants sufficient notice of what conduct is permissible. As a result, the criminal statute could face void for vagueness challenges. It also might be difficult to show prosecutors what to prove. By creating a list of more specific caveats, the criminal statute is less broad and flexible to changes in international law and new, unconsidered things, but more useful to prosecutors and fair to defendants.

3. 5 INTERNATIONAL HUMANITARIAN LAW

Deliberate Unlawful killing by state forces runs contrary to the principle that civilians and non-military objectives cannot be targeted during armed conflict, provided they do not take active part in the hostilities. However, the extant enforcement mechanisms under the Geneva Conventions are particularly scarce. Options include designating “protecting powers” to monitor the belligerent parties’ compliance with the laws of war and humanitarian law, but this mechanism is seldom used in practice. If a party to the conflict alleges that the other party has acted in breach of its obligations, they can resort to classical international law diplomatic (non-binding) dispute-settlement procedures. Protocol I establishes an International Fact-Finding Commission composed of fifteen members “of high moral standing and acknowledged impartiality”, whose competence may be recognized by the contracting states upon signature or ratification/ accession or at any subsequent time, on a basis of reciprocity.[141] The acceptance of the Commission is therefore optional, and even so the Commission’s intervention is confined to inquiry and mediation, in fact it is only competent to “enquire into any facts alleged to be a grave breach” and to facilitate, through its good offices, the restoration of an attitude of respect for the

[140] Torture Victim Protection Act of 1991
[141]Supra note 121

Conventions and this Protocol”. Security Council may request the Secretary-General to establish an international commission of inquiry to investigate violations of humanitarian law and identify the perpetrators; however, their actual accountability will depend on the cooperation of the States concerned.

3.5.1 European Court of Human Rights

Under the original scheme of the 1950 European Convention, declarations accepting individual complaints and the jurisdiction of the Court were optional. The system was based on the shared jurisdiction of a European Commission of Human Rights and a European Court: the Commission dealt with admissibility, and issued a report on the merits; if the Commission believed there was a violation, the Commission or the State could refer the case to the Court. After Protocol 9, victims have been able to directly refer a case declared admissible by the Commission to the Court. However, in cases where the Court did not have jurisdiction, the Commission reported to the Committee of Ministers, who decided in camera by a 2/3 majority if there had been a violation – a quasi-judicial role seen as inappropriate for a political body.

3.5.1.1 European Union

The EU has become renowned for having an almost uniquely effective system of implementation of treaty obligations, through the development of judge-made doctrines as well as the treaty provisions for enforcement. The key driver in this was the interplay between the national courts and European Court of Justice using the preliminary rulings reference by which a national court at any stage of the proceedings may make a reference on a question of interpretation of EU law, or validity of secondary acts. While the EU has been effective in enforcement vis à vis its Member States, some have questioned the ECJ's commitment to human rights protection when those rights face a different direction from the economic rights, or even when there is serious political controversy. Furthermore, there is no direct right of action for human rights violations; any claim must fall within the Treaty competence already and the Charter does not change this. In the event that problems occurred in a Member State Post-2000, the introduction of a network of independent experts on fundamental rights to review the implementation of the Charter rights in the member States. A new Fundamental Rights Agency has also been established, though there have been questions about its range of competence and what powers it has; it is not an enforcement mechanism. The European Parliament established a committee to review human rights, the scope of which goes beyond the member States of the EU, and may pass resolutions on particular issues. The effectiveness of this as a mechanism is doubtful, though it may feed in to the EU process of negotiating trade agreements with third countries

3.5.2 Americas

3.5.2.1 Inter–American Commission on Human Rights

The OAS institutions probably constitute the most evolved enforcement mechanism after the ECHR. The Inter–American Commission on Human Rights is a double monitoring organ[142] composed of 7 members of high moral character and recognized competence in the field of human rights, appointed by the General Assembly of the OAS. Under the Convention, it examines inter-State and individual complaints[143]. While it has optional competence for inter-State complaints, it has compulsory competence to receive individual complaints. According to Article 44 of the American Convention, any person, group of persons or any non-governmental entity may lodge a petition with the Commission, regardless of whether the applicant is a victim. The admissibility criteria are similar to ECHR: domestic remedies must have already been exhausted, petitions must be filed within six months of the final domestic decision, proceedings must not be already brought before another court, they cannot be anonymous, and must be substantiated by evidence. If attempts to secure a friendly settlement fail, a confidential report is transmitted to the responding State, containing the facts and recommendations to the State on how to solve the matter. The Commission can submit a case to the Court within 3 months from the report, if the Court has jurisdiction in respect of that State. If the Court is not seized, the Commission may decide to publish the report after the prescribed time period for the adoption of remedial measures has elapsed.

[142] under the OAS Charter and under the Convention on Human Rights
[143] Art. 44 of the convention

3.5.2.2 Inter–American Court of Human Rights

The Inter–American Court of Human Rights is made up of 7 judges elected by the OAS General Assembly in their individual capacity from jurists of high moral authority and recognized competence. The situation in respect of the contentious jurisdiction of the Court is akin to ECHR prior to Protocol 11: only the Commission and the States have *locus standi* to bring a case before the Court. Also, States may elect whether to accept the jurisdiction of the Court. When the Court is competent to hear a case and finds a violation, it can order reparation, including awards of compensation. The Court can also order States to take provision measures where an individual faces grave or imminent danger. The Court also has a remarkably wide advisory jurisdiction, extending beyond the interpretation of the Convention to any OAS treaty.

3.5.3 Africa

3.5.3.1 African Union

a. African Commission on Human and Peoples' Rights

Established in 1987, the African Commission promotes the protection of human rights through studies and research, cooperation with other human rights bodies, dissemination of information. It adopts resolutions and guiding principles to facilitate the interpretation of the Charter and of the reason supporting its decisions. The most significant competence of the Commission is the power to consider complaints for violation of the Charter's provisions, submitted by the victims of a human right violation, but also by a third party, a feature that distinguishes it from other complaint mechanisms. However, when a violation of a human right is found, the Commission's communication may only contain recommendations to the respondent State, including an award of compensation. The individual complaint procedure is not frequently used, and there is no follow up mechanism for the Commission's recommendations.

b. African Court on Human and People's Rights

The African Court on Human and People's Rights was established by a Protocol adopted in 1998, which entered into force in 2004. Under the provisions of the Protocol, the Court can: make an appropriate order to remedy the human rights violation, deliver advisory opinions, adopt provisional measures in circumstances of 'extreme gravity and urgency when 'irreparable harm to persons' would otherwise ensue. However, less than half the member States of the AU have ratified the Protocol. The African Commission is entitled to submit cases to the Court, so there is no individual right of petition directly to the Court.[144] The African Court of Human Rights will be replaced by the African Court of Justice when the Protocol on the Statute of the African Court of Justice, adopted in 2008, enters into force. The new court, when it comes into operation, will not have a right of individual access (either directly or indirectly through a reference mechanism from the national court), which is a weakness. This is by contrast to the position for the ECOWAS court.

c. **The AU Special Rapporteur on the unlawful killing**

The Special Rapporteur publishes press releases, sends letters to the governments, receives information about violations of the Charter's provisions, engages with NGOs, undertakes on–site visits and produces reports that include recommendations. The Special Rapporteur has recently reported incidents of unlawful killing by state forces and formulated conclusions and recommendations in the report.

3.5.3.2 The African Peer Review Mechanism (APRM)

It is part of the New Partnership for Africa's Development (NEPAD) adopted in 2001 as the development framework for the AU. It publishes reports that address, amongst other things, human rights issues. It involves a political Forum that consists of the heads of participating States that aim to exercise political pressure in a conciliatory way. This explains also the fact that the APRM has not been in much cooperation with the African Commission on Human and Peoples' Rights. It adopted a Declaration on Democracy, Political, Economic and Corporate Governance in 2002 within the framework of NEPAD.

[144] Article 5 of Protocol,

3.5.3.3 The Pan–African Parliament

The Protocol to the treaty establishing the African economic community relating to the pan–African parliament was adopted on 2 March 2001, and entered into force on 14 December 2003. Its objectives include "promoting the principles of human rights and democracy in Africa".[145] Despite the name, this body only exercises a consultative and advisory role in limited areas: election observation, fact–finding missions.

3.5.3.4 The AU Peace and Security Council

The African Union established the Peace and Security Council with the Protocol on the Peace and Security Council which was adopted in 2002 and entered into force in 2003. One of the PSC's objectives is to 'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts'. Its powers do not include binding decisions.

3.5.3.5 The Economic Community of West African States (ECOWAS)

The Community Court of Justice became operative in 1996. It originally only had a limited field of access and no complaints were brought before it until 2004. The Authority of Heads of State and Government can seize the Court when a member State or an institution failed to comply with its obligations.[146] The Court also provides advisory opinions on any legal issues upon request from the ECOWAS Authority[147] or Council of Ministers (Article 10.3(h)). Any disputes on the interpretation or application of the Treaty can be referred to the Court by either party or any other Member States or the Authority, whose decision is final[148]; this includes proceedings brought by a member State on behalf of aggrieved nationals, after attempts to solve the dispute amicably have failed. In this the jurisdiction of the court was essentially confined to the intergovernmental sphere. A 2005 Supplementary Protocol expanded the

[145]Article 3 of Protocol,
[146]Article 7.3(g) of the protocol
[147]Ibid Article 7.3(h)
[148]Ibid Article 76

jurisdiction significantly: not only did it confirm that national courts may make references to the ECOWAS court, but it also granted individual access to the Court for victims of human rights violations seeking relief. In addition to the expansion of its remit to include human rights, the peculiar feature of the Court's jurisdiction lies in the fact that there are only two admissibility criteria: the application must not be anonymous; and not made while the same matter is pending before another international adjudicating body. It is notable that there is no requirement of exhaustion of domestic remedies. The 2005 Protocol has increased the number of cases coming before the court, and these include a number of claims relating to human rights. While this shows the possibilities of the court's jurisdiction, a note of caution should be sounded about the level of acceptance and use of the new mechanisms, as the majority of the cases have emanated from one State, Nigeria. Further, the ECOWAS court is itself unusual in the context of the African sub-regional systems. The courts of the other communities are limited in terms of access or effectively exist on paper only.

3.5.4 Arab countries

There is no effective enforcement mechanism in respect of the 2004 Arab Charter. A monitoring body is provided for, but its powers are rather limited. Article 45 of the Charter establishes an Arab Human Rights Committee, consisting of seven members elected by secret ballot by the States parties amongst nationals of the state's parties highly experienced and competent in the field of human rights, and observing the rotation principle. The members of the Committee serve in their personal capacity and are expected to be fully independent and impartial. A Report produced by Cairo Institute for Human Rights Studies, Bastion of Impunity, Mirage of Reform, suggests that the Committee established under the Charter has been weakened by the non-inclusion of NGOs in its work. As with the previous version of the charter, the expert Committee remains the only system of monitoring State compliance. It receives periodic reports from States parties, but there is no mechanism either for petitions from a State party or from an individual to the Committee for violations of the Charter. There is no other enforcement mechanism – the contracting States failed to establish an Arab Court on Human Rights.

3.5.5 Asia

3.5.5.1 ASEAN Intergovernmental Commission on Human Rights

The AICHR is a consultative body with the aim of promoting and protecting human rights, and regional co-operation on human rights, in ASEAN member States, and it has now held 5 meetings. In terms of monitoring and implementation of human-rights norms, the AICHR acts as an advisory body whose role is promotion of rights, not their enforcement. In accordance with AICHR Terms of Reference, the AICHR has the following tasks:

- To obtain information from ASEAN Member States on the promotion and protection of human rights;
- To develop common approaches and positions on human rights matters of interest to ASEAN;
- To prepare studies on thematic issues of human rights in ASEAN;
- To submit an annual report on its activities or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting*”*.

Further concerns are raised by designation of AICHR membership, an inter-governmental body on which each State has one Representative nominated by and answerable to their government and serving a three-year term, renewable once. One significant weakness is that the Representative may be replaced at the appointing government's discretion, which may undermine their independence, despite the fact that the Representatives, according to the Terms of Reference, are under an obligation to act impartially. Decision-making is on the basis of consensus which gives the wide ranging political and religious standpoints of the ASEAN members, may prove hard to reach, especially with regard to any measure that was effective or enforceable. the slow development of the AICHR from the original decision to introduce it, as well as the reluctance on the part of some Asian States to sign up to international human rights treaties suggesting there will be a lack of enthusiasm for implementing AICHR policies and that there are in any event great disparities between the ASEAN States. While it may be said that the ICHR lacks teeth, another assessment sees the very fact that all ten ASEAN governments agreed to implement a human rights commission at all as 'remarkable' and 'an essential first step toward ASEAN's stated goal of respecting and protecting human rights'.

3.5.5.2 The South Asian Association for Regional Cooperation (SAARC)

SAARC has no specific human rights organ. President Maumoon Abdul Gayoom of Maldives at the 13th SAARC Summit (2005) suggested that: "It is time that an autonomous SAARC Centre for Human Rights, based on civil society, is established. Such a Commission could promote international standards, facilitate co-operation among lawyers and jurist, and share expertise and resources in the advocacy of human rights and democracy in the region". This is a long-way short of the sort of organization envisaged under the Paris Principles. SAARC may seem to be weak institutionally. SAARC is supported by a Secretariat, but the organization seems fully intergovernmental in form and suffers from inter-regional tensions. Commentators have suggested that the focus of SAARC has been on the core areas, rather than on more sensitive matters and SAARC generally has avoided much involvement in its member States' internal matters. Indeed, at the 13th Summit, the states reiterated 'their commitment to the principles of sovereign equality, territorial integrity and national independence, non-use of force, non-intervention, and non-interference in the internal affairs of other Member States'. The types of obstacles encountered by victims seeking a remedy internationally vary according to the mechanism considered. In some cases there is no individual right of access to a court whatsoever, in other cases the right is mediated by a non-judicial body, and in some other cases yet (ECHR) the right exists and it is practicable, but the actual benefit of the procedure can be seriously diminished by other factors, such as the excessive length of the proceedings. The ignorance of legal avenues available to seek remedy for violations, the costs, as well as the intimidation of lawyers may be additional factors. The fact that some of these procedures request status of victim, and do not admit actiopopularis. Impunity takes place within the context of that national legal system. More work may be required to understand the different circumstances which allow impunity to flourish. This is not just a question of formal measures for the implementation of international norms or compliance with reports and rulings, but raises questions about more subtle points within each national legal system concerning the operation of the domestic legal system, the awareness of international norms within the judiciary and legal profession, journalists and other civil society activists. Focusing just on state-level compliance may omit part of the picture and mean opportunities for positive developments within the individual states are likewise missed. It seems that the incremental approach has proven insufficient and that more direct and coordinated steps are needed.

3.6 CONCLUSION

This article does not oppose taking more time to consider the complex issues raised by the criminalization of extrajudicial killings. It does not oppose the international community or lawmakers in the United States from taking time to flush out the concept of what an extrajudicial killing is, and criminalizing it in a way that does not rely on the philosophies and mechanisms that underlie the Convention Against Torture. But it seems that the CAT, prized as it is for its strong stance against illiberal states that violate human rights, omits a rather serious practice that is relatively common the world over, and quite intimately related to torture. Oppressive states, regimes, and *de facto* powers do not always torture their victims and release them, leaving them as witnesses. Often, they kill them outright, or torture and kill them leaving very little evidence of the one crime that could potentially be prosecuted. It seems strange that greater cruelty could remove a human rights violator from international concern and therefore from our jurisdiction. Even though torture is conceptually simpler and more cohesive, more must be done to end impunity for human rights violators.

There is nothing wrong with taking more time to consider the nature of what it is for the state, a state official, or a political organization to kill an individual and to determine which actions are legitimate and which are not. This article has specifically sought to the limit the concept of what an extrajudicial killing is to exclude killings that are governed by the law of armed conflict, executions that pass through the judicial organs of the state, and killings that occur for public safety reasons. Although the first and last should be dealt with by the discreet bodies of law that govern them, the second concept, procedural fairness, is not so easily dismissed. Many of the illiberal executions that occur in the transitional or corrupted societies of the world do pass through some amount of judicial process that clearly does not meet an even minimum standard of procedural fairness and due process. Many of these murders are politically motivated. But, political motivation should not be a factor. If there is a place in the world where officers of the state have impunity to execute people for non-political reasons that impunity should not continue.

This essay tries to address politically motivated murders that are essentially the common completion of the act or torture, and fill what might be perceived to be a rather large gap in our enforcement of criminal sanctions on torture. Yet, more discussion is warranted. A treaty of the kind suggested here could successfully co-opt the well-worn path of the Convention Against Torture, both its international treaty and its statute as written in U.S. domestic law, to move non-controversially to legislating against this emergent international crime. Hopefully by doing so, the international community, or even the United States alone, can begin ending impunity for illegitimate, state-sanctioned, and political murders.

Chapter 4

CONSTITUTIONAL AND LEGAL PERSPECTIVE OF UNLAWFUL KILLING BY STATE FORCES

4.1 INTRODUCTION

The basic tenet of police system in India is that it's a vital arm of government for establishing the stability in the society. The police must play its role according to the law of the land and perform its duty impartial and independent manner without any biases and prejudices to anybody. But the ground realities tell a different story as there is a rampant of criminality[1]in the police system. The whole police system has been facing trust-deficit crisis as civil society treats them as foe instead of friend. The Indian Police deeply involved in corruption and partisan politics and behave highly unprofessionalism. The police is not a master of the society but the servant and its biggest accountability is towards the public at large.

The policing in India have always been a controversial issue due to various factors including human rights violation and numerous instances of custodial violence i.e. how police treat suspects, custodial murder, inhuman custodial torture, their biases and prejudices against a particular community. Its matter of fact that many innocent youths have been killed in fake encounters and most of them belongs to a particular minority community. The chief reason of rampant criminality among police is that its non-accountability and unanswerable attitude towards the society and the reason being is there is no law which can prosecute errant police officials. When it comes to extra-judicial

[1]The term "Criminality" denote lawlessness, human rights violation and indulging directly or indirectly in different criminal activities by the Police e.g. custodial violence, custodial rape, implicating innocent people, non-registration of FIR, rampant corruption, extra-judicial killing for name, fame, medals and promotion etc. There is no dearth of trigger happy police officers in India who acclaimed themselves as "encounter specialist" rather it's a cold blooded murder in the custody.

killings it is worst as their targets are mainly from the minority community especially the Muslims.[2]

There have been many conclusive studies that suggest police have played highly partisan role while tackling terrorism or performing duty to ensure law and order in the society. The finding of Justice Nanavati Commission Report of 1984, Justice Srikrishna Commission Report and National Police Commission Report are some instances. The main thirst of the present paper is to examine the pattern of police criminality and activism of Indian judicial system.

4.2 BACKGROUND AND LEGAL PROSPECTIVE

4.2.1 Constitutional and Legislative Prospective

The Indian Constitution provides all citizens with the "right to equality before the law," the right to "the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth," and the "right to freedom of speech and expression."[3] Further, it specifies that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest" and that every person arrested be presented to the nearest magistrate within 24 hours of the arrest.[4] In 1993, India passed the Protection of Human Rights Act which created the National Human Rights Commission (NHRC). The National Commission for Minorities (NCM) is another governmental body charged with monitoring and reporting on human rights violations against minorities and ensuring that minorities are protected and treated equally.[5]

In 2011, the Government introduced in Parliament a Prevention of Communal and Targeted Violence (Access to Justice and Reparation) Bill to criminalize "any act or series of acts, whether spontaneous or planned, resulting in injury or harm to the person and or property, knowingly directed against any

---

[2]K M Ziyauddin and Eswarappa Kasi (Eds.), "Police Biasness Against Minorities", Dimension of Social Exclusion: Ethnographic Exploration, Cambridge Scholars Pub. (2009) p. 171

[3] U.N. Human Rights Council, National report submitted in accordance with paragraph 15(a) of the annex to human rights council resolution 5/1 (Mar. 6, 2008) available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=13940, 4, para 15.

[4]Article 22 of the Constitution of India, 1950

[5]National Commission for Minorities, "Genesis of NCM," available online at http://ncm.nic.in/Genesis_of_NCM.html

person by virtue of his or her religious or linguistic identity." The BJP, however, opposed the bill and it was therefore dropped.[6]

4.2.2 Universal Periodic Review 2012

As part of the second cycle of the UPR of India in 2012, many Member States expressed concern at India's non-ratification of certain international treaties. Many countries urged India to ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearances.[7] India accepted the recommendation to ratify the Torture Convention, but it has yet to do so.

Additionally, India accepted recommendations to continue cooperating with Special Procedures and to accept, in particular, requests for country visits from Special Rapporteurs (Brazil).[8] The Government, however, has still not accepted the request from the Special Rapporteur on Torture to visit India, pending since 1993.[9]

In its 2012 UPR, India accepted some recommendations related to the rights of religious minorities. India agreed to improve measures to prevent violence against members of religious minorities (Iran),[10] to strengthen the Federal Government's effort to guarantee freedom of religion to everyone (Holy See),[11] and to put in place appropriate monitoring mechanisms to ensure that the

---

6 http://www.bjp.org/images/publications/communal%20violance%20bill_booklet%20e%20part%202.pdf, foreword; 'Venkaiah terms communal bill anti-majority', New Indian Express, Oct. 25, 2013 (http://www.newindianexpress.com/states/andhra_pradesh/Venkaiah-terms-communal -bill-anti-majority/2013/10/25/article1854553.ece).

7 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: India (Jul. 9, 2017), U.N. Doc. A/HRC/21/10, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-10_en.pdf, 14-17, para 138. pg1-36

8 Ibid., para 138.66

9 http://economictimes.indiatimes.com/news/politics-and-nation/not-averse-to-visits-by-unspecial-rapporteurs-india/articleshow/46541336.cms

10 For recommendations made: Report of the Working Group on the Universal Periodic Review: India, (Jul. 9, 2012), U.N. Doc. A/HRC/21/10, p.21, para 138.79; for recommendations accepted: UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: India, Addendum (July,04,2017), U.N. Doc. A/HRC/21/10/Add.1,available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/57/PDF/G1216757.pdf?OpenElement, 4.

11 Report of the Working Group on the Universal Periodic Review: India, (Jul. 9, 2017), U.N. Doc. A/HRC/21/10, p.23, para 138.125; Report of the Working Group on the Universal Periodic Review: India, Addendum (July. 04, 2017), U.N. Doc. A/HRC/21/10/Add.1, 4.

intended objectives of progressive policies for the promotion and projection of the welfare and the rights of the vulnerable, including scheduled castes and tribes and minorities, are achieved (Ghana).[12] Further, India agreed to provide more resources for the enjoyment of economic and social rights, especially in favor of vulnerable groups like minorities (Viet Nam).[13]

4.3 IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

4.3.1 Equality and Non-Discrimination

Discriminatory religious-based laws that ban the slaughter of cows. Several Indian states have passed legislation that bans cow slaughter and makes the sale of beef punishable by up to five years in prison.[14] Prime Minister "Modi's office has suggested that these bills are models for other states to emulate."[15] Religion-based cow protection laws have a discriminatory impact on Muslims, Christians, and low-caste Dalits (the former Hindu "untouchables" formally known as Scheduled Castes), many of whom consume beef. Attacks on members of religious minorities suspected of slaughtering cows have increased in India.[16] In September 2015, a mob of 200 people murdered Mohammad Akhlaq and injured his son for allegedly killing a cow.[17] In October 2015, Zahid

---

[12]Report of the Working Group on the Universal Periodic Review: India, (Jul. 9, 2012), U.N. Doc. A/HRC/21/10, p.20, para 138.75; Report of the Working Group on the Universal Periodic Review: India, Addendum (Sept. 17, 2012), U.N. Doc. A/HRC/21/10/Add.1, 4.

[13]Report of the Working Group on the Universal Periodic Review: India, (Jul. 9, 2012), U.N. Doc. A/HRC/21/10, p.23; Report of the Working Group on the Universal Periodic Review: India, Addendum (Sept. 17, 2012), U.N. Doc. A/HRC/21/10/Add.1, 2.

[14]Manil Suri, "A Ban on Beef in India Is Not the Answer," New York Times, Apr. 17, 2015, available at http://www.nytimes.com/2015/04/18/opinion/sunday/manil-suri-a-ban-on-beef-in-india-is-not-the-answer.html?_r=0.

[15]Ibid.

[16]Suhasini Raj, "Indian State to License Cow Protection Groups to Aid Police," New York Times, Aug. 11, 2016, available at http://www.nytimes.com/2016/08/12/world/asia/indian-state-to-license-cow-protection-groups-to-aid-police.html?rref=collection%2Ftimestopic%2FModi%2C%20Narendra&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection.

[17] 'Dadri: Outrage after mob lynches man for allegedly consuming beef', Indian Express, Oct. 1, 2015, available at http://indianexpress.com/article/india/india-others/outrage-after-man-lynched-over-rumour-of-storing-beef-in-house/

Rasool Bhat was burnt to death for allegedly transporting cows to slaughter.[18] A 22-year-old Muslim man was lynched in Himachal Pradesh state for transporting cows.[19] Protests spread in Gujarat in July 2016 after a video went public showing vigilantes thrashing four Dalits about to skin a dead cow.[20] Prime Minister Modi was forced to denounce cow vigilantes and order arrests.[21] But Pravin Togadia, a Hindu nationalist directly connected with RSS-BJP and a former close ally of Modi's, rejected Modi's call as an "insult" and bluntly said that the cow vigilantes had helped Mr. Modi get elected in 2014.[22]

Scheduled Castes lose affirmative quota benefits if they convert from Hinduism. The Indian Constitution guarantees freedom of religion and also provides reserved places (reservations) for Scheduled Castes in educational institutions and government jobs. Yet the Government denies reservations to members of Scheduled Castes who convert out of Hinduism.[23] In 2009, a commission led by a former Chief Justice recommended non-Hindu Scheduled Castes is eligible for reservations.[24] The government opposed the recommendation in the Supreme Court.[25] In February 2016, an Indian minister

[18] U.S. Commission on International Religious Freedom, 2016 Annual Report, available at http://www.uscirf.gov/sites/default/files/USCIRF%202016%20Annual%20Report.pdf, 161.

[19] Gaurav Bisht&ShalenderKalra, 'Cow smuggler' lynched in Himachal, police yet to make arrest, Hindustan Times, Oct. 16, 2015, available at: http://www.hindustantimes.com/india/suspected-bajrang-dal-members-lynch-man-over-alleged-cow-smuggling/story-MRBEhyD4UqwjZg1wzwjm6J.html.

[20] Dalits atrocities: How the protests have become nightmare for BJP, The Indian Express, Aug. 1, 2016, available at: http://indianexpress.com/article/india/india-news-india/dalits-atrocities-how-the-protests-have-become-nightmare-for-bjp-2947514/.

[21] Modi slams cow vigilantes, again: 'Fake gaurakshaks want to fuel tension,' Hindustan Times, Aug. 7, 2016, available at: http://www.hindustantimes.com/india-news/modi-attacks-cow-vigilantes-again-fake-gau-rakshaks-want-to-fuel-tension/story-tozyi1lR7MrxNSxBddKuHJ.html.

[22] PM Modi's remarks against cow vigilantes are insulting, says Pravin Togadia, First Post India, Aug. 14, 2016, available at: http://www.firstpost.com/india/pm-modis-remarks-against-cow-vigilantes-are-insulting-says-pravin-togadia-2955082.html.

[23] SubodhGhildiyal, Government firm on opposing dalit tag for converts, Times of India, Oct. 10, 2014, available at: http://timesofindia.indiatimes.com/india/Govt-opposed-to-Dalit-status-for-converts/articleshow/44765858.cms.

[24] Ranganath Mishra Commission Report, 2009, http://minorityaffairs.gov.in/sites/default/files/volume-1.pdf, 11, para 32.

[25] SubodhGhildiyalGovernment firm on opposing dalit tag for converts, Times of India, Oct. 10, 2014, available at: http://timesofindia.indiatimes.com/india/Govt-opposed-to-Dalit-status-for-converts/articleshow/44765858.cms.

said allowing non-Hindu Scheduled Castes to benefit from reservations would "encourage conversion and weaken the Hindu religion."[26]

4.3.2 Right to Life, Liberty and Security of Person

- **Communal violence**

India has a dark history of communal violence against religious minorities. Significant occurrences in recent history include: the 1984 Delhi riots that resulted in the deaths of more than 3,000 Sikhs; the 2002 attacks in Gujarat, which resulted in the deaths of an estimated 1,100 to 2,000 Muslims as well as deaths of Christians and destruction of churches; and the 2007–2008 attacks against Christians in Orissa, which resulted in approximately 100 deaths.[27]

Since 2012, communal violence has been increasing in India. The U.S. Commission on International Religious Freedom has put India on "a negative trajectory in terms of religious freedom," noting the steady increase of religious intolerance and violence.[28] In August and September of 2013, communal riots broke out in the Muzaffarnagar district in the state of Uttar Pradesh. Clashes between Hindu and Muslim communities resulted in more than 60 reported deaths and hundreds of injuries,[29] including sexual assault.[30] Communal violence further escalated during the weekend of September 7-8 by "inflammatory speeches by Hindu political leaders that encouraged attacks on Muslims."[31] Human Rights Watch reports that "a curfew was imposed and the Indian army

[26]SC Status to Dalit Muslims, Christians will encourage conversion, says Union Minister, DNA, Feb. 16, 2016. Available at http://www.dnaindia.com/india/report-sc-status-to-dalit-muslims-christians-will-encourage-conversion-says-union-minister-2178077.

[27] U.N. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns: Mission to India (Apr. 26, 2013), UN Doc. A/HRC/23/47/Add.1, available at https://documentsddsny.un.org/doc/UNDOC/GEN/G13/134/53/PDF/G1313453.pdf?OpenElement, 10, Para 45-46

[28] U.S. Commission on International Religious Freedom, 2016 Annual Report, 159.

[29] U.S. Dept. of State, Human Rights Report 2013: India, available at: http://www.state.gov/documents/organization/220604.pdf, 62; India: Stop Forced Evictions of Riot Victims, Human Rights Watch, Jan. 17, 2014, http://www.hrw.org/news/2014/01/17/india-stop-forced-evictions-riot-victims. According to the government of Uttar Pradesh, 128 communal incidents occurred between August 27 and September 16, and, through the first week of October; 46 Muslims and 16 Hindus were killed in communal riots. Ravish Tiwari, Uttar Pradesh BJP Wants Tickets for Four Riot-accused MLAs, The Indian Express, Mar. 10, 2014, available at http://indianexpress.com/article/cities/lucknow/uttar-pradesh-bjp-wants-tickets-for-four-riot-accused-mlas/.

[30]India: Stop Forced Evictions of Riot Victims, supra note 28.

[31]Ibid.

was deployed to restore law and order,"[32] but in the end more than 42,000 people were displaced by the violence.[33]

State governments in Muzaffarnagar and Shamli Districts organized relief camps for riot victims,[34] but conditions were woefully inadequate. The Indian National Human Rights Commission reported in December 2013 that approximately 40 children had died due to extreme cold in the camps.[35] On December 27, the state government began relocating riot victims from the camps[36]; Human Rights Watch, which conducted a fact-finding visit to the camps in January 2014, called the removals "forced evictions" as those remaining in the camps still fear return.[37]

The Supreme Court of India has stated that it holds "the state government responsible for being negligent at the initial stage and in not anticipating the communal violence [in Uttar Pradesh] and for taking necessary steps for its prevention." According to news reports, it "rebuked the central government, saying that the violence could have been prevented if [Indian] intelligence agencies [had] alerted the district administration in advance."[38]

---

[32]Ibid.

[33] U.S. Department of State, supra note 28, at 28, 62.

[34]Ibid.,28.

[35]Ibid.,28–29. "In October and December of 2013, a team from the Indian National Human Rights Commission team assessed the state government efforts for relief and rehabilitation of displaced persons. The NHRC reported that approximately 40 children died due to extreme cold in the relief camps and made several recommendations to the state governments. The recommendations included providing compensation to families of those who died in the camps, providing adequate clothing and blankets, registering the names and addresses of all displaced persons, providing drinking water, improving sanitation, and providing regular medical checkups. State government officials claimed that they provided proper compensation to the displaced families as well as blankets, drinking water, medical check-ups, and free medicine to those in the camps. The media and civil society activists, however, reported that conditions in the camps were "unhygienic and subhuman."

[36]Ibid.,29. "Some of those affected alleged that they were being forcefully evicted from their camps without being provided proper alternative shelters or due compensation. A journalist who visited the area stated that bulldozers demolished approximately 30 tents in the Loi relief camp. According to official sources, 4,783 persons were living in the relief camps in Muzaffarnagar and Shamli at year's end."

[37]India: Stop Forced Evictions of Riot Victims, supra note 28.

[38]Supreme Court criticizes Uttar Pradesh Govt for Muzaffarnagar Riots, Live Mint & the Wall Street Journal, Mar. 27, 2014, http://www.livemint.com/Politics/ 3yUYjIuP1GmLtWGqLDikDP/ Supreme-Court-criticizes-Uttar-Pradesh-govt-for-Muzaffarnaga.html. "'We prima facie hold the state government responsible for being negligent at the initial stage and in not anticipating the communal violence and for taking necessary steps for its prevention,' an apex court bench headed by chief justice P. Sathasivam said."

India has seen a substantial increase in communal violence since the election of Prime Minister Modi in 2014.[39] According to India's federal interior ministry, India experienced a 17% increase in communal violence in 2015, compared to the previous year (751 vs. 644 incidents). In 2015, 97 people were killed and 2,246 people injured.[40] States that have significant instances of communal violence are Uttar Pradesh, Bihar, Maharashtra, Madhya Pradesh, Karnataka, and Gujarat.

- **Encounter killings-**

Extrajudicial executions occur in the context of "Encounter Killings," or killings that occur during clashes between security forces or law enforcement and alleged armed suspects.[41] According to the National Human Rights Commission of India (NHRC), between 2008 and 2013, there were 555 registered encounter killings, with the highest numbers reported from Uttar Pradesh (138 killings) and Jharkhand (50 killings).[42] In a previous report, the NHRC recorded nearly half as "fake encounters,"[43] meaning that the encounters were staged as a pretext for an extrajudicial execution. In April 2015, the police killed 20 woodcutters in Andhra Pradesh, allegedly in self-defense.[44] But evidence suggests the victims had been unarmed and had been tortured before dying.[45] In 2016, the Special Investigation Team closed an investigation against

[39]SaniaFarooqui, India Sees a Sharp Rise in Communal Violence in the First Five Months of 2015, Time Magazine, July 21, 2015, available at: http://time.com/3965515/india-communal-violence-rise/.

[40] Ministry of Home Affairs (India), Annual Report 2015-16, by Departments of Internal Security, States, Home, Jammu & Kashmir Affairs, and Border Management (New Delhi: Royal Press, 2016), para 6.63, 85, available at: http://mha.nic.in/sites/upload_files/mha/files/AR(E)1516.pdf.

[41] Human Rights Watch, India: Impunity Fuels Conflict in Jammu and Kashmir (September 2006), found at http://www.hrw.org/news/2006/09/11/india-impunity-fuels-conflict-jammu-and-kashmir

[42] U.S. Department of State, Human Rights Report 2015: India, available at: http://www.state.gov/documents/organization/253175.pdf, 2.

[43]Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to India (Apr. 26, 2013), Doc. A/HRC/23/47/Add.1, 4, para 12.

[44] A.D. Rangarajan&Y. Mallikarjun, 20 red sander smugglers shot dead in Chittoor, The Hindu, Apr. 7, 2015, available at: http://www.thehindu.com/news/cities/hyderabad/twenty-woodcutters-killed-in-seshachalam-encounter/article7076696.ece.

[45] J. Sam Daniel Stalin, Chittoor Killings: 2 Witnesses Who Claim Encounter Was Fake, Meet Rights Body, NDTV.com, Apr. 13, 2015, available at: www.ndtv.com/india-news/chittoor-killings-2-witnesses-who-claim-encounter-in-andhra-pradesh-was-fake-to-meet-rights-body-754436.

the officers involved, concluding that "the complaint was false."[46] Also in April 2015, the police in Telangana state killed five terrorism suspects in custody while they were travelling from jail to a court hearing.[47] Police asserted that the victims had snatched weapons and opened fire, prompting police to return fire in self-defense. But photographic evidence suggests that the victims were handcuffed and tied to their seats and that the weapons found on the bodies of the victims had been planted.[48] Efforts to file criminal charges against the police officers have met with stiff resistance.[49] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions reported in 2013 that encounter killings "have become virtually parts of unofficial State policy" in India.[50]

In September 2014, the Supreme Court of India established a 16-point set of guidelines for encounter killings. It ruled that regardless of the circumstances of death in an encounter, officials must file an FIR (police report) immediately in every case and an independent investigation must be carried out. Until the inquiry is over, no police officer involved in the encounter should be given any out-of-turn promotions or gallantry awards.[51] Yet the April 2015 encounter killings described in the preceding paragraph demonstrate that these guidelines have not been fully implemented on the ground.

---

[46]Andhra encounter: In final report, SIT says complaint false, The Indian Express, May 21, 2016, available at: http://indianexpress.com/article/india/india-news-india/andhra-encounter-in-final-report-sit-says-complaint-false-2811635/.

[47]Human Rights Watch Global Report 2016, 300.

[48]It's not an encounter, it's revenge killing by Telangana police: Advocate of the deceased, TwoCircles.net, Apr. 7, 2015, available at: http://twocircles.net/2015apr07/1428410953.html#.V-LDITX2XKE.

[49]Demand to provide Justice to five Muslim Under Trial Prisoners killed by police in 'Cold-blooded' manner, The Milli Gazette, Sept. 27, 2015, available at: http://www.milligazette.com/news/13058-demand-to-provide-justice-to-five-muslim-under-trial-prisoners-killed-by-police-in-cold-blooded-manner.

[50]Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, supra note 26, 5, para 17.

[51]PUCL &Anr v. State of Maharashtra, Supreme Court of India, Criminal Appeal No. 1255/1999 (Sept. 23, 2014), available at http://supremecourtofindia.nic.in/outtoday/ar12551999.pdf, 3, 10, 12.

- **Arbitrary Detention-**

Human rights defenders report increased police harassment, arbitrary arrest, and detention of Muslims based on the pretext of their purported involvement in terrorist activities.[52]

- **Torture and Cruel, Inhuman or Degrading Treatment of Detainees**-

While in custody, many suspects are also subject to torture and ill-treatment.[53] The Ravi Chander Commission, charged by the Andhra Pradesh State Minorities Commission with investigating the cases of 20 Muslim suspects, reported that the men were held without charge for several weeks (without appearing in court within 24 hours as required by law and without notification to families for several days, in spite of the families filing missing persons reports) at illegal detention centres and tortured to extract forced confessions of involvement in the Hyderabad bombings.[54] Further, in 2015, there were reports that policemen raped detainees.[55]

[52] This information is consistent with that reported by the U.S. Commission on International Religious Freedom, supra note 27, at 233 ("Since July and September 2011 terrorist attacks in Mumbai and New Delhi respectively, there have been reports of increased police harassment and detentions of Muslims on unfounded allegations of terrorist activities and membership in terrorist groups"). The UN Special Rapporteur on Freedom of Religion or Belief included similar information in her report on her mission to India. Report of the Special Rapporteur on Freedom of Religion or Belief, supra, paras 20–21.

[53] While abuses happen throughout the country, Human Rights Watch has identified the Ahmedabad Crime Branch of the Gujarat state police as the location of some of the worst abuses. Here, suspects testify that they were "blindfolded and shackled with their arms crossed over their knees from morning to night." Suspects also claimed to have been denied proper food and water and some were tortured with electric shocks. Human Rights Watch, Anti-Nationals: Arbitrary Detention and Torture of Terrorism Suspects in India (February 2011), available at http://www.hrw.org/sites/default/files/reports/india0211W.pdf, 4.

[54] Ravi Chander Commission Report, submitted to Andhra Pradesh Minorities Commission (October 2008), http://www.twocircles.net/files/report_ravi_chander.pdf. See also Report by the Fact Finding Commission appointed by the National Commission for Minorities, http://ncm.nic.in/pdf/Hyderabad%20report.pdf; Report by the Fact Finding Committee to conduct an independent assessment of the Hyderabad Torture cases. This report is archived here: http://www.indianmuslims.info/reports_about_indian_muslims/hyderabad_blast_report_arrests_detention_muslim_youths.html.

[55] U.S. Department of State, Human Rights Report 2015: India, available at http://www.state.gov/documents/organization/253175.pdf, p.17.

4.3.3 Administration of Justice, including impunity, and the rule of law

- **Impunity for non-State actors-**

Communal violence against religious minorities in India has increased since the election of Prime Minister Modi, yet many of the individuals responsible for these acts have not been brought to justice. Although there are court cases pending for these incidents, NGOs report religious bias and corruption and intimidation of witnesses in court proceedings.[56]

In August 2015, suspected Hindu supremacists shot and killed former Vice Chancellor of Kannada University, M.M. Kalburgi, a recipient of India's highest award for literature and a renowned campaigner against social evils in Hinduism. Police arrested two men, belonging to an extreme Hindu right group, for conspiracy to the murder. They are also accused of involvement in the February 2015 Mumbai slaying of Govind Pansare, a communist leader, who had been outspoken against Hindu right-wing politics.[57] In 2013, a leading "rationalist" and campaigner against superstition, witch-craft, and "black magic," Narendra Dabholkar, was similarly shot dead in a town near Mumbai.[58]

- **Impunity for police officers and government officials-**

A junior minister in Mr. Modi's government, veterinarian Dr. Sanjeev Balyan, became a first-time Member of Parliament in 2014 following his involvement in the August 2013 anti-Muslim violence, referred above, in Muzaffarnagar. Police made him an accused based on speeches he made before the violence. He was given bail.[59] In 2016, police officer P.P. Pandey was

[56] United States Commission on International Religious Freedom, 2016 Annual Report, p.159.
[57]Kalburgi murder case: Prasad Attavar arrested, but not as murder suspect, The News Minute, Sept. 3, 2015, available at http://www.thenewsminute.com/article/kalburgi-murder-case-prasad-attavar-arrested-not-murder-suspect-33954; Kalburgi case: Police question SanatanSanstha activist arrested for Pansare's murder, First Post India, Sept. 22, 2015, available at: http://www.firstpost.com/india/kalburgi-case-police-question-sanatan-sanstha-activist-arrested-for-pansares-murder-2442578.html.
[58]Indian anti-superstition activist Narendra Dabholkar shot dead, The Guardian, Aug. 20, 2013, available at: https://www.theguardian.com/world/2013/aug/20/anti-superstition-narendra-dabholkar-shot-dead.
[59]Arrest Warrant Against BJP Leader Sanjeev Balyan in Muzaffarnagar Riots Case, NDTV, Nov. 3, 2015, available at: http://www.ndtv.com/india-news/arrest-warrant-against-bjp-leader-sanjeev-balyan-in-muzaffarnagar-riots-case-1239634?site=full; Muzaffarnagar riots accused Sanjeev Baliyan in Modi's cabinet, First Post Politics, May 27, 2014, available at:

promoted as Director General of Police (DGP) in Gujarat, becoming the first accused in an encounter killing to head a state police. When Mr. Pandey surrendered in court in 2013, associates of RSS-BJP accompanied him. Mr. Pandey had spent a year and a half in prison before getting bail.[60]

In March 2015, a trial court in Delhi acquitted 16 policemen accused of killing 42 Muslim men 28 years previously arbitrarily picked up from Meerut city of Uttar Pradesh, 70 km to Delhi's northeast. Charges were dismissed due to "scanty, unreliable and faulty investigation."[61]

India fails to implement the Indian Supreme Court's 1996 *DK Basu* Guidelines- The *DK Basu* Guidelines set forth human rights protections for detainees, including the requirement that police officers submit a memo of the arrest signed by the arrestee and a witness, that a friend or relative of the arrestee be informed of the arrest, and that a medical examination of the arrestee be conducted and signed upon arrest and repeated every 48 hours.[62] In *DK Basu v. State of West Bengal*[63], the Supreme Court on July 24, 2015 reviewed the status of the Guidelines and issued fresh direction for their implementation after it found the response of state governments inadequate.

4.3.4 Freedom of religion or belief, expression and association

- **Anti-Conversion Laws-**

Indian states such as Chhattisgarh, Himachal Pradesh, Gujarat, Madhya Pradesh, Arunachal Pradesh, and Odisha, have passed so-called Freedom of Religion acts, commonly called anti-conversion laws, restricting the freedom of religious minorities. These laws purport to outlaw "improper" conversions of

---

http://www.firstpost.com/politics/muzaffarnagar-riots-accused-sanjeev-baliyan-in-modis-cabinet-1543867.html.

[60]P.P. Pandey Appointed As In-Charge Gujarat DGP, Outlook India, Apr. 16, 2016, available at: http://www.outlookindia.com/newswire/story/pp-pandey-appointed-as-in-charge-gujarat-dgp/936946; PP Pandey appointed as in-charge Gujarat DGP, Business Standard, Apr. 16, 2016, availableat:http://www.business-standard.com/article/pti-stories/p-p-pandey-appointed-as-in-charge-gujarat-dgp-116041600154_1.html.

[61] Amnesty International, Annual Report: India 2015-2016, Feb. 23, 2016, https://www.amnesty.org/en/countries/asia-and-the-pacific/india/report-india/

[62] Ludhiana Police, DK Basu Guidelines, found at http://ludhianapolice.in/CustomPages/dkbasuguidelines.aspx

[63]AIR 1997 SC

Hindus to other religions, but they fail to define clearly an "improper conversion."[64] The laws do not contain evidentiary requirements and are not applied to prohibit forceful conversion *to* Hinduism. Individuals seeking to convert from Hinduism to another religion must seek official authorization, and the ambiguous term "improper" gives authorities the power to accept or reject the legitimacy of a conversion.[65] This authorization process serves as a barrier to discourage individuals from converting from Hinduism.[66] The UN Special Rapporteur on freedom of religion or belief reports that these laws and draft laws "have had adverse consequences for religious minorities and have reportedly fostered mob violence against them."[67] In January 2016, authorities in Karnataka state detained 15 Christians after two Hindu nationalist groups, Bajrang Sal and VHP, alleged that the Christians' conversions had been "improper."[68]

4.3.5 Restrictions on Civil Society

Criticized by several countries during the 2008 and 2012 UPRs, the draconian Foreign Contributions Regulation Act (FCRA) continues to restrict foreign funding and revoke licenses of NGOs that criticize the government.[69] Section 3 prohibits "organisations of a political nature" from receiving funds under an FCRA license. Section 5 authorizes the central government to specify any organization as being of a political nature "having regard to the activities of the organisation or the ideology propagated by the organization."[70] This broad discretion allows the government to freeze the accounts of organizations that it deems to be "of a political nature" and to initiate criminal proceedings against them.

---

64 U.N. Special Rapporteur Asma Jahangir, On Freedom of Religion or Belief (Jan. 26, 2009), available at http://www.refworld.org/docid/498ae8032.html, 16-17, paras 47-18.
65Ibid, 17, para 49.
66 Laura Dudley Jenkins, Legal Limits on Religious Conversion in India, 71 Law & ContemporaryProblems109(2008),availableathttp://scholarship.law.duke.edu/cgi/viewcontent.cgi ? article=1469&context=lcp.
67 United Nations Special Rapporteur Asma Jahangir, On Freedom of Religion or Belief (Jan. 26, 2009),availableathttp://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/104/62/PDF/G0910462. pdf?Open Element), 17,para 50.
68 U.S. Commission on International Religious Freedom, 2016 Annual Report, 162.
69Ibid., at 163.
70 Foreign Contribution (Regulation) Act, 2010, No. 42 of 2010, available at: http://www.icnl.org /research/library/ files/India/ForeignContribution.pdf.

The government uses the FCRA to target its critics in civil society. In January 2015, officials stopped Greenpeace activist Priya Pillai from boarding a flight as she was headed to testify before the British Parliament about human rights abuses in Madhya Pradesh state.[71] The FCRA bars Greenpeace from making anti-national statements. The Delhi High Court ruled the government's action unlawful and rejected the government's assertion that her testimony would have been an anti-national act.[72] Activist Teesta Setalvad has been a prime target of government retaliation for her work seeking justice for the Gujarat victims and a new trial for Modi and other Gujarat officials implicated in the 2002 violence.[73] In February 2015, the Supreme Court stayed attempts to arrest her under Sections 33–39 of the FCRA for financial embezzlement. As Ajit Sahi testified before the Tom Lantos Human Rights Commission of the U.S. Congress, "The Supreme Court had to stay attempts to arrest her on charges of financial embezzlement through the Citizens for Justice & Peace, her NGO. Her offices and homes have been raided several times, failing each time to recover incriminating evidence."[74] In June 2016, the government suspended the registration of Lawyers Collective, an Indian NGO dedicated to human rights issues, allegedly due to its legal assistance to Setalvad.[75]

4.3.6 Human Rights and Counter-Terrorism

- **Armed Forces (Special Powers) Act (AFSPA)**–

During India's 2008 and 2012 UPR, several countries recommended that the AFSPA be repealed. The AFSPA remains in effect in government specified

[71]Greenpeace campaigner Priya Pillai 'offloaded' at Delhi from flight headed to London, The Indian Express, Jan. 12, 2015, available at: http://indianexpress.com/article/india/india-others/ greenpeace-campaigner-offloaded-at-delhi-from-flight-headed-to-london/.
[72]*PriyaParameshwaran Pillai v. Union of India & Others,* Delhi High Court (Mar. 12, 2015), available at https://indiankanoon.org/doc/64486862/, para 15.7.
[73]AjitSahi, Challenges & Opportunities: The Advancement of Human Rights in India, Testimony before the Tom Lantos Human Rights Commission (2012), available at https://humanrights commission.house.gov/sites/tlhrc.house.gov/files/documents/Ajit%20Sahi%20-%20Journalist_0.pdf, 12.
[74]AjitSahi, Challenges & Opportunities: The Advancement of Human Rights in India, Testimony before the Tom Lantos Human Rights Commission (2012), available at https://humanrights commission.house.gov/sites/tlhrc.house.gov/files/documents/Ajit%20Sahi%20-%20Journalist_0.pdf, 13.
[75] U.N. Office of the High Commissioner of Human Rights, UN rights experts urge India to repeal law restricting NGO's access to crucial foreign funding, available at http://www. ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E.

"disturbed areas," giving military personnel and police extraordinarily wide discretion to use to force against civilians, including the right to shoot to kill, to raid houses, and destroy any property that is "likely" to be used by insurgents, and "to arrest without warrant" even on "reasonable suspicion" a person who has committed or even "about to commit a cognizable offence."[76] The AFSPA also results in immunity from prosecution as prosecution requires sanction of the Central Government, which is rarely granted in practice.[77]

Jammu and Kashmir: Disputed by Pakistan, India's northernmost state has seen several wars. The Special Rapporteur on extrajudicial, summary and arbitrary executions has expressed concern about killings and disappearances conducted by Indian security forces in this Muslim-majority region.[78] The International Peoples' Tribunal on Human Rights and Justice in Kashmir, an NGO, reports that over 900 army personnel, as many as 150 of them major or ranked higher, are individually responsible for murders and disappearances, among others.[79] It noted the "extrajudicial killings of 1,080 people and enforced disappearances of 172 people" during 1990-2014.[80]

PSA Excesses: The Public Safety Act (PSA) allows detention of individuals without official charges or judicial review and is in effect only in Jammu and Kashmir.[81]During 2004-14, more than 690 individuals, including activists, opposition leaders, lawyers and journalists, have been considered "terrorists, insurgents and separatists" and detained under the PSA.[82] Many reported being tortured and denied access to lawyers or families for up to two

[76] The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (1990), available at http://mha.nic.in/sites/upload_files/mha/files/pdf/Armedforces%20_J&K_%20Splpowersact1990.pdf , 2, para 4(c).
[77] U.N. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to India, Document A/HRC/23/47/Add.1, 26 April 2013, 6, para 23.
[78]Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to India, U.N. Doc. A/HRC/23/47/Add.1, 26 April 2013, para 86-87.
[79] Jason Burke, Indian Forces in Kashmir accused of Human Rights Abuses Cover-up, The Guardian, Sept. 11, 2015, available at https://www.theguardian.com/world/2015/sep/12/indian-forces-kashmir-accused-human-rights-abuses-coverup.
[80]Ibid.
[81] U.S. Department of State, Human Rights Report 2015: India, available at http://www.state.gov/documents/organization/253175.pdf, 13.
[82]Ibid., 14.

years.[83] "PSA detentions are a revolving door to keep people [that the State] can't or won't convict through proper legal channels lock up and out of the way."[84] The PSA also protects state officials from prosecution.[85]

Manipur encounter killings: In July 2016, the Supreme Court of India ruled AFSPA cannot be in place indefinitely and ordered an investigation into over 1,500 cases of killings by security forces in Manipur, a small state in India's northeast, during 1978-2010.[86] Ruling that "the use of excessive force or retaliatory force" was impermissible,[87] the court noted evidence that as many of half of the cases that had been investigated involved fake encounters.[88] Earlier, a Supreme Court-appointed commission led by a former judge found 15 of 62 cases to have been "faked."[89] The Government has yet to implement the Supreme Court's orders on Manipur.

4.3.6.1 Other counter-terrorism measures

India has repeatedly used its anti-terror laws against innocent Muslims across the country as well as against innocent tribal people in the regions where Maoist insurgency activity is common. The laws have been used to ban and outlaw organizations of Muslims, rendering them a suspect community. The

[83] Amnesty International USA, Jammu and Kashmir: Hundreds held each year without charge or trial, Aug. 11, 2016, available at http://www.amnestyusa.org/research/reports/jammu-and-kashmir-hundreds-held-each-year-without-charge-or-trial.

[84]Ibid.

[85]Ibid.

[86]Extra Judicial Execution Victim Families Association (EEVFAM) & ANR v. Union of India & ANR, No. 129/2012 (2016), available at http://supremecourtofindia.nic.in/FileServer/2016-07-08_1467967629.pdf , 35, 84, para 92(c),18 175(b). In January 2016, for example, a former policeman in Manipur confessed to killing an unarmed man in 2009. Esha Roy, Imphal Encounter: 6 years later, the admission — 'Yes, I shot him dead, he was unarmed, officer told me to', The Indian Express, January 27 2016. Available at: http://indianexpress.com/article /india/india-news-india/imphal-encounter-6-years-later-the-admission-yes-i-shot-him-dead-he-was-unarmed-officer-told-me-to/.

[87] Neha Tara Mehta, Indian court tackles extrajudicial killings in Manipur, Al Jazeera, Jul. 24, 2016,http://www.aljazeera.com/news/2016/07/indian-court-tackles-extrajudicial-killingsmanipur 160724121240369.html.

[88]Extra Judicial Execution Victim Families Association (EEVFAM) & ANR v. Union of India & ANR, No. 129/2012 (2016), available at http://supremecourtofindia.nic.in/FileServer/2016-07-08_1467967629.pdf , 35, 84, paras 173 –174; Press Trust India, Manipur encounter killing: Army can't use excessive force, Supreme Court says, The Times of India, Jul. 8, 2016, http://timesofindia.indiatimes.com/india/Manipur-encounter-killing-Army-cant-use-excessive-force-Supreme-Court-says/articleshow/53112320.cms.

[89]Extra Judicial Execution Victim Families Association (EEVFAM) & ANR v. Union of India & ANR, No. 129/2012 (2016) available at http://www.hrln.org/hrln/criminal-justice/pils-a-cases/1509-sc-appointed-commission-gave-report-on-its-investigation-of-the-extra-judicial-killings-in-manipur.pdf, 83, para 174.

Unlawful Activities Prevention Act (UAPA) and the Maharashtra Control of Organized Crimes Act (MCOCA) give police and investigating agencies wide and discretionary powers, resulting in arbitrary arrests and other due process violations.

UAPA made increasingly draconian: Enacted in 1967, UAPA was amended in 2004, 2008 and 2012. UAPA now gives investigating agencies sweeping powers to arrest, search, and detain suspects based merely on "personal information."[90]Authorities may keep an accused under arrest without charge for up to 180 days,[91] three times the duration for ordinary cases. UAPA prohibits the release of a charged defendant on bail.[92] The law creates a presumption of guilt.[93] UAPA abandoned a previous law's provision that allowed police officers to be punished for malicious prosecution,[94] and a separate provision that had required a Review Committee to assess whether the evidence is sufficient to prosecute.[95]

Under the UAPA the government has discretion to designate, by simple notification, any organization as "unlawful,"[96] if the government sees that organization as a threat or potential threat to the country's "sovereignty and integrity," or as promoting "enmity between different groups" or as making "imputations prejudicial to national integration." The law allows a judicial tribunal to confirm or reject the designation, but it does not specify the standards

[90] Unlawful Activities (Prevention) Act, Section 43A, available at http://mha.nic.in/sites/upload_files/mha/files/pdf/UAPA-1967.pdf.
[91]Ibid. Section 43D.
[92] Unlawful Activities (Prevention) Act, Section 43D (5); Jigbanshu Paul v. National Investigation Agency, (2011(3) GLT615), Guahati High Court ("the proviso to Sub-Section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail").
[93] Unlawful Activities (Prevention) Act, Section 43E; Human Rights Watch, Back to the Future: India's 2008 Counterterrorism Laws, July 27, 2010, available at https://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf, 16.
[94] Unlawful Activities (Prevention Act, Section 49; Rethink the new UAPA, The Hindu, Dec. 20, 2012, available at http://www.thehindu.com/opinion/editorial/rethink-the-new-uapa/article 4218425. ece, 25.
[95]Ujjwal Kumar Singh, The State, Democracy and Anti-Terror Laws in India (Sage Publications, New Delhi & London 2007), 308.
[96] Unlawful Activities (Prevention) Act, Section 3.

for adjudication.[97] UAPA also criminalizes membership in an "unlawful" organization and any act of "helping" a terrorist organization.[98]

Vague definition of terrorism: UAPA loosely defines terrorism as "any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people."[99] In practice, this definition lumps together political dissenters and members of the banned Maoist insurgents.[100] Authorities use the definition to label Muslims as members of the Students' Islamic Movement of India (SIMI), an organization the government has banned since September 2001.[101]

Ban on SIMI and its repercussions: The 15-year ban on SIMI has enabled the arrest and incarceration of Muslims across the country under the pretext that they are aiding and abetting the activities of a banned organization.[102] Moreover, extra-legal "national security" concerns have swayed judicial pronouncements, to the detriment of the rule of law. In a 2013 report, stakeholder JTSA revealed a pattern of prejudice inherent in the SIMI arrests, investigations, and prosecutions in Madhya Pradesh state,[103] which, interestingly, has witnessed not a single terror incident. In almost all cases police had not even alleged violence. Most FIRs (police reports) are nearly identical. An overwhelming number of cases pertain to seizure of SIMI posters, pamphlets, and other literature, which themselves have never been declared "unlawful." Many accused spent years in prison accused of nothing more than shouting pro-

---

[97]Ibid., Section 4-5.
[98]Ibid., Section 10(a).
[99]Ibid., Section 15.
[100] Human Rights Watch, Stifling Dissent: The Criminalization of Peaceful Expression in India, May24,2016,availableat:https://www.hrw.org/report/2016/05/24/stifling-dissent/ criminalization-peaceful-expression-india; Arun Ferreira & Vernon Gonsalves, Kerala cops campaign to criminalise dissent, Daily O, Feb. 9, 2015, available at:http://www.dailyo.in/politics/ kerala-cops-campaign-to-criminalise-dissent-unlawful-activities-prevention-act-maoist/story/1/1920.html.
[101]AjitSahi, Expose: The SIMI Fictions, Tehelka, Aug. 16, 2008, available at:http://www.tehelka. com/2008/08/the-kafka-project/.
[102]Ibid.
[103]Jamia Teachers Solidarity Association, Guilt by Association, UAPA cases in Madhya Pradesh (JTSA, Delhi, 2013), available at http://www.indiaresists.com/wp-content/uploads/2014/07/ Guilt-by-Association-pdf.pdf, 7.

SIMI slogans in public and carrying posters. Some were accused of publicly addressing people about SIMI and *jihad*.[104]

Judicial abdication in Madhya Pradesh: Despite weak evidence and procedural violations, courts have convicted many people under the UAPA. In 2013, a Madhya Pradesh court convicted 14 Muslims accused of furthering SIMI's activities by printing, distributing, and possessing SIMI literature. The evidence came from a witness who was a member of the Bajrang Dal, an affiliate of the RSS-BJP. After another prosecution witness turned hostile, news media reported the police had detained him. He allegedly committed suicide during the trial. The state high court later criticized the prosecution and the trial court.[105]

17 years of MCOCA: The MCOCA, adopted in 1999, contains provisions that go further than UAPA in violating international human rights standards. It allows confessions to police officers to be admitted into evidence. MCOCA enables prosecutors to use such confessions to implicate a co-accused or other individuals named in the confession.[106] An overwhelming number of people charged under MCOCA are Muslims.[107] Police use of torture on individuals accused under MCOCA in Maharashtra has been widespread.[108] MCOCA disallows anticipatory bail for six months, and officials therefore allegedly can use the law to engage in preventive detention.[109]

[104]Ibid, 10.
[105]Ibid., 54-55.
[106]*State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari & Others*, Supreme Court of India, Criminal Appeal. No. 445/2013 (Mar. 14, 2013), available at https://indiankanoon.org/doc/174123277/ para 5.
[107]Meena Menon, TISS report points to anti-Muslim bias of police, The Hindu, June 24, 2012, available at: http://www.thehindu.com/news/national/tiss-report-points-to-antimuslim-bias-of-police/article3563333.ece.
[108]EsteshamQutub, My 75 days of horror in the hands of ATS, Milli Gazette, Oct. 1–15, 2010, available at: http://www.milligazette.com/print/issue/1-15-october-2010; Human Rights Watch, The "Anti-Nationals": Arbitrary Detention and Torture of Terrorism Suspects in India, Feb. 1, 2011, available at: https://www.hrw.org/report/2011/02/01/anti-nationals/arbitrary-detention-and-torture-terrorism-suspects-india; Human Rights Law Network, A Movement for Justice, available at: http://www.hrln.org/hrln/images/stories/pdf/HRLN%20Compendium%20Part-2.pdf.
[109] Maharashtra Control of Organised Crime Act, 1999, No. 30, available at http://www.satp.org/satporgtp/countries/india/document/actandordinances/maharashtra1999.htm, ¶ 21.

Mumbai train blast injustice: On July 11, 2006, more than 180 people died as seven bombs went off in local trains in Mumbai.[110] In 2015, a trial court found 12 of the 13 people arrested for crime guilty and sentenced them to death and life sentences.[111] The case highlights human rights violations under MCOCA, especially in conjunction with UAPA. Initially the crux of the case rested on intercepted cellular phone communications (another power that MCOCA allows), which became the basis for the police to take the suspects under custody. But the evidence in the final charge sheet was based only on confessions of a majority of the accused, all of whom later recanted and even wrote a public letter addressed to India's highest authorities detailing the torture to which they had been subjected to extract the confessions.[112]

According to a study conducted by the Quill Foundation on terror prosecution in Maharashtra state since 1993, an overwhelming number of the more than 460 persons accused in terror cases have been declared innocent after spending an average of three to six years in prison.[113] More than half of the accused in the state were doctors, engineers, and educated professionals in the cusps of their careers, almost all of whom have been forced to take on traditional occupations or start small businesses, or who remain unemployed. The conviction rate in these cases is very low. Only 42 of 93 cases filed since 2001 against alleged members of the banned group SIMI, with more than 200 accused, have concluded. Of these, 39 resulted in acquittals. The other three saw convictions with sentences of two years each.

[110]All you need to know about the 7/11 Mumbai train blasts, The Hindu, Sept. 30, 2015, available athttp://www.thehindu.com/news/cities/mumbai/all-you-need-to-know-about 711/article7640887.ece.
[111]Aamir Khan, 7/11 Mumbai train blasts verdict is out: 12 out of 13 accused found guilty, The Indian Express, Sept. 12, 2015, available at: http://indianexpress.com/article/india/india-others/2006-mumbai-serial-train-blasts-verdict-12-out-of-13-accused-convicted/.
[112]Pranali Lotlikar Chindarkar & Drishti Mishra, 2006 Mumbai train blasts accused pure as ray of light, innocent as new-born child: Advocate Yug Chaudhry, DNA India, Oct. 1, 2015, available at http://www.dnaindia.com/mumbai/report-2006-mumbai-train-blasts-accused-pure-as-ray-of-light-innocent-as-new-born-child-advocate-yug-chaudhry-2130495.
[113] Quill Foundation, Terror Prosecution in Maharashtra: 1993–2015, forthcoming.

4.4 INDIA'S LEGAL FRAMEWORK REGARDING THE RIGHT TO A REMEDY FORENFORCED DISAPPEARANCES

This section describes and assesses India's current domestic legal regime in the area of remedies for enforced disappearances. The laws and entities include: (a) the Armed Forces Special Powers Act; (b) the National Human Rights Commission; (c) the Prevention of Terrorism Act; (d) the Right to Information Act; (e) the Prevention of Torture Bill; and (f) the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill.

4.4.1 Armed Forces Special Powers Act

Enacted in 1958, AFSPA "regulates instances of use of special powers by the Armed Forces in so-called 'disturbed areas' of the country." A disturbed area refers to an area affected by conflict that exists for a "limited duration" and is "dangerous to the extent that the use of armed force is deemed necessary." The Supreme Court has ordered the periodic review of "disturbed area" determinations every six months, but in practice these periodic reviews rarely occur. Currently, the following areas are classified as disturbed areas: Manipur, Assam, Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, Tripura, and Jammu and Kashmir. AFSPA does not apply in times of armed conflict or in times of "undisturbed" peace.

AFSPA permits the Indian armed forces to use lethal force, and the law prohibits individuals from bringing a judicial action against officers alleged to have used excessive force or to have abused their powers under the act. In other words, AFSPA immunizes state agents from public or private prosecution, thereby preventing victims from accessing their right to a remedy for enforced disappearances in most circumstances.

Section four of AFSPA enables an officer to fire at and cause the death of a person acting against a law, so long as the officer deems such use of force necessary to maintain public order and gives due warning to the target of his fire.

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions (SR on Extrajudicial Killings), section four violates the "international standards on use of force." Section six of AFSA also poses vexing problems by prohibiting the prosecution of members of the armed forces unless the government grants "sanction" (permission) to prosecute the military official. Notably, only forty-four applications for sanction have been brought to the authorities, none of which were granted.

The SR on Extrajudicial Killings has stated that the powers granted under AFSPA are broader than those allowed under states of emergency, and the suspension of individuals' rights may constitute a suspension of the right to life. Moreover, the Special Rapporteur has stated that India should repeal or substantially amend AFSPA so that individuals may hold the government accountable for enforced disappearances. Not only has the Special Rapporteur recommended that AFSPA be repealed, but Indian domestic bodies such as the 2004 Indian Government special committee, the Second Administrative Reforms Commission, and the National Human Rights Committee have called for its repeal.

The Indian state defends AFSPA. Officials have stated that the Act "provides necessary powers, legal support and protection to the Armed Forces for carrying out proactive operation[s] against the terrorists in a highly hostile environment." Additionally, in 1997 the Supreme Court of India ruled in favor of AFSPA's constitutionality and upheld all its provisions. While the Court outlined precise guidelines for using lethal force under AFSPA, the Special Rapporteur believes these guidelines do not conform to prevailing international standards.

4.4.2 The National Human Rights Commission

The National Human Rights Commission (NHRC) plays an important role in guaranteeing respect for human rights in India. Created in 1993 under the PHRA, the NHRC is a permanent, autonomous public institution with an annual budget of about 40million rupees ($600,000 USD). The NHRC employs a staff of 350 that conducts research and investigations to protect and promote human rights. In conducting investigations, the NHRC staff may “utilize the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government.” Additionally, the NHRC has issued several important guidelines, including the Guidelines on Encounter Deaths.

This particular guideline was issued in 1997, and it identifies steps for police to take when they initiate lethal action against civilians suspected of particular crimes without due process of law. In 2010, the NHRC issued a formal letter to the Chief of Ministers criticizing Indian states for noncompliance with the guideline. Thus, the NHRC can be seen as one example of how India is implementing its obligations under the ICCPR to establish a domestic legal infrastructure to prevent and redress human rights violations.

While the NHRC has been pivotal in protecting the right to life in India, it has been criticized for taking an overly “legalistic and deferential approach.” The SR on Extrajudicial Killings investigated the functioning of the NHRC and found several shortcomings. First, he concluded that the Commission’s effectiveness is limited by its mandate, which restricts its investigative powers to complaints filed within one year of the incident, a circumstance which he found may create obstacles for those who want to expose past violations. Second, he identified a lack of clarity about the extent to which NHRC may examine human rights violations by members of the armed forces.

Section 19 of the PHRA enables the Commission to request reports from the central government and make recommendations about its findings. However, the Commission is not expressly authorized to investigate members of the armed forces for human rights violations. As a result of these findings, the SR on Extrajudicial Killings recommended that the statute of limitations be extended and that Section 19 be amended to expressly authorize this investigatory power.

4.4.3 The Right to Information Act

In 2005, India’s parliament enacted the Right to Information Act (RTI) to give citizens access to information controlled by public authorities, including notes, draft documents, government records, and virtually any other document. Additionally, the RTI formalized the right to petition the Supreme Court as a fundamental right under Articles32 and 226 of the Constitution. Both articles promote government transparency and increase accountability. RTI activists have emerged and begun to successfully use the law to expose human rights violations, poor governance, and corrupt officials. By providing citizens the right to obtain government information, India has taken an important step toward promoting the right to truth for victims of enforced disappearances and fulfilling its obligation under Article 19 of the ICCPR to ensure the “freedom to seek receive and impart information of all kinds.”

While RTI was a major achievement, its implementation has produced concerns about the violence associated with RTI filings. There have been several reports of RTI activists having been targeted for killing, because they sought to expose human rights violations and corruption within the government through RIT requests. In 2010, there were as many as ten killings where the targeted individuals had filed RTI requests.

4.5 EVALUATION OF INDIA’S LEGAL FRAMEWORK REGARDING THE RIGHT TO AREMEDY FOR ENFORCED DISAPPEARANCES

Although a number of India’s domestic laws discussed in the preceding section intend to protect individual rights and restrict arbitrary or abusive uses of power by government officials, weaknesses persist in practice. First, weaknesses in the legal regime create a system of de jure impunity that denies victims their right to a remedy under law. Second, those laws that do provide for remedy often go unenforced by the Indian state, creating de facto impunity. This section discusses the de jure and de facto limitations on the right to remedy for victims of human rights violations in India.

4.5.1 Legal Weaknesses

India's domestic laws do not consistently promote accountability for human rights violations and some stand in direct conflict with international standards concerning the right to remedy. Although the AFSPA has been found constitutional, it creates a system of de jure impunity because officers cannot be prosecuted without the government's explicit permission.[114]Examples of such de jure impunity send a strong message to victims of enforced disappearances that the state stands with the alleged perpetrators of these violations and indifferent to the violation of their rights.[115] The SR on Extrajudicial Killings has declared impunity and other obstacles to accountability to be India's central problem in combating extrajudicial executions.[116]The ICCPR protects the individual's right to a competent judicial authority,[117]yet the AFSPA contradicts India's treaty obligations by failing to provide access to justice to victims of enforced disappearances.

Although the NHRC functions in part to investigate and report on human rights violations, including the widespread system of impunity for such violations, its mandate prevents it from addressing cases that occur outside the one year statute of limitations.

Additionally, the NHRC may not expressly investigate members of the armed forces, which restricts its ability to address human rights violations committed under the AFSPA.

[114]*See* Human Rights Watch, "Everyone Lives in Fear": Patterns of Impunity in Jammu and Kashmir 27 (2006), *available at* http://www.hrw.org/reports/2006/india0906/india0906web.pdf. For purposes of reminder, "sanction" refers to "permission," it does not connote criminal punishment

[115]*Id.;* Heyns, *supra* note 63, at 23.

[116]*Id.* at 92.

[117]ICCPR, *supra* note 80, at art. 2(3) (b).

The POTA enables officials to label a broad range of behavior as "terrorist activity" without government oversight. Under such a broad definition of "terrorist activity," many individuals receive harsher punishment under the POTA than they would be subject to under the Penal Code.

The failure of the PTB to reflect the provisions of CAT also stunts the legal framework supporting the right to a remedy for enforced disappearances. The PTB does not create a minimum sentence for those guilty of torture, and victims must file complaints within a six-month statute of limitation; thus, perpetrators may be inadequately punished and it is likely that only a small proportion of victims be able to access justice or benefit from an effective remedy. Like the AFSPA, the PTB also creates de jure impunity by protecting public servants from prosecution unless expressly approved by the government.

4.5.2 Enforcement Weaknesses

Exacerbating the existing weaknesses in the legal framework, government officials do not adequately enforce laws on the books that are intended to protect human rights and guarantee the victims' right to remedy. Thus, individuals are not sufficiently protected by domestic laws and do not have legal recourse when violations occur.

Further, the general lack of cooperation from India's security forces[118] prevents victims from ascertaining the truth, achieving justice, and, ultimately, accessing adequate remedies. Courts rarely make inquiries into human rights abuses even though they possess the power to order investigations by special investigative teams.[119] AFSPA and POTA create a system in which access to justice is conditioned on the government's acquiescence the investigation and prosecution of its own agents. Under this "impunity unless sanctioned" regime, many requests for authorization to prosecute are never formally denied by the Indian government, but instead allowed to pend for years without a decision. To date, a sanction to prosecute requested under AFSPA

[118]The Myth of Normalcy, at 12.
[119] *Id.* at 13, note 49.

have never been granted.[120] Currently, NHRC does not have an adequate method to enforce compliance with its guidelines or recommendations. If given such power, the Commission could play an important part in guaranteeing effective remedies for victims of enforced disappearances.

4.5.3 Assessment of Domestic Framework

While India's domestic framework guarantees certain aspects of the right to a remedy for enforced disappearances, it neglects others. First, this section will assess the adequacy of India's domestic policy to protect the rights of victims of enforced disappearances, using the framework of the Special Rapporteur on Transitional Justice.

Second, this section will situate India's domestic laws providing remedies for enforced disappearances within the larger context of international law. India most clearly provides for the right to truth, an emerging right that India will be obligated to guarantee if it ratifies CED. Though fraught with limitations and concerns, as discussed above, RTI provides access to information controlled by public authorities and, thus, at least theoretically enables Indian citizens to acquire information about past disappearances. Additionally, NHRC is an independent body that conducts research and issues guidelines concerning enforced disappearances, addressing the right to truth outside of the individual inquiry process. However, the Commission's work likely fails to completely fulfil the right to truth, because the NHRC may not be capable of rigorously investigating "what really happened, why it happened, and who is directly and indirectly responsible."[121]

The right to justice, arising for India under the CED, the CAT, the Genocide Convention, and the Geneva Conventions, is also protected in part by NHRC, because the Commission has authority to investigate violations of human rights. However, NHRC does not have jurisdiction to prosecute cases and thus may not punish guilty perpetrators. While PTB provides for criminal punishment of torture violations and PCTV criminalizes communal and targeted violence,

[120]Heyns, *supra* note 63, at 23. For a detailed analysis of *de facto* impunity in Kashmir, *see* The Myth of Normalcy, *supra note* 88.
[121]Méndez & Bariffi, at 4.

neither law has been adopted by Parliament. Given these limitations, India falls short of its international obligations to investigate, prosecute, and adequately punish perpetrators guilty of enforced disappearances. India is best equipped to address the first component of the right to justice adequate investigation, though the state's capacity even in this area suffers limitations.

As it exists today, India does not offer victims of enforced disappearances adequate access to reparations. If passed, PCTV will provide a relatively robust compensation and reparation scheme for victims of communal and targeted violence. However, nothing currently exists to address the seven categories of reparations: cessation, restitution, compensation,[122] satisfaction,[123] interest,[124] guarantees of non-repetition,[125] and rehabilitation for victims of enforced disappearances. Additionally, Article 9 of

India's Constitution prevents compensation for unlawful arrests and detentions.[126] Thus, India's domestic legal framework conflicts with widely recognized international norms regarding the right to reparation.

Finally, NHRC indirectly addresses the right to non-recurrence[127] by monitoring human rights violations. However, the commission is not able to investigate military officials who violate human rights. Additionally, AFSPA effectively exempts military officials from prosecution, which renders the justice process ineffective and weakens deterrence and, therefore, undermines India's ability to fulfil its obligation to guarantee non-recurrence and access to justice.

The Special Rapporteur on extrajudicial killings has made additional conclusions about India's compliance with its international legal obligations. This Special Rapporteur investigated the status of extrajudicial killings in India

[122]"Compensation" means to compensate for any financially assessable damages that the State caused. Shelton, at 25.

[123]"Satisfaction" includes incalculable damages, to redress moral or legal injury (for example, an acknowledgement of the breach, an expression of regret, or an apology). *Id.* at 28

[124]"Interest" is granted on a case-by-case basis, and awarded only to ensure full reparation. *Id.* at 26.

[125]"Guarantees of non-repetition" generally involve a promise (more than a mere statement) not to repeat the violation. Often this requires states to take preventative measures to avoid repetition. *Id.* at 27.

[126]*See* Indian Constitution.

[127]*See* the guarantee of non-recurrence.

in 2012 which resulting in his calling for India to ratify several relevant treaties[128] that would broaden the scope of the international obligations binding India. If India ratifies additional treaties, international norms should play a more prominent role in shaping its policy and practice with regard to providing remedy to victims of enforced disappearances. Providing individuals with an opportunity to bring claims for violations under treaties, such as through the ratification of the Optional Protocol of the ICCPR, also would also advance the right to a remedy for enforced disappearances in India.

Indian domestic law allows impunity for enforced disappearances in states such as Gujarat, Manipur, Jammu and Kashmir, and Punjab. Although victims possess certain entitlements in the area of the right to truth, de facto and de jure immunity minimizes victims' access to the right to justice. In addition, agents of the state are rarely held accountable for their acts through other forms of sanction (e.g. removal from office). In law and practice, India does not satisfy the right to non-recurrence, as those responsible for enforced disappearances are permitted to remain in their posts and the state has not put in place policies or processes aimed at reforming the institutions implicated in these violations. Furthermore, the state has made no provisions to grant victims of enforced disappearances access to reparations. On the whole, India's legal framework in the area of the right to a remedy for victims of enforced disappearance is weak and requires reform in order for India to meet its obligations under international law.

4.6 ROLE OF POLICE FORCES

It is generally believed that police is the biggest human rights violators. It is universal phenomenon that the police have been criticised for committing the very acts which are just contrary to the cherished ideals that expressed while establishing the organisation. The primary reason of such unfortunate situation is that powers which are given to the police to perform essential function are capable of being abused by them to torture, oppress and intimidate the

[128]Heyns, *supra* note 63, at 97-98 (he included the following treaties: (a) CAT, (b) CED, (c) both Optional Protocols to the ICCPR, (d) the Optional Protocol to CEDAW, (e) Rome Statute of the ICC, and (f) the two Optional Protocols to Geneva Conventions).

innocents.[129] The term 'Police' derived from the Latin word 'politia' which signify maintaining the civil administration? The word first appeared in the French language in 1250 that stand for administration and political organisation. Later on, the term Police acquired its modern sense of an organisation that deals with the maintaining the law and order situation.[130] The primary role of the police is to act as peacekeepers and to exercise force for the purpose of peace and maintaining the law and order. Further, its role is to curb crime and violence in the society. If anybody violates any law or rules which cause threat to peace in the society, the police penalise such people. The term 'penalise' means role of the police is to book such offenders and bring them before the judicial authority. The main task of the police authority is to produce the offenders of the law before the magistrate and get the compliance order passed by the court. Here, the police also act as chief organ of investigation.[131] The police must ensure successful prosecution of the accused through proper investigation so that nobody can raise any finger over the content of First Information Report u/s 154 Cr.P.C[132] and submit charge sheet. So the police play dual role in society.

It is not an easy to fix the police accountability. It is indeed a difficult job as police play dual role i.e. investigating agency and of maintaining the law and order and there is no full proof checks and balances of its role about 'abuse' and 'misuse of power'. Nobody can deny the fact that there have been rampant of incidents of police lawlessness and numerous incidents of misuse of power. The serious allegations levelled against police system cannot be denied categorically and need to be examined properly. This sharp criticism from the judiciary is not new for the police establishment as there had been a numerous such criticism that appeared in newspapers almost daily on account of gross human rights violation of the detainees and accused. The fact of the matter of is that police must not indulge in the disorder and criminal activities. The law gives power to the police to exercise it against the criminals and peacekeeping.

---

[129]Ahmed Siddique, Criminology and Penology, Eastern Book Company, Lucknow (2011) p. 323
[130]Amit Jain's "Accountability of Police and Custodial Crimes: Judicial Insight", Indian Bar Review, (April-June 2013) p. 97
[131]K S Dhillon, Police and Politics in India: Colonial Concepts, Democratic Compulsions, Manohar Pub. New Delhi 92005) p. 12
[132] R V Kelkar's, Criminal Procedure 2012- Eastern Book Company, Lucknow(2012), P. 117

There can be no gain saying that freedom of an individual must yield to be security of the State. The Courts have upheld the right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *saluspopuliest suprema lex* (the safety of the people is the supreme law) and *salusrepublicaeest suprema lex* (safety of the State is the Supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation - determined in accordance with the provision of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons.

His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to ‘terrorism’. That would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto them. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

4.6.1 The Emergence of Police State

Sir Charles Napier is known for the father of Indian Police System and the modern Indian Police system began with the enactment of the Police Act 1861. Before the police Act 1861, the British India legislate a first codified penal law i.e. Indian Penal Code 1860.[133] These are the only document that is available which forms the basis of police functioning which was enacted in the context of mutiny.[134] It is pertinent to note that British India enacted these two important laws just after the famous 1857 Revolt i.e. India's first freedom movement, a historical fact. The British establishment had treated the 1857 India's first independence movement as 'mutiny' and after that incident the British Government had brought tremendous changes in the civil administration and brought a full proof police system in order to insure no repetition of such 'mutiny' of 1857. The aim of the British Government to bring such laws is to suppress the all sort of nationalist voices amongst Indian revolutionaries. The sole purpose of these Acts was to provide for a police which could prevent and investigate crime, maintain order and to protect overall colonial interests.[135]

In a sense, the police are themselves trapped in a vicious circle created by the colonial Police Act of 1861 that conceives of the police not as a force to maintain law and order and prevent crime, but as an organisation that practices institutionalised violence and quashes dissent. The colonial rulers themselves realised this. The Indian Police Commission appointed in 1902 (the Frazer Committee) concluded "The Police force is far from efficient; it is defective in training and organisation; it is inadequately supervised; it is generally regarded as corrupt and oppressive; and it has utterly failed to secure the confidence and cordial cooperation of the people."[136] The role of the police never clearly defined nor its performance clearly spell out, as the police act as regulator of the people. The Indian police still work on the same line which was established by the British Government.

---

[133]Sankar Sen, Police Accountability and Civilian Oversight, CBI Bulletin, Vol-8, Oct.-2000, p. 5-8

[134]Chaman Lal, "Need for People Friendly Police", Minorities and Police in India, Manohar Pub. New Delhi,(2006), p. 177-178

[135]Ibid

[136] Adam Shinar, "Accountability for the Indian Police: Creating an External Complaints Agency", Human Rights Law Network, New Delhi August (2009), p. 4

From 1947 to till date the policy makers and politicians have never made any sincere efforts to give an Indian face of British cultured police. Performance and work profile of the police under the doubts and it is still unclear undefined what is the actual role of the police in a free and independent democratic society. The police system has been in peculiar situation, as the object is to serve public and practically has become curse for the public. How the police should function in a country that has been described as a sovereign, democratic and socialist republic in the Constitution. How the police supposed to function in a country like ours which has diversity of every kind-ethnic, religious, social and cultural? There is no document which can explain the expected role of the police in India's multi-cultural and multi-religious society.[137]

According to the Third National Police Commission Report, more than sixty percent arrests made by the police are unjustified and illegal. The power of arrest of the police is the chief source of corruption in the police department.[138] In *Joginder Kumar* v. *State of UP*.,[139] the Hon'ble Supreme Court has laid down the guidelines governing arrest of a person during investigation. This has been done with a view to strike a balance between the needs of police on the one hand and the protection of human rights of citizens from oppression and injustice at the hands of law enforcing agencies. Unfortunately, police made arrest as the victim failed to 'grease the palm' of the police personnel. It is almost impossible to get your complaint registered by the police unless you have big contacts with higher officials or matter is highly serious. Even for registering a complaint of cognizable offence, the police demand money for 'service' i.e. registration of FIR, filing of charge sheet and subsequent proceeding. This sort of problem not only prevailed in Delhi but also in every part of the country.

The issue of police accountability towards public is more serious as the force established to provide a security to the public at large. Obviously people will do expect to see prompt action of their complaint. The police can't go beyond the rules prevailed in law books and certain norms that go with the

[137] Author is thankful for the views expressed by Dr. Swaraj Puri, IPS and former DGP, Madhya Pradesh, Dr. Puri had shared his view with the author in a seminar conducted by the ASC, Jamia Millia Islamia, New Delhi on dated 06.09.2013.
[138] J N Pandey, Constitutional Law of India, Central Law Agency, Allahabad (2005), p. 268
[139] *Joginder Kumar v. State of UP*, (1994) 4 SCC 260

discharge of their duty. Unless the functions and work profile of the police are clearly spell out and delineated, it is almost impossible to expect a humane face of Indian police.

Rampant use of third degree methods during interrogation and making the detainees to starve, detaining the suspects for long period is common things to the police establishment. Horribly, the police have even not spared small children and make them arrested illegally for many days in private makeshift jails in Delhi's.[140] This shameful incident had been widely covered by the national media. It is well settled principle amongst police personnel that they have absolute authority to commit torture and violence against detainees. The torture and custodial violence is widespread in India and is a routine strategy to extract confession and get some 'leads' in the ongoing investigation. The National Police Commission of India emphasised that police must have pro-people face and must develop a sense of accountability towards society. There should be an end of the police state and people police concept should be developed. If police have some sense to provide security, cooperation and participation feeling towards society then the police can expect some sort of assistance from the public in order to preventing crime, correct, speedy and impartial investigation by the police.[141]

4.6.1.1 Country Reports on Human Rights Practices - 2003 Released on February 25, 2004.

The law prohibits torture, and confessions extracted by force generally are inadmissible in court; however, authorities often used torture during interrogations. In other instances, authorities tortured detainees to extort money and sometimes as summary punishment. The U.N. Special Rapporteur on Torture has reported that the security forces systematically tortured persons in Jammu and Kashmir to coerce confessions to militant activity, to reveal

[140] Harsh Mander, "Protectors Turn Predators", Communalism Combat Jr. Teesta Sitalwad (Ed.) Sept (2002) p. 92. Also see detailed report telecasted by Headline Today news channel Dt. 12.07.2013 under a sting operation and subsequent investigation launched by NCPCR, New Delhi (Last visited http://www.headlinetoday.com19.07.2013 at 21.30 IST)

[141] Amarjit Singh Narang, Minorities and the Police in India, Manohar Pub. New Delhi, 2006 p. 42

information about suspected militants, or to inflict punishment for suspected support or sympathy with militants.

In a 1996 report, the U.N. Special Rapporteur on Torture noted that methods of torture included beating, rape, crushing the leg muscles with a wooden roller, burning with heated objects, and electric shocks. Because many alleged torture victims died in custody, and others were afraid to speak out, there were few first- hand accounts, although marks of torture often were found on the bodies of deceased detainees. For example, in February, there were protests in the villages of Handwara and Trial, after a Rashtriya Rifles unit detained two villagers, allegedly tortured them for 2 days and then released them. There were noreports of action taken in any of these cases. Unlike in 2001, the Home Ministry again did not extend an invitation to the U.N. Special Rapporteurs on Torture and on extra judicial Killings.

The prevalence of torture by police in detention facilities throughout the country was reflected in the number of cases of deaths in police custody. New Delhi's Tihar jail was notorious for the mistreatment of prisoners, with approximately 10 percent of custodial deaths nationwide occurring there. Police and jailers typically assaulted new prisoners for money and personal articles. In addition, police commonly tortured detainees during custodial interrogation. Although police officers were subject to prosecution for such offenses under the Penal Code, the Government often failed to hold them accountable. Torture usually takes place under two scenarios: In the course of regular criminal investigations, and following unlawful and arbitrary arrests. For example, during criminal investigations, police frequently resorted to torture to extract information from suspects while in custody.

The family of the 14-year-old girl allegedly abducted, tortured, and raped for 6 days by Patiala police in Punjab in 2001 filed a report with the state authorities to press for prosecution of the responsible police officer. The state government at years end took no action.

Human rights training for new recruits, middle ranks, and long-serving officers continued at the National Police Academy. The training has raised police awareness of human rights, and there was some decrease in police use of physical force. According to the NHRC, complaints of police harassment and abuse generally declined over a 3-year period. In April, the Home Ministry reported that from 2002 until April, there were 28,765 complaints lodged against police, compared with 29,964 in 2001-2002, and 32,123 in 2000-2001. Some militant groups in the northeast used rape as a tactic to terrorize the populace; however, no cases were known to be reported during the year.

In Punjab, cases of torture were inadequately prosecuted, and victims frequently refused to accept compensation out of fear of retribution. Allegations by human rights activists that victims were hounded and harassed by government agents were-common.

The 1,157 deaths in judicial custody reported to the NHRC in March included a large proportion of deaths from natural causes that in some cases were aggravated by poor prison conditions. Deaths in police custody, which typically occurred within hours or days of initial detention, more clearly implied violent abuse and torture. However, in January 2001, the NHRC requested that the Commission be informed of any custodial death within 2 months and that a post-mortem report, magisterial inquest, and a video of the post-mortem are provided to the NHRC.

The NHRC identified torture and deaths in detention as one of its priority concerns. In February, the Government disclosed plans to supplement state funds to effect prison reforms. Noting that Orissa demonstrated a particular need for assistance, the Home Ministry reported that it had provided $5,000 (Rs. 233,078) for the modernization of the prison administration between 1993 and 2002.

4.6.1.2. Role of National Human Right Commission.

International convention and norms, in case of void in the domestic law, when there is no inconsistency between them have been used to fill the void or enlarge the meaning and the content of the fundamental rights, as a canon of construction. The award of compensation as a public law remedy, distinct from, and in addition to private law remedy in torts or damages, has been held to be a mode of enforcement of a fundamental right. In this manner, award of compensation as a remedy in public law for custodial death is recognized.

It may be mentioned that the provision to award immediate interim relief under Section 83 of the protection of Human Rights Act 1993 available to the NHRC. In addition to power under Section 18(1) to recommend the initiation of proceedings for prosecution or such other action as the commission may deem fit against the person responsible for the violation of Human Right, or negligence in the prevention of Human Right.

4.6.2 Custodial Violence and Torture

India has shameless record of custodial violence and torture against detainees and under trails accused. Basically torture is an instrument to suppress the voice of the people whether their status is accused or detainees against injustice and to silence people and make sure that they remain docile. The present discourse amongst intellectual and human rights activists on the issue of prevention of torture and using third degree methods by the police in order to extract confession from accused is meaningless as India has not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Punishment but has signed the Convention on 14 October 1997.[142] Torture is not criminalised in law as a separate or special offense. The Convention against Torture elaborates on Article 7 of the ICCPR that deal with prohibition of torture and ill-treatment.[143] It provides specific hard law guarantees of proper treatment of detainees that apply to all phases of detention under all circumstances. Moreover, like the ICCPR, it has monitoring body, the European Committee for the Prevention of Torture.[144]

Provisions in the Indian Penal Code, 1860 (sections 330& 348) penalises acts that can also be considered as torture, with seven and three years of imprisonment respectively if proven guilty. But the offense attracts no particular

[142] See "India Should Ratify UN Convention against Torture" ,The Hindu New Delhi, Dt 27.06.2013

[143] See International Covenant on Civil and Political Rights 1966, http://www.uno.org/documents (Last visited on 22.06.2017 at 11.30 am IST)

[144] See International Covenant on Civil and Political Rights 1966, UN Convention Against Torture and Other Cruel or Degrading Treatment Punishment (CAT) available at file:http://www.uno.org/documents (Last visited on 22.06.2017 at 7.30 PM IST)

relevance if the crime is committed by a police officer. The temporal treatment of the law is to deal with a regular offense. The two provisions also falls short of covering all aspects of torture, as defined in the Convention against Torture. In addition, the reduced possibility of a proper forensic medical examination of a victim and the complete absence of a witness protection mechanism facilitates easy acquittal of the criminal.[145]

The Indian Evidence Act, 1872 also does not have any provisions in dealing with the aspect of torture. An act of torture if proved does not require the perpetrator to pay compensation to the victim. The right against torture is not a fundamental right. The courts in India, thus far have taken a minimalistic view on compensatory claims concerning acts of torture. A claim for compensation is dealt within the realm of personal injury claims. Awards of compensation vary widely from court to court throughout the country. Interestingly, Article 9 (5) of the International Convention on Civil and Political Rights (ICCPR) provides that any person “who has been the victim of unlawful detention or arrest shall have an enforceable right to compensation” and India is one of the signatory party of ICCPR.

Although India has acceded the ICCPR in 1979 but had made certain reservations. They are laid down in the instrument of Accession by way of Declaration. This Declaration expressly provides in para 11 that “under the Legal System, there is no enforceable right to compensation for persons claiming to be the victims of unlawful detention against the state.[146]The fundamental rights under Article 21 and 22(1) of the Constitution are required to be zealously and scrupulously protected.[147] The expression right life includes right to live with human dignity. Unfortunately Indian police does not believe in these human rights provisions which had also been guaranteed by the Hon’ble Supreme Court in number of cases. The landmark judgment of *D K Basu*v. *State of West*

[145]See Sec. 330 and 348 of Indian Penal Code 1860

[146] See International Covenant on Civil and Political Rights 1966, UN Convention Against Torture and Other Cruel or Degrading Treatment Punishment (CAT) available at file: http://www.uno.org/documents (Last visited on 23.06.2017 at 9.00 PM IST)

[147]Article 21 of the Constitution of India deals with Right to Life and Personal Liberty and Article 22 deals with Constitutional Protection against Arrest and Detention

Bengal[148] case, in this case the Hon'ble Supreme Court took a serious note of custodial violence and death in police lock up. The Hon'ble Supreme Court has reaffirmed that basic human rights of the citizens must be protected by the state. The Hon'ble Court laid down a set of 11 guidelines for the police to follow when making an arrest. These were nothing new as they had existed for long in constitutional and statutory provisions, but had been forgotten in the wake of frequent violations. So the court served a reminder. It even said that these guidelines must be put up in every police station. The apex court had expressed its deep concern and allegations made against the police officials about the growing custodial crimes and third degree torture methods. It was specifically laid down that though a crime suspect must be interrogated–indeed subjected to sustain and scientific interrogation-determined in accordance with the provisions of law. The court emphasis on eliminating of all form of custodial crimes and adopting third degree methods against detainees in order to extract confession and information.

Moreover, the torture has been in practiced as a routine and accepted as a means for investigation in Indian police system. Most police officers and other law enforcement officers consider torture as an essential investigative tool, rather than an unscientific and crude method of investigation. Controversial police officer Sachin Vaje of Mumbai Police had justified the third degree torture and encounters. A majority of Mumbai police officers had strongly advocated the extra judicial killings of the criminals while holding the view that "ends just matter not the means", Mr. Vaje add.[149] But the biggest question is that who will decide whether the accused or detainee has done crime or not. The policy makers and bureaucrats believe that there is nothing wrong in punishing a criminal in custody, not realising the fact that a person under investigation is only an accused, not a convict and further, that even a convict cannot be tortured. This is due to the lack of awareness about the crime, its nature and about its seriousness. Torture is practiced by the all sections of the law enforcement agencies, even the paramilitary forces and military units. Torture, as a form of violence is used for

[148]D K Basu v. State of West Bengal (1997) Cr. L.J. 743 (SC)

[149]ACP Sachin Vaje, a controversial police officer of Mumbai Police who had been indulged in different extra-judicial killings. The detailed interview of Sachin Vaje available at http://www.ndtv.com/wethepeople (Last visited on 27.06.2017 at 21.30 PM IST)

social control. Trauma from torture affects an individual's capacity to act prudently and further to respond normally to incidents. Torture - mental or physical or a combination of both is practiced in every police station (12,441 police stations in the country). Given the fact that a victim of torture and a witness -who includes the perpetrator, since the perpetrator is also a witness-suffers from mental trauma from an act of torture, arguably, the police stations in the country are manned by individuals suffering from mental trauma associated with torture.[150]

Concern regarding the widespread use of torture in India has been expressed by domestic as well as international experts, particularly the thematic mandate holders under the UN framework. The National Human Rights Commission of India has repeatedly recommended to the Government of India to ratify the Convention against Torture and to criminalise the act of torture in the country. The Commission said "Daily the Commission receives petitions alleging the use of torture, and even of deaths in custody as a result of the acts of those who are sworn to uphold the laws and the Constitution and to ensure the security of its citizens. Such a situation must end, through the united efforts of the Government...”As early as 1981, the Supreme Court of India has said”...nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights" the apex court observed in *Kishore Singh* v. *State of Rajasthan*.[151]

It is a settled provision u/s 50 of Cr.P.C and Article 22 of the Indian Constitution that police must informed the reasons of arrest to the arrested person and it is the right of arrested person to see arrest warrant u/s 75 of Cr.P.C issued by the competent court. But police establishment hardly follow these laws while making arrest, if we look at the practical scenario.[152] There have been countless incidents of wrongful confinement (illegal detention), informal arrest (abduction), custodial rape and murder and police have been clearly indicted by

---

[150] See “Crime in India” Annual Report of 2013, National Crime Record Bureau, Ministry of Home Affairs, Chapter 16, p. 161-166

[151] AIR 1981 SC 625

[152] R V Kelkar’s on Code of Criminal Procedure, 1973, Eastern Book Co. Lucknow (2012) Para 6.5 P. 73-77

the courts and various commissions in its findings. The use of third degree methods in order to extract confession merely on the ground of suspicion is widely acknowledged in our society and the same is a serious issue to the rule of law concept. Death in the police custody is a matter of serious concern and its most serious offence too as nobody is allowed to be killed at the hands of those who supposed to be protectors of the society. Nothing in the laws which gives police an ultimate authority to kill someone during investigation in fact it is a work of judicial system to award sentence to an accused after the trail. Torture and custodial violence is dire reality of Indian police system and it is a routine strategy to control crime.

In *Haricharan & Another* v. *State of M.P & Ors*[153], it was found by the court that the deceased had been tortured and subjected to most barbaric form of violence like electric shock and physically beaten up brutally. The prosecution has proved beyond reasonable doubt that the deceased was taken to the police station and he was subjected to the third degree torture by the police. Not even that, the police personnel terrorised the entire family to not to complain this matter. But there were sufficient evidence on the record to prove beyond reasonable doubt that the deceased died due to inhuman torture inflicted upon him by the police. Justice B. Sudershan Reddy and Justice Surinder Singh Nijjar said "a custodial death is perhaps the worst crime in the civilised society governed by the rule of law. It aggravated the fact that crime in the custody are committed by persons who are charged with the solemn responsibility to protect the fundamental rights of all the citizens. These crimes committed under the shields of uniform and authority within the four walls of police station or lock-up, the victim is totally helpless".

A similar view taken by the Kerala High Court in *Murukeshan s/o Raman* v. *State of Kerala,*[154] the Hon'ble court held that custodial violence and torture and death in the lock-ups, strikes a big blow at the rule of law, which demands that powers of the executive should not only be derived from the law but that the

[153]Criminal Appeal No. 581 of 2003, http://judis.nic/supremecourt/heldis.aspx (Last visited on 22.06.2016 at 11.30 AM IST)
[154]WP (Criminal) No. 13426 of 2010 (Q) http://www.indiakanoon.org/doc/1522181 (Last visited on 27.06.2016 at 18.30 PM IST)

same should be limited by law. The rising graph of custodial violence is a matter of great concern. It aggregated the fact that it is committed by the persons who supposed to be protectors of the citizens. According to Indira Jaisingh, former additional solicitor general of India, the government had never took the issue of custodial torture seriously, she pointed out that while the Police Act of 1861 noted that 'neglect of duty will be dealt by government', but there was no clarity on the definition of "neglect of duty".[155] If an aggrieved person wishes to lodge complaint against police over the custodial violence, he can't do so as the police are protected under section 197 of Cr.P.C.[156]

4.6.3 Police Criminality-Fake Encounters, Extra-Judicial Killing & Extortion

Justice A N Mulla had once commented,

> "*I say it with all sense of responsibility that there is not a single lawless group in the whole country whose record of crime is anywhere near the record of that organized unit which is known as the Indian Police Force.*"[157]

Indeed the police force has gained much negative publicity for its lawlessness as per the latest annual report released by the National Crime Records Bureau. Today, fake encounters, custodial deaths, rapes in the police stations and tortures have drawn the attention of the media and the legislature. There have been numberless instances of police atrocities and police attitude of undermining the law of the land, posing threat to the democracy, secularism and the rule of law. There have been various instances of police atrocities where no rule of law is followed, what is expected is not delivered.[158] A bright example can be the famous Ruchika Girhotra case of 1990 where a fourteen year girl was molested by a senior IPS officer, leading to her eventual suicide due to the harassment posed by the police. This incident clearly shows the abuse of power and disobedience of law by the upholders themselves. Another example is the

[155] Indira Jaisingh, "Most Complaints Against The Police Every Year", The Hindu, New Delhi, Dt. 10.07.2011

[156] R V Kelkar, Criminal Procedure Code 1973, Eastern Book Co. (2012) p. 212

[157] J. Om Prakash, Roots of the Riots, Kanishka Pub. New Delhi (1998) p. 198

[158] See "Crime in India 2013" National Crime Records Bureau, Ministry of Home Affairs, Chapter-16, p. 161

famous Connaught Place shootout case where Delhi Police had gunned down two innocent businessmen in broad day light. The Mathura rape case was another famous case where a tribal girl was raped by policemen in the premises of the police station itself. There is a list of instances where police have tortured the innocent public by misusing their power and abusing the law.

There have been instances of police atrocities in remand, police refusing to file in complaints and thereby harassing people, police catching hold of innocents in a certain case to show arrests etc. The fake encounters that had taken place in recent past have exposed the barbaric attitude of the police towards innocent citizens like encounter of Soharabuddin Sheikh and Kausar Bi, Ishratjahan and Tulsi Ram Prajapati etc.

Eminent jurist and former Solicitor General of India Mr. Soli Sorabjee has opined that "encounters do happened in Indian society which is totally against the basic philosophy of rule of law, he further says that it is easy to eliminate criminals but it is wrong to say that it has acceptance from society. Fake encounters and extra judicial killings of innocent people whether they have past criminal record or not is against the guiding principles of our Constitution-it reflect the very psyche of police system towards society and it is really dangerous development." [159] It is suggested that an effective institutional grievance- redressal mechanism to vindicate 'police excesses' is also the need of the hour. As held by the Supreme Court, "custodial torture" is a naked violation of human dignity and a degradation which destroys, to a very large extent human personality.[160]

4.6.3.1 Extrajudicial Killings by Police

The Indian police can be broadly categorized as committing two types of unlawful killings. In the first, suspects die during custodial torture or by execution and police deny all responsibility, claiming instead that there were other causes for the deaths. In the second, known as "fake encounter" killings,

---

[159] Soli Sorabjee in interview to NDTV, telecast on Dt. 14.07.2013 also visit at http://www.ndtv.com/wethepeople visited on 16.06.2017 at 18.30 PM IST

[160] S.C Sarkar, Sarkar, Code of Criminal Procedure 1073, Dwivedi Law Agency, Allahabad, 1st Edn, (2005), p. 506

the police acknowledge the killings but falsely claim they acted in self-defence or to prevent victims from fleeing arrest. In parts of India, police commit both kinds of killings with impunity.[161] Efforts by the media and NGOs to document hundreds of such killings during the past decade have been hampered by systematic police denials. The absence of records including post-mortem examinations and registries of arrest and detention ordinarily makes it difficult if not impossible to disprove police accounts.[162]

Killings for which Police Deny Responsibility Police often deny responsibility for killings, even when evidence suggests a victim died in police custody. For instance, the police deny any involvement in the August 13, 2008, death of Krishnamurthy, a building contractor in the Kolar Gold Fields area in Karnataka, although he was last heard from while in police custody. According to his family, the night he died Krishnamurty and two friends had gone to dinner at a hotel restaurant, where they quarrelled with a non-uniformed man who claimed to be a police officer. They left, but near the BEML police station, a constable flagged down Krishnamurthy's car. Krishnamurthy's friends told the constable they were not from the area and he let the friends go after they emptied their wallets and gave him more than 3000 rupees (about US$63). The constable sent Krishnamurthy to the police station. Before reaching the station, Krishnamurthy used his mobile phone to call and alert his friend Parashar Reddy. Hours later, Krishnamurthy called Reddy again and said the police had beaten him severely. Reddy and Krishnamurthy's brother Vijay Kumar rushed to the station, but according to Kumar a constable there told him,

> "We don't know any Krishnamurthy." Reddy then called a police contact, who gave him the phone number of the

[161] According to ACHR, it learned through a Right to Information Act request that the NHRC received 1,184 complaints of deaths in police custody between April 2001 and March 2009, with most deaths reportedly resulting from torture. ACHR, India Human Rights Report 2009. Arguing that number does not reflect the true extent of the problem, ACHR has compiled and analyzed dozens of media reports of killings from across India in its annual reports. See ACHR, Torture in India 2009; ACHR, Torture in India 2008; ACHR, India Human Rights Report 2009 , ACHR, India Human Rights Report 2008; ACHR, ACHR's Actions Against Torture and Other Forms of Human Rights Violations in India.

[162] For instance, in 2007 magisterial or judicial inquiries were conducted in 73 of 118 reported deaths in police custody, but only seven cases were sent for trial and no police were convicted of wrongdoing. National Crime Records Bureau, Ministry of Home Affairs, "Crime in India 2007," http://ncrb.nic.in/cii2007/home.htm (accessed June 17, 2017)

constable who apparently responded to the hotel restaurant manager's complaint about the quarrel. According to Kumar:

> "When we called the constable, he said he had gone to the hotel. But everyone had already left. When we asked about Krishnamurthy, he said, "There is a temple near the hotel. Krishnamurthy is there, sitting inside his car."[163]

The constable later claimed that he found Krishnamurthy driving while drunk, stopped him and told him to park and sleep it off. Still at the station, Kumar asked the police to accompany him to the temple but they refused. With Reddy and other friends, Kumar searched for his brother's car:

> "We found it near the temple as the police had described. Krishnamurthy was lying in the backseat. We first thought he was unconscious and tried to wake him up. His condition seemed very bad. We went to the police station, but the constable said there was no need to lodge a complaint and that we should go to the hospital. But [when we got there] the doctors said my brother was dead."[164]

The next day, Kumar tried to file a complaint against the police. He said that the friends who had been with Krishnamurthy at the restaurant and in the car changed their stories and supported the police version, denying having seen Krishnamurthy being taken into custody. One of them later called Kumar to apologize. According to Kumar:

> He said, "Don't be angry. The police threatened me. They said I must make the statement they ask or they would charge us with the murder." But then he offered to come to court and tell the truth as long as he was safe from the police.[165]

The case is still pending in the courts.

---

[163] Human Rights Watch interview with Vijay Kumar, Kolar, December 14, 2008.
[164]ibid
[165]ibid

4.6.3.2 "Fake Encounter" Killings

While in the cases described so far police deny responsibility for killings, in other cases police publicly acknowledge killing individuals, often alleged organized crime figures, terrorists, and violent criminals. In dozens of cases, police have been accused of killing these individuals, who are often petty criminals, in "fake encounter" killings, or fabricated shoot-outs, to win public favour or in furtherance of police officers' own political or criminal ties. The frequency of fake encounter killings, characterized by police acknowledgment of involvement but false denial of malfeasance, is unclear.

The Indian government reports that in 2007, police killed 250 individuals designated as civilians and injured 616; in 2006, police killed 472 and injured 432.[166] Human Rights Watch is not in a position to determine how many incidents are genuine police shootings in self-defence rather than shoot-outs staged or falsely reported by police. Half of the shootings reportedly occurred in anti-dacoit, or armed robbery, operations or those "against others," circumstances unlikely to involve impartial witnesses who can confirm or contradict police accounts.[167] That the Indian police also suffered a high number of fatalities from shootings - 59 police died in 2007 and 64 died in 2006, mostly in "extremist/terrorist" operations - suggests a significant proportion did involve an exchange of fire.

The National Human Rights Commission has not released nationwide data on killings by police fire since 2005; that year, it reported receiving 84 complaints of fake encounter deaths.[168] The term "encounter killing" emerged in the late 1980s following a spate of police operations against individuals alleged to be involved in organized crime.[169] "Encounter specialist" police officers often

[166] The government claims all of the casualties occurred in "incidents necessitating police firing." See National Crime Records Bureau, Ministry of Home Affairs, "Crime in India 2007," http://ncrb.nic.in/cii2007/home.htm (accessed March 28, 2009); National Crime Records Bureau, Ministry of Home Affairs, "Crime in India 2006," http://ncrb.nic.in/cii2006/home.htm (accessed June 17, 2017).
[167] About 28 percent of incidents in 2006 and 2007 were categorized as "against extremists and terrorists."
[168] Supra note 145
[169] Human Rights Watch, India - Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir, pp. 64-86

made only faint gestures toward firing in self-defence because they enjoyed vast public support for what the media depicted as vigilante-style heroism in courageously hunting and gunning down criminals. The government awarded gallantry medals and promotions to police who "scored" dozens of encounter deaths, crediting the deaths, rather than arrests, with breaking organized crime's stronghold on Mumbai and Delhi, and reducing gang violence in Bangalore.[170] In this narrative, the police officer as judge, jury, and executioner was necessitated by the impotence of a clogged court system that, given its low conviction rate, was out of touch with the reality of escalating levels of violence. The Indian public's historic tolerance of police killings as a crime-control technique has diminished in the last decade. "Encounter specialists" have been suspended on charges of corruption and police across India face prosecution for fabricating shoot-outs.[171] But the practice persists, and has undoubtedly spread beyond major cities and "specialist" police units into smaller cities and surrounding villages.

According to Human Rights Watch's analysis of dozens of court cases, cases before the NHRC, information from NGOs, and media accounts, fake encounter killings are usually carried out by station officers, sub-inspectors, and constables that is, low-ranking police. However, considering the scale of this practice in many locales, it is unlikely that local officials and senior police officers are unaware of the involvement of police in such killings. Doubtlessly, senior officers have also been involved in planning or ordering fake encounters.

An Uttar Pradesh sub-inspector, speaking on condition of anonymity, said he and other sub-inspectors had committed killings in the past few years on the orders of a superintendent of police (the officer in charge of a police district): Now it's the SP who decides. Ten years ago it was just the constable. The SPs do it to secure their posting. Also because of poor prosecution, because these guys [criminal suspects] can get bail, because of corruption of the judiciary. The SP

[170] 6 For instance, Mumbai sub-inspector Daya Nayak claimed in 2004 to have killed 83 individuals in encounters during the previous four years; his life was apparently the basis for the 2004 film Ab Tak Chhappan. Calcutta Telegraph, "The decline and fall of encounter specialists
[171]Pushkar Raj and Shobha Sharma, "Culture of Encounters," The Tribune, November 4, 2007. In April 2009, an Uttar Pradesh court issued warrants against 35 police for a 1998 encounter killing allegedly staged. See Manish Sahu, "At large after 'encounter,' 35 policemen face NBWs," Indian Express, April 1, 2009.

will say to the DGP, under my regime, so many criminals were encountered.[172] While some senior police denied the practice, low-ranking officers appear to regard it as a necessary crime control tactic. The sub-inspector quoted immediately above also told Human Rights Watch that, just days earlier, he had been ordered by a superintendent of police to commit a killing. Asked if he would do it, the sub-inspector said:

> "In these cases, this is a way to do, these are criminals. I am looking for my target, I will eliminate him."[173]

Police officers claim that fake encounter killings only target individuals who are a danger to the public, an assertion often disputed by family members and rights activists. Regardless of their motive, fake encounter killings violate domestic law and the prohibition against arbitrary deprivations of life under international law.[174]

India's Criminal Procedure Code invites abuse by authorizing police to use all necessary force to effect arrest, without regard to whether a suspect is armed.[175] The Code thus enables police to kill suspects under the pretext of attempting to make an arrest, even if police initiated the exchange of fire and even if the suspect was unarmed.

Similarly, police are authorized to use deadly force to make an arrest whenever a suspect "attempts to evade the arrest," regardless of whether the suspect is armed or dangerous.[176] Because little is required to justify police use of deadly force, police can easily fabricate evidence to substantiate their

---

[172] Human Rights Watch Interview with sub-inspector, Uttar Pradesh, other details withheld.
[173]Ibid
[174] ICCPR, Arts. 2(1), 6(1); Indian Constitution Art. 21. As the Indian Supreme Court has noted: "[T]he gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with procedure established by the Constitution and laws." *Prabhu Dayal Deorah v. District Magistrate,* (1974) 1 SCC 103.
[175] 2 Criminal Procedure Code, sec. 46, authorizes police to use "all means necessary to effect the arrest" of any person who "forcibly resists the endeavour to arrest him, or attempts to evade the arrest." However, it adds: "Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life such police officer or other person.
[176]ibid

accounts.[177] Characteristics of "Fake Encounter" Killings In police accounts, encounter killings ordinarily occur in the early hours of the morning. The police virtually always claim that the suspect opened fire upon spotting police, and was killed when police returned fire. In some cases, police say a suspect in custody fled and that, when they found him or his hideout, the suspect opened fire. In other cases, police claim they exchanged fire with a suspect fleeing arrest or leaving the scene of the crime, or with a suspect caught during the commission of a crime. In the latter two types of claims, perhaps to justify the absence of bullet-casings from a non-police handgun, police often claim the suspect snatched the handgun of a police officer and turned it on him, leaving the officer no option but to kill him in self-defence.[178] In many cases, police are the only eyewitnesses to these alleged encounters.

In many encounters alleged to be faked, police do not report sustaining injuries. Where police lack bullet-proof vests or jackets, their lack of injury may indicate that the police's claim of an exchange of fire is false. When asked about newspaper accounts of exchange-office encounters, the sub-inspector who admitted committing fake encounter killings said: In 99.1 percent, it's fake. Because we don't have the equipment. We don't have the jacket. In a real encounter, the police would also get injured.[179] Individuals facing criminal charges or their family members are frequently the target of allegedly fake encounter killings.[180] In four cases documented by Human Rights Watch, one which occurred in 2008 and the remainder which occurred in 2006, victims' families say police targeted victims due to their failure to pay a bribe or because they crossed a powerful local figure who directed police to commit the killing. While such police motives are virtually impossible to establish, the facts in the cases below indicate the implausibility of police's accounts of the killings.

---

[177] http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf(accessed June 17, 2017)

[178] " NHRC, Case Details of File Number 179/1/2003-2004, Diary No. 7291/JR, direction issued 04/09/2009; Mumtaz Alam Falahi, "AP Government pays Rs. 3 lakh to Mohd Shafi killed in encounter,"Twocircles.net,http://www.twocircles.net/2009feb22/ap_govt_pays_rs_3_lakh_mohd _shafi_killed_fake_encounter_2003.html (accessed July 16, 2009). The NHRC also noted that the firing of four bullets was disproportionate force; an analysis of other NHRC and media reports suggests that use of force greater than that required for self-defense is another characteristic of encounter killings alleged to be fake.

[179] Supra note 156

[180]ibid

4.6.3.2.1 The Killing of Sugriv Singh Yadav

Sugriv Singh Yadav died on August 6, 2008, in Faizabad, Uttar Pradesh. According to the police, they shot and killed Yadav while he was fleeing from them on a motorbike after he and three others stole a mobile phone and 10,000 rupees (about US$210) from a man. The police had already lodged several criminal cases against Yadav, and suspected that he was involved in the death of a police officer. Believing the police's account to be fake, Yadav's brother successfully petitioned a district court in Faizabad to order a police investigation. Annirudh Yadav, the lawyer handling the case, told Human Rights Watch that the police story does not hold up:

The motorbike that the robbers were using had not a drop of petrol on it. There was no blood at the site of the incident where Sugriv was apparently shot.[181] The investigation was ongoing at this writing.

4.6.3.2.2 The Killing of Santosh Patel

Nineteen-year-old Santosh Patel left his home in Purabpur village, near Varanasi, Uttar Pradesh, at 5 p.m. on December 13, 2006, to join two friends for dinner. He then disappeared. In written statements, police said Patel and an accomplice stole a cashbox from a small shop in Harahua market at 6:30 p.m. and fled on his motorbike. Sub-inspector Ravindra Bhusan Maurya of the Harhua police post, drinking tea at a nearby shop, heard noises and called Mahendra Pratap Yadav, inspector for the Badagaon police station, on his mobile phone. Yadav pursued Patel and his accomplice in his jeep from one direction, while Maurya approached from the other. Finding themselves cornered, Patel or his accomplice opened fire. Police fired back in self-defence, killing Patel while his accomplice escaped in the darkness.[182] Patel's family disputed the police's account, and in January 2008 they succeeded in getting an FIR registered against the police and other individuals that alleges a conspiracy to murder Patel. According to Patel's brother Ramlal, on December 13, Patel's friends Manoj Kumar Yadav and Bully Yadav called him continually from noon, urging him to

[181] Human Rights Watch interview with Annirudh Yadav, Faizabad, January 12, 2009

[182] Statement of Ravindra Bhusan Maurya; Crime no. 18/08 u/s 302/120(B) P.S. Badagawn-Varanasi, Police Form No. 342. Originals on file with PVCHR.

attend a dinner party. Two hours after Patel left on his motorcycle for the dinner, one of his brothers received an anonymous call saying that Patel had been in an accident. A neighbour also received an anonymous call saying Patel was at Pragya Hospital Harahua, but when they later checked they found the hospital had no record of him having been there.[183] In a statement to a local magistrate, Patel's father, who died in 2008, said police denied knowing Patel's whereabouts later that night, well after the time of the alleged encounter killing:

I went to Harahua police chowki to inquire into the matter. I was told there that there was not any matter related with an accident....[Later] when I came back to Harahua police chowki, I saw that the motorcycle of [my son] was standing there. When I asked the policemen about that motorcycle, I was told that the dead body of Santosh Kumar Patel had been sent to Badagaon police station.[184]

The next morning, the family read in the newspaper that Patel had been killed in an encounter while supposedly robbing a shop. Patel's brother Ramlal told us that the police's account was implausible and internally inconsistent, based on fabricated evidence that did not match the supposed crime: Police say this happened at 7 p.m. The place of the supposed incident, the nearby residents didn't hear any fire....The shop that was supposedly a petty shop, why was the cashbox that was recovered full of 500 rupee notes? The statement of the shopkeeper was that the culprit was much built, but [Patel] was small.[185] Patel's post-mortem report also showed "blackening of the body," indicating a shot from very close-range rather than a shoot-out, as alleged by police.[186]

[183] Human Rights Watch interview with Ramlal Patel, Varanasi, translated from Hindi, January 14, 2009.
[184] Statement of Complainant, Crime No. 18/08 u/s 302, 120(B) IPC, January 23, 2008, translated from Hindi, original on file with PVCHR.
[185] Interview with Ramlal Patel, Varanasi, translated from Hindi, January 14, 2009
[186] Post-mortem report of Santosh Patel, copy on file with Human Rights Watch.

4.6.3.2.3 The Batla House Encounter: Some Unanswered Questions

It is a matter of fact that Indian police systems hugely biased against minorities especially the Muslims and also act prejudicially against it.[187] In September 2008, the infamous Batla House 'encounter' that had taken place in Jamia Nagar area of Delhi still afresh in the minds of many. There is constant demand of independent and impartial judicial probe over the encounter to ascertain the genuinely of the encounter. In the said encounter two persons namely Atif Amin and Mohammad Sajid were killed by the police suspecting them terrorists. It is alleged by the Special Cell (a specialised unit of Delhi Police which has mandate to burst terror module) that they were terrorists and member of Indian Mujahideen. In the said encounter the police had been used to change their theory right from the day one and justification of encounter had been given of antecedents and previous criminal records of the "alleged terrorist". Even some famous lawyers of Supreme Court and well known human rights activists had been raised the question of veracity of police theory. The Delhi Police claim that NHRC had approved the facts and details of the encounter proved wrong when NHRC issued a statement that apex human right watch body of India had never been approved or justified the killing of two persons in Batla House as police repeatedly saying that both the persons are terrorists.

The human rights activists and lawyers raised suspicion on police theory of encounter due to their conflicting version. How a terrorist can escape from the encounter place i.e. Batla House which was heavily cordoned off by the police? Not even that according to the police version the alleged "Shehzad" escaped after jumping off the three story building of L-18, Batla House, but how? After some time, the Special Cell had changed its statement and said on record that alleged escaped terrorist "Shehzad" was not jumped off from the top floor of the house but run away after dodging the police party at the time of encounter. The question is how a person can appeared when an encounter is going on at the house and why no police person stops such person who suddenly appeared when gun shots still going on at the L-18 Batla House? How can a person dodge the

[187] Asaghar Ali Engineer's, Minorities and Indian Police System, Manohar Pub. New Delhi, 2006, pp. 19, Also see K S Subramanian, former IPS, "Role of Police in Gujarat Carnage 2002" in Political Violence and Police in India, Sage Publication, New Delhi, 2007, pp. 77-79

police party (in good numbers) standing in the streets with highly sophisticated loaded weapons? Why police is not comes with clean hands of these unanswered questions? Further, the police have never given a concrete reply that if the alleged gunned down persons were really terrorist then why a terrorist would go for police station for tenant verification? It is a matter of fact that alleged terrorist had done their tenant verification from the area police station and local police had not made any adverse comments while verified their documents. The massive house to house search operation launched by the police in Azamgarh has also failed to throw up any evidence that the police were confident to obtain? Further, the Bank accounts of the alleged terrorists believed to contain some crores turned out to a few hundreds. Why the police had not disclosed the post-mortem report of the alleged terrorists? The post-mortem report clearly shows that alleged dead terrorists had received multiple gun shots at their skull on top. How the alleged terrorists received gun shots on their skull? In an encounter, normally there is an exchange of fire from both sides why police had not made any efforts to arrest the alleged terrorists? Why the police had been failed to produce the ballistic report which may be quite useful to prove how many rounds of gun fire shots by the alleged terrorists if they had weapon as police had claimed?

Former IPS officer K S Subramanian says that there are better ways in which the 'Delhi Police' could have achieved its purposes in the Batla House case. Nothing prevented it from surrounding the suspected premises and with the help of local police station staff and the local people in the congested area getting the inmates to come down and surrender to the police. This would have helped the police elicit valuable further intelligence on terrorist activities but also saved the life of inspector Mohan Sharma and avoid injuries to others. On the face of it, the police action appears hasty, premature and botched. Highly skilled and professional training is required to carry out such operations delicately and successfully.[188] Mr. Subramanian further says that some blunders had occurred in the course of police action in Batla House is acknowledged by senior policemen in private. These can be placed on record only by a proper judicial

[188] K S Subramanian, Terror, Batla House and Indian Police, Jamia Teachers Solidarity Association (JTSA) Report (2011) p. 89

probe. Saving the life of inspector Sharma and those of the suspected terrorists was more important than desire for quick results. Following the operation, politicians, bent on vote banks, have rushed to make a martyr out of the dead inspector Mohan Sharma. They did not bother much about the families of the slain 'terrorists', their relatives and the extremely worried local population of their village Azamgarh, Uttar Pradesh, who live in inter-communal harmony.[189]

There was outrage in the area as residents, civil rights activist and lawyers believed that this was a contrived "encounter" and that those killed and detained were innocent men failing to prey to a beleaguered police that was under pressure to perform following incidents of bomb blasts earlier in Delhi. The overwhelming demand of for a judicial probe was denied. The police treat entire Muslims community as terrorist that why they have arrested a large number of Muslims youth across India. Muslim youths are picked up on the charges of suspected terror links and incarcerated for long period. In a large number of cases they are released after years and months. After the Mecca Maszid blasts in Hyderabad, 26 young men were picked up and released after 3 years when nothing could be proved. The Malegaon case was a bigger disaster when youths were imprisoned for 5 years, only to be let off by the courts. It cannot be denied that it is difficult to prove many cases in courts and therefore the claim of the police is to be respected that despite strong suspicion and basic evidence, parishioners are let off because in the final analysis. In most the cases where Muslims youths have been arrested, the court's view, the evidence is not hard enough. On the other hand, it is tragic to see incarcerated innocent youth for many years without any fault.[190]

These are some prominent example of police atrocities against Muslim and gross violation of minorities rights. It is an obvious fact that police do used third degree torture against minorities in order to frame them in a false terror cases. All these happened just for name, fame, medals and promotions. There is no dearth of trigger happy police officers like SS Rathi, Sachin Vaje, Pradeep Sharma, Daya Nayak and Rajbeer Singh. These are some of the notorious cops

---

[189]Ibid
[190]Najeeb Jung, Sting of a Bee, Readworthy Pub. New Delhi, (2013) pp. 107-108,

who have built properties worth of crores through illegal means while serving as 'acknowledged encounter cops' of Special Cell/ATS etc. in different state police. The notorious encounter cop Rajbeer Singh was killed during the transaction of deal when he went there to get his share in Gurgaon. He was the cop who always carries a 'Z' plus security cover and killed many innocent people in fake encounters.

Whenever the lawyer or human right organization protest about torture, framing of innocent youth in false terror charge the police and general public pay no attention, single argument placed it's a question of saving lives. How we are demoralizing our security forces, we are told, such is the attitude of our many politicians BJP and its sister's organizations in particular. Honestly no sensible person would like to destroy the image of entire Delhi Police, the institution that has been created for the protection of society and maintaining the law and order. But according to the human rights perspective, we accept growing human rights violation by the police in the name of tackling terror. How we can digest the concocted story of their so called 'bravery' and an attempt to showing the so called "dedicated" service to the citizens. In-fact the Delhi Police functioning like mafia or a gang of organized criminals who have licensed to commit crimes. If anybody dares to raise his voice, the force implicates him in false terror case and he will surely be confess to his crime under the pressure of third degree torture.[191] Very few people might have knowledge that Delhi Police have converted some of Delhi's Guest House into an illegal torture centres (FIR No. 146/2005 State v. Saqib Rehman judgment passed by Virender Bhatt, ADJ, Dwarka Distt. Court).[192] The case of Delhi Police is unique in itself as it knows only one thing that nobody can dictate them as the force directly come under the Ministry of Home Affairs in resulted acute lawlessness flawed in the force

[191]See "Crime in India 2013" NCRB Report-"Delhi Police has been on top in all India level percentage of crime committed by the police personnel and human rights violation cases e.g. custodial violence, extortion, outraging the modesty of woman and other serious category of crime according to the latest report on crime released by the National Crime Records Bureau", Ministry of Home Affairs. Chapter-16, p. 161-166

[192] See JTSA's Report, "Torture, Framed and Damned-An Account of Very Special Cell," A Detailed Report on Criminal Activities of Delhi Police's Special Cell published by Jamia Teachers Solidarity Association (JTSA), 2011 and the referred case details are :- State of Delhi vs. Saqib Rehman and Others, FIR No. 146/2005, PS-Kapashera, Delhi and the stricture made against the Delhi Police by Hon'ble Court of Sh. Virender Bhatt, Additional Session Judge, Dwarka Courts, New Delhi

without hindrances. It is widely acknowledged that Delhi Police inspectors have been paying huge amount of bribes to the higher officers in order to get some lucrative posts as SHOs. It would be wrong to say that entire Delhi Police has been indulged into lawlessness as there are many officers in the force who have an impeccable record of honest service, quite, impartial and secular in discharge of their duties. These officers will be remembering for their excellent work like Kiran Bedi, Amod Kanth, Nikhil Kumar and Deepak Mishra.

Politicisation of the criminal justice system (CJS) in India has increasingly come in the way of human rights protection. Police officers are increasingly preoccupied with politics, penetrated by politics and participate in it individually and collectively. The central police Intelligence Bureau (IB), unlike the CBI, does not have any police powers; nor a legal framework and charter of duties. It seems to function mainly as the hand maiden of the ruling party of the day. The ruling politicians seem to wish to immunise the guilty IB officials from arrest and prosecution and have attempted distorting and misuse of the provisions of the Criminal Procedure Code (CrPC). A few former Directors of the CBI, the IB including the Governor of a state (former Director of the IB) have unacceptably opposed the arrest of the IB officials in spite of the credible evidence against them. They deem such action would hinder ‘national security’ concerns. They ignore that they thus unwittingly undermine the foundational principles of India’s Constitution and the canons of the rule of law, criminal justice and human rights. Unfortunately, the union Ministry of Home Ministry (MHA) has joined the campaign relying on the section 197 of the colonial Indian Penal Code (IPC) which insists on prior government permission before prosecution of serving officials. They also ignore section 187 of the Indian Penal Code (IPC), which provides that ‘obstructing a public official from the performance of his duties’ is a cognisable offence. While the government has administrative authority over the CBI, the power to interfere with its investigative process rests with a higher official in the investigative hierarchy as provided for in section 36 of the CrPC. Moreover, a successful petition under Section 319 of the CrPC in the Supreme Court of India can place the concerned IB officials under the clutches of the law to the embarrassment of these officials.

4.7 OBSTACLES TO POLICE ACCOUNTABILITY

While allegations of police abuses are frequently reported in the Indian media, only 28 percent of the 282, 384 complaints filed against police between 2003 and 2007 resulted in police department, magisterial or judicial inquiries, according to the Indian government. During the same period, prosecutions of 8, 736 officers were initiated, but only 1,070 trials were completed and 264 officers convicted.[193] While not conclusive, this data suggests that despite high-profile and successful prosecutions of some abusive officers, many police operate in an environment where impunity is still the norm. Independent investigations are critical to reducing impunity for police human rights violations. Internal police investigations in India have not fulfilled this role.

In some states, internal disciplinary proceedings are hampered by the lack of a police ombudsperson or dedicated internal monitoring unit. In 2006 the Indian Supreme Court ordered the states to create police complaints authorities to investigate complaints of police misconduct, but only about half the states have done so. Most existing bodies do not function properly, and, according to the Commonwealth Human Rights Initiative, none have staff to conduct independent investigations.[194] Community-led protests in response to particular incidents of police violence sometimes trigger temporary suspension or transfer of junior- and low-ranking police. Government data shows that internal disciplinary proceedings do not ordinarily result in serious disciplinary actions against perpetrators.[195] There is no official nationwide data disclosing how frequently internal proceedings identify higher-ranking police who either ordered or tolerated the alleged abuse. In some cases documented by Human Rights Watch, ad-hoc or informal internal investigations resulted in local police and

[193] 7 National Crime Records Bureau, Ministry of Home Affairs, "Crime in India 2007," http://ncrb.nic.in/cii2007/home.htm (accessed June 15, 2017).

[194] According to CHRI: "As these members are essentially political appointees, they are much more likely to behave in accordance with what the executive wishes and do nothing that would displeased the government or the police." CHRI, Feudal Forces: Reform Delayed (New Delhi: CHRI, 2008), pp. 40-43.

[195] Bureau of Police Research & Development, "Data on Police Organisations in India As on 01-01-2007, http://www.bprd.gov.in/writereaddata/linkimages/All%20Chapters5598831415.pdf (reporting that 56,744 "departmental proceedings" were "processed" during 2006).

political figures publicly promising action or compensation to victims, which they ultimately failed to deliver.[196]

4.8 CONCLUDING REMARKS

Nobody would dispute on the issue that police should do their duty and work impartially but in the name of terrorism we can't let the police to killing innocent citizens. If we go through the controversial area of encounters, the police come off even worse. Nobody seriously disputes that many of the people killed in so called encounters have actually been killed in the police custody.[197]

In the language of Mr. Wajahat Habibullah the former chairman of National Commission for Minorities, "all encounters are fake and illegal and the police are creating a kind of paranoia in the multi-cultural and multi-religious Indian society and there is strong apprehension that these developments will certainly rise the communal atmosphere of the Indian society. The police have been completely failed to build confidence amongst members of minorities. The whole community have been under frightened and force to live under the shadow of police terror. The minority community have legitimate rights to not to cooperate with police as there had been a history of police atrocities against them. How they can trust police who framed innocent youths from their community in the false terror charges, subjected them to acute form of torture and barbaric cruelties."[198]

The problem of police violence on suspected offenders, accused and under trails is of a universal nature. In *Sunil Batra*v. *Delhi Admn* [199] the Supreme Court did not find itself handicapped by the absence of a specific law against

[196] For instance, according to the family of Pradeep Singh, whose death in police custody is discussed at p. 72, after a village protest the district magistrate promised them 100,000 rupees (about US$2100) in compensation, which was reported in a local newspaper, but they have never received any money. Ram Chandra Prasad, who was beaten severely by police as described on pp. 70-71, told us that the Station Officer he implicated was transferred from his post and that senior police told him they would order an independent investigation, but that no investigation has occurred and he has received no compensation for medical costs. Sakia Begum, whose husband was killed in an allegedly fake encounter as described on pp. 88-89, told us some police she implicated had been suspended but were later given promotions.

[197] Vir Sanghvi in "Counterpoint", Hindustan Times, New Delhi Edn. Dt. 23.11.2008

[198] See the detailed interview of Mr. Wazahat Habibullah at http://www.ndtv.com/wethepeople (Last visited on 16.06.2017 at 18.30 PM IST)

[199] (1978) 4 SCC 494: 1979 SCC (Cri) 155

torture and custodial violence and gathered support from certain provisions of the Indian Constitution. The Hon'ble court condemned the third degree violence by the police and held such methods of torture against the permissibility of Article 14, 19 and 21 of the Constitution. India, being the largest democracy in the world, has to take certain stringent steps to make a people-friendly police. The main steps are to be taken up by the government is to make special legislation for prevention of custodial violence and stringent punishment for extra-judicial killing. The custodial violence and extra-judicial killing by the police is against the very idea of 'rule of law'. The "rule of law" has to be always upheld whatever may be the circumstances. There is no dispute over the issue of strengthening the internal security; there can be no compromises on internal security and menace of rising graph of the terrorism. At the same time, the unity and integrity of India is a non-negotiable issue. There should be an end of the 'police state' and 'minorities witch-hunt' and the state must provide protection and promotion of human rights of minorities through people friendly police measures.

Chapter 5

ROLE OF INDIAN JUDICIARY IN THE PROTECTION OF LIFE AND LIBERTY

The role of Indian Judiciary and the scope of judicial interpretation have expanded remarkably in recent times, partly because of the tremendous growth of statutory intervention in present era. The Judiciary plays an important role in the protection of the fundamental rights of citizen. The twin safeguard of equality before law and equal protection of law and right to life and personal liberty are acknowledge as two of the important pillar of human right. India is the largest democracy in the world, a sovereign, and socialist, secular, democratic and republic with a comprehensive charter of rights written into constitution. The Indian Constitution lays down base on which the life and liberty of an individual is protected. The Supreme Court has played a significant role in interpreting constitutional provisions broadly to encompass a wide range of rights. The right to life in Article 21 as read with Article 14 right to equality of Constitution of India, for example, has been interpreted expansively by the Supreme Court to include the right to a life of dignity, freedom from exploitation and a number of socio-economic rights contained in the directive principles of the Constitution. Reasoning in this manner, the Supreme Court constructed Article 21 of the Constitution to include the prohibition of torture and inhuman and degrading treatment.

In addition to the efforts of the Supreme Court to incorporate the prohibition on torture and inhuman and degrading treatment into the domestic law, the Court has, in the absence of specific laws regarding the treatment of detainees and prisoners, intervened and ordered reforms and improvements to the system to prevent abuses in custody. In addition to giving expansive readings to fundamental constitutional rights, the Supreme Court has issued a number of guidelines - predominantly cases of custodial death and custodial torture – that seek to give added practical protection for citizens from violations of their constitutional rights.

Major human rights problems included reported extrajudicial killings of persons in custody, killings of protesters, and torture and rape by police and other security forces. Investigations into individual abuses and legal punishment for perpetrators occurred, but for many abuses, a lack of accountability due to weak law enforcement, a lack of trained police, and an overburdened court system created an atmosphere of impunity; lengthy court backlogs prolong the latter. Poor prison conditions and lengthy detentions were significant problems. Unlike in previous years,1 there were no instances of officials using antiterrorism legislation to justify excessive use of force; however, indiscriminate use of force by Border Security Forces was a problem. Corruption existed at all levels of government and police. There were reports of delays in obtaining legal redress for past attacks against minorities. The law in some states restricted religious conversion, but there were no reports of convictions under these restrictions. Violence associated with caste bias occurred. Domestic violence, child marriage, bonded labour, dowry-related deaths, honour crimes, and female feticide remained serious problems.

5.1 ACTIVE ROLE OF JUDICIARY

All legal rights are human rights but it is unfortunate that all human rights have not become legal rights as on date. This is because the law follows the action, as a consequence, it is not possible to codify all probable laws in anticipation for protection of human rights, and this is when the due procedure of law or the principle of natural justice plays an active role in protecting the rights of the people when there is no legislation available.

Fundamentally, the basic motive of all the three wings of the democratic government, namely, the executive, the legislative, and the Judiciary revolves around the protection of human rights. They strive together and separately to uphold the human rights of the people in the country.

[1]In the year of 2008 and 2009

5.1.1 Protection of Human Rights

The Judiciary with no doubt has played a vital role in protection of Human rights over the decades. Some of the most unpleasant violation of human rights like Sati, Child Marriage, Honor Killings, Slavery, Child labour etc., have been abolished wholly owing to widespread awareness and strict implementation measures taken by the Judiciary.

The status of human rights is fairly high under the Constitution of India which makes provision for fundamental rights and empowers Supreme Court of India and High Courts to enforce these rights. Equally important is the fact that India is a signatory to international conventions on economic, social, cultural, civil and political rights, with certain conditions. These rights are partly contained in Part III of the Constitution of India including the right to equality in Article 14, right to freedom of speech and expression in Article 19(1)(a), the right to protection of life and personal liberty in Article 21 and the right to religious freedom in Article 25 etc.

The Article 21 of the Constitution of India says that "No person shall be deprived of his life and personal liberty except according procedure established by law". The meaning of the words "personal liberty" came into consideration of Supreme Court for the first time in *A.K. Gopalan V. Union of India*[2].The Supreme Court interpreted the law as state made law and rejected the plea that by the term law in article 21 meant not the state made law but jus natural or the principle of natural justice.

But this restrictive interpretation of the expression personal liberty in *Gopalan case* has not been followed by Supreme Court in the later decision.

In Kharak Singh v State of U.P[3] case it was held that personal liberty was not only limited to bodily restraints or confinement to prison only, but was used as a compendious term including within itself all the varieties of rights which go to make up personal liberty of man dealt within article 19(1) of constitution of India.

[2] AIR 1951 SC 27
[3] 1963 AIR 1295

Finally in *Maneka Gandhi V. Union*[4] of India the Supreme Court has not only overruled *Gopalan case* but widened the scope of the words personal liberty considerably. Justice Bhagwati observed that the expression in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have rose to the status of distinct fundamental rights and given additional protection under article 19.

In the 1981 Supreme Court case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*[5], the Court declared that: " Any form of torture or cruel , inhuman or degrading treatment would be offensive to human dignity… and it would… be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorizes and no procedure which leads to such torture or cruel, inhuman or degrading treatment can never stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violation of Articles 14 and 21".

5.1.2 Combating Custodial Violence

The landmark case of *D K Basu v. State of West Bengal*[6] in 1997 is a strong example of the Court's interventionist approach in combating custodial violence. The case began as a writ petition drawing the Supreme Court's attention to deaths in police stations and alleged attempts by the State Government to cover up their occurrence. Speaking on behalf of the Supreme Court, Justice A. S. Anand identified Article 21 as including the prohibition of torture and inhuman and degrading treatment and observed the need to fill the lacuna in domestic law, which did not contain any specific prohibition against its use:

"Any *form of torture or cruel, inhuman or degrading treatment would fall within inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness, and every man would have the tendency to become law*

[4] AIR 1978 SC 597
[5] AIR 1981 SC 746
[6] AIR 1997 SC 610

unto him thereby leading to anarchism. No civilized nation can permit that to happen".

The court also held that it is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressed of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element.

The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty-bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizens, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

Noting the disturbing prevalence of violence and deaths in custody, the Supreme Court established detailed instructions for proper procedures to be followed by the police in cases arrest or detention in its 1996 judgment. These guidelines are set out below:

- Police personnel should wear name badges, and their identify details should be logged before they carry out interrogations.
- A memo of arrest should be prepared, signed by the accused and witnessed by a member of the accuser's family or a respected member of his community.
- A person who is detained in a lock-up has the right to have someone informed of his whereabouts.
- The police must notify the chosen friend or family member of the time, place of arrest and venue of custody. The arrested person must be informed of his right to make contact with a friend or family member.
- The details of the friend or family member must log at the police station.
- The arrested person may ask for a medical examination to take place. All findings should be logged and signed by the parties.
- A trained doctor should subject the arrestee to medical examination every 48 hours during his detention in custody by a doctor.
- Copies of all the documents above should be sent to the Magistrate for his record.
- The arrested person may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
- A police control room should be provided at all district and state headquarters, and information regarding the arrest shall be communicated by the officer causing the arrest within 12 hours of affecting the arrest, and it should be displayed on a conspicuous notice board in the police control room.

The Supreme Court insisted that these guidelines be requirements to be implemented by state governments across the country and concluded optimistically:

"*It is hoped that these requirements would curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes*".

Unfortunately, the aim of the Supreme Court to prevent the use of torture and violence against detainees has not been realized.

In 2015 Supreme Court division bench headed by Chief Justice of India T.S. Thakur added the following directions in *D.K. Basu*[7] case

- The State of Delhi, Himanchal Pradesh, Mizoram, Arunachal Pradesh, Meghalaya, Tripura and Nagaland shall with in a period of six months from today set up State Human Right Commissions for their respective territories with or without resort of provisions of Section 21(6) of the Protection of Human Right Act, 1993.
- The State Governments shall take appropriate action in terms of Section 30 of the protection of Human Right Act 1993, in regard to setting up/ specifying Human Right Courts.
- The State Governments shall take steps to install CCTV cameras in all the prisons in all their respective States, within a period of one year from today but not later than two years.
- The State Governments shall also consider installation of CCTV cameras in police stations in a phased manner depending upon the incidents of human right violation reported in such stations.
- The State Governments shall consider appointment of non-official visitors to prisons and police stations in terms of the relevant provisions of the Act wherever they exist in the Jail Manuals or the relevant Rules and Regulations.
- The State Governments shall launch in all cases where an enquiry establishes culpability of the persons in whose custody the victim has suffered death or injury, an appropriate prosecution for the commission of offences disclosed by such enquiry report and/ or investigation in accordance with law.
- The State Governments shall consider deployment of at least two women constables in each police station wherever such deployment is considered necessary having regard to the number of women taken for custodial interrogation or interrogation for other purposes over the past two years.

[7] (2015)42SCD800

5.1.3 Protection of Fundamental Rights

In *Nilabati Behera v. State of Orissa*[8] the Apex Court held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort. It is held further that the award of damages by the Supreme Court or the High Court in a writ proceeding is distinct from and in addition to the remedy in private law for damages. It is one mode of enforcing the fundamental rights by the Apex Court or High Court. Reliance is placed upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which says, “Anyone who was has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” The reference to and reliance upon Article 9(5) of the International Covenant on Civil and Political Rights, 1996 in Nilabati Behera raises an interesting question, viz., to what extent can the provisions of such international covenants/conventions be read into national laws. It was held that state is party to the International treaty does not itself state law till it is incorporated in municipal law by statute.

In *Challa Ramkrishna Reddy v. State of A. P.*[9] a decision of the Division Bench of the Andhra Pradesh High Court, dealt with the liability of the State where it deprives a citizen of his right to life guaranteed by Article 21. It was held "In our opinion, the right to life and liberty guaranteed by Article 21 is so fundamental and basis that no compromise is possible with this right. It is 'non-negotiable'. .... The State has no right to take any action which will deprive a citizen of the enjoyment of this basis right except in accordance with a law which is reasonable, fair and just. *“The decision also dealt with the question whether the plea of sovereign immunity is available in such a case. The following observations are relevant”.* The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty otherwise than in

[8] (1993) 4 SCC 260
[9] 1989 AIR (AP) 235:(1989)2 Andh LT

accordance with the procedure prescribed by a law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State ?Can the fundamental right to life guaranteed by Article 21 be defeated by pleading the archaic defence of sovereign functions ? Does it mean that the said theory clothes the State with the right to violate the fundamental right to life and liberty, guaranteed by Article 21? In other words, does the said concept constitute an exception to article 21? We think not. Article 21 does not recognize any exception, and no such exception can be read into it by reference to clause (1) of Article 300. Where a citizen has been deprived of his life, or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the sovereign functions of the State. It was held by the High Court:

"The fundamental rights are sacrosanct. They have been variously described as basis, inalienable and indefeasible. The founding-fathers incorporated the exceptions in the articles themselves - wherever they were found advisable, or appropriate. No such exception has been incorporated in Article 21, and we are not prepared to read the archaic concept of immunity of sovereign functions, incorporated in Article 300(1), as an exception to Article 21. True it is that the Constitution must be read as an integrated whole; but, since the right guaranteed by Article 21 is too fundamental and basis to admit of any compromise, we are not prepared to read any exception into it by a process of interpretation. We must presume that, if the founding-fathers intended to provide any exception, they would have said so specifically in Part III itself."

In *State of A.P. V. Challa Ramkrishna Reddy*[10] known as prisoners murder case the Supreme Court held that in the process of judicial advancement Kasturilal's case has paled into insignificance and no longer of any binding value. In this case a prisoner who had informed the jail authority that his appended danger to his life but no action was taken on this information and no measures were taken for his safety and he was killed in the prison. It was also found that police officer was a party to the conspiracy to kill the prisoner which

[10] AIR 2000 SC 2083

was hatched in the prison. The Court held that in case of violation of fundamental rights the defence of sovereign immunity which is old and archaic defence cannot be accepted and government and the police are liable to compensate the victim. The Court said that personal liberty should be given supremacy over sovereign immunity which has been rejected in several cases by the Supreme Court.

The Supreme Court of India in *Nandini Sathpathi v. P.L. Dani*[11] held that to strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. It was also observed that Supreme Court has earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests. Since *Maneka Gandhi case* there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-breakers. Constitutional principles are eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws. Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice.

The National Police Commission in its Third Report referring to the quality of arrests by the police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission in its Third Report observed thus: "It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime

[11] AIR 1977 SC 1025

prevention. Continued detention in all of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all.

In *Prakash Kadam vs Ramprasad Vishvanath Gupta*[12] the important witnesses or their relatives were given threats at the time of trial of the case to save them. This aspect has been completely ignored by the learned Sessions Judge while granting bail to accused. The Supreme Court held that it is a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta and the police officers and the staff acted as contract killers for them. If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of a third person, it cannot be ruled out that they may kill while granting bail to the accused persons.

The Supreme Court held that, the High Court was perfectly justified in cancelling the bail to the accused-appellants. The accused/appellants are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. As the Bible says “If the salt has lost its flavour, wherewith shall it be salted?”, or as the ancient Romans used to say, “Who will guard the Praetorian guards?" The Supreme Court held that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake `encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. The Supreme Court observed that if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties. The Supreme Court policemen that they will not be excused for committing murder in the name of encounter on the pretext

[12] (2011) 6 SCC 189

that they were carrying out the orders of their superior officers or politicians, however high. In the Nuremburg trials the Nazi war criminals took the plea that 'orders are orders', nevertheless they were hanged. If a policeman is given an illegal order by any superior to do a fake `encounter', it is his duty to refuse to carry out such illegal order, otherwise he will be charged for murder, and if found guilty sentenced to death. The 'encounter' philosophy is a criminal philosophy, and all policemen must know this. Trigger happy policemen who think they can kill people in the name of 'encounter' and get away with it should know that the gallows await them.

The Supreme Court pinioned to mention that our ancient thinkers were of the view that the worst state of affairs possible in society is a state of lawlessness. When the rule of law collapses it is replaced by Matsyanyaya, which means the law of the jungle. The Supreme Court observed it because behind the growing lawlessness in the country the Supreme Court can see the looming danger of matsyanyaya.

5.2 PROTECTION IN POLICE ENCOUNTER/ EXTRA JUDICIAL EXECUTION

In *Chaityanya Kalbagh V. State of U.P.*[13] the Supreme Court was concerned with a writ petition filed under Article 32 of the Constitution wherein the impartial investigation was sought for the alleged killing of 299 persons in the police encounters. The Court observed that in the facts and circumstances presented before it, there was an imperative need of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens.

In *R.S. Sodhi V. State of U.P*[14]. A writ petition was brought to Supreme Court under Article 32 of the Constitution relating to an incident in which 10 persons were reported to have been killed in what were described as "encounters" between the Punjab militants and the local police. The Court observed, "Whether the loss of lives was on account of a genuine or a fake

[13] (1989) 2 SCC 314
[14] 1994 Supp (1) SCC 143

encounter is a matter which has to be inquired into and investigated closely". The Apex Court entrusted the investigation to C.B.I.

In *Satyaveer Singh Rathi V. State through C.B.I.*[15] The matter before Supreme Court arose from the First Information Report (for short, "FIR") registered against police personnel involved in a shoot-out for an offence punishable under Sections 302/34 of the Indian Penal Code (for short, "IPC"). In the complaint, it was alleged that the police officials had surrounded the car and had fired indiscriminately and without cause at the occupants, killing the two and causing grievous injuries to the third. This Court concurred with the High Court and the trial Court on the conviction under Section 302 IPC and rejected the defence set up by the accused persons relying on Exception 3 in Section 300 IPC as it was found to be not in good faith or due discharge of their duty.

A two-Judge Bench of Supreme Court in *B.G. Verghese V. Union of India*[16] dealt with two writ petitions. In Writ Petition (Criminal) No.31/2007, it was stated that during the years 2003-2006, 21 police encounter killings took place in the State of Gujarat. It was alleged that the so-called police encounters were fake and the persons were killed by the police officials in cold blood. In the writ petition a prayer was made for ordering an inquiry into all the cases of police encounters, which, according to the petitioner, were fake in order to establish the rule of law and to bring out the truth in each case. In the other Writ Petition (Criminal) No. 83/2007, the allegation related to the killing of one person in a police encounter. It was alleged that this too was an instance of fake encounter in which the victim was killed by the officers of the crime branch of police in cold blood and in a premeditated manner. The prayer was made in the writ petition to order an independent investigation by a special investigation team into all the fake encounters. During the pendency of the matter before this Court, the State of Gujarat had constituted a Monitoring Authority and Special Task Force for investigation of police encounters. Since the former Judge of this Court was appointed as Chairman of the Monitoring Authority, the Court requested the Chairman of the Monitoring Authority to look into all the cases of

[15] 2011 (6) SCR 138
[16] (2013)11 SCC 525

alleged fake encounters as enumerated in the two writ petitions and to have them thoroughly investigated so that full and complete truth comes to light in each case.

In *Rubabbudin Sheikh V. State of Gujarat*[17] it was alleged by brother of the deceased that his brother was killed in fake encounter by the joint operation of Gujarat police. The Supreme Court held that considering the nature of crime that has been allegedly committed not by the third party but by the police personnel of the state of Gujarat, the investigation concluded in the present case cannot be satisfactorily held. After the chart sheet being filed the investigation could be handed to CBI authorities or any other agencies from the state police authorities. The Court has power to monitor the investigation after chart sheet was filed. The scope of order, however cannot deal with the power of the court to monitor the investigation, but on the other hand in order to make sure justice is not only done, but also seen to be done and considering the involvement of the state police authorities and particularly the high official of the state of Gujarat are involved, the Supreme Court even in this stage directed CBI authorities to investigate in to the matter. Since the high police official of the state of Gujarat are involved and some of them are in are already in custody the Supreme Court viewed that it would not be sufficient to install confidence in the minds of victim as well as of the public that it would not be sufficient to authorities would be allowed to continue with the investigation when the offence and allegation are against them. In the present circumstances and in view of the involvement of the police officials of the state in the crime, the Supreme Court cannot shut their eyes and direct the state police authorities to continue with the investigation and the chart sheet and for a proper and fair investigation the Supreme Court felt that CBI should investigate the case and submit the report in the court.

In *Narmada Bai V State of Gujarat*[18] the petitioner Narmada Bai, mother of Tulsiram Prajapati who was according to her was killed on 27/28.12.2006 in the fake encounter by the officials of Gujarat and Rajasthan police. She filed writ of mandamus or in the nature thereof any other writ, order or direction directing

[17] (2010) 2 SCC 200
[18] (2011) 5 SCC 208

the CBI to register a First Information Report and investigation in to the fake encounter killing of her son and submit the report to the apex court. In the same petition she also prayed for compensation for killing of her son in the fake encounter and thereby causing gross violation of article 21 and article 22 of the Constitution of India. The Supreme Court, reframed from expressing any opinion on the allegation made by either side but thought it is wise to have the incident investigated by the independent agency like CBI so that it bears credibility. The Apex Court felt that no matters how faithfully and honestly the local police may carry out investigation .The Court acts merely in the public interest. It is trite law that accused person don't have to say in the matter of appointment of the investigating agency. The accused person cannot choose as which investigating agency must investigate and alleged offence committed by them. The Supreme Court thought it would be advisable and desirable and interest of justice to entrust the investigation at early date to the independent agency like CBI .Since CBI has been investigating the case of Soharubuddin fake encounter case and this case seems to relates to the part of transaction as alleged by petitioner thereby above investigation is entrusted to CBI.

In *Rohtas Kumar V State of Haryana*[19] the Supreme Court held that while inquiring whether the encounter is genuine or not, the Tahsildar, is carried away by the fact that six FIRs are registered against Sunil (deceased) and that he is a proclaimed offender. The inquiring authority must first focus its attention on the circumstances that led to the death of a person in an encounter. If it comes to a conclusion that it was the deceased who had attacked the police to prevent them from arresting him or to prevent them from performing their public duty and, therefore, the police had to retaliate, then the antecedents of the deceased could be taken into consideration as additional material at that stage to support the police version that it was a genuine encounter. But the inquiring authority cannot start the inquiry keeping in mind the antecedents of the deceased. The Tahsildar was in error in doing so. The Tahsildar has placed reliance on the statements of two chance witnesses, both named Amar Singh, who were allegedly present at the time of encounter.

[19] (2013) 14 SCC 434

The Sessions Judge has, therefore, merely reproduced his evidence and has not given any weightage to it. Reliance placed by the Tahsildar on the statements of these two chance witnesses weakens his report further. After notice was issued by this Court, the Additional Deputy Commissioner conducted an inquiry and submitted his report dated 7/1/2011. This report places reliance on the earlier report of the Tahsildar which we have found to be not satisfactory. This report places the burden of proof on the appellant. We find it difficult to accept the report of the Additional Deputy Commissioner which concurs with the Tahsildars finding that the encounter was genuine.

The High Court has erroneously observed that the appellant has failed to bring on record anything to establish his case of false encounter. All the relevant circumstances were completely overlooked by it. In the circumstances, the High Court order impugned in this appeal will have to be set aside. What disturbs us is the fact that the police have refused to follow the guidelines dated 2/12/2003 issued by the National Human Rights Commission. The two crucial guidelines which have been completely ignored by the police are that the investigation into the encounter death must be done by an independent investigation agency and that whenever a complaint is made against the police making out a case of culpable homicide, an FIR must be registered. In the instant case, the police have refused to even register the FIR on the complaint made by the appellant alleging that his son Sunil was killed by the police. Section 154 of the Code mandates that whenever a complaint discloses a cognizable offence, an FIR must be registered. This Court has, in a catena of judgments, laid down that the police must register an FIR if a cognizable offence is disclosed in the complaint. Ignoring the mandate of Section 154 of the Code and the law laid down by this Court, the police have merely conducted inquiries which appear to be an eyewash. It is distressing to note that till date, no FIR has been registered on the complaint made by the appellant. The only FIR which was registered is against Umesh under Sections 332, 353, 307 read with Section 34 of the IPC at the instance of ASI Ram Sarup. In that case, Umesh has been acquitted. Once this come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as rightly pointed out by learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. The Supreme Court are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage. The Supreme Court shared the pain and anguish of the appellant, who has lost his son in what appears to be a fake encounter. He has conveyed to Supreme Court that he is not interested in money but he wants a fresh investigation to be conducted. While Supreme Court respected the feelings of the appellant, but the fresh investigation was not directed. The Supreme Court directed respondent 1 State of Haryana to pay a sum of Rs.20 lakhs to the appellant as compensation for the pain and suffering undergone by him on account of loss of his son - Sunil. The payment be made by demand draft drawn in favour of the appellant Rohtash Kumar within a period of one month from the date of the receipt of this order. In the same case Court cautioned against the use of retaliatory force even against a dreaded criminal. It was held:

"It also appears that he [the appellant] was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given case if a dreaded criminal launches a murderous attack on the police to prevent them from doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed. That could be a case of genuine encounter. But in the facts of this case, we are unable to draw such a conclusion."

In *Peoples Union for Civil Liberties v. Union of India and another*[20], the Court earlier dealt with a similar issue from Manipur itself. In the above case, it was alleged that two persons along with others were seized by the police and taken in a truck to a distant place and shot there. In an inquiry by the District and Sessions Judge, Manipur (West), held on the direction of this Court, the allegation was found to be correct. In that case, dealing with question of the

[20] AIR 1997 SC 1203

right to life in a situation where the State was infested with terrorism and insurgency, the Apex Court in the judgment observed that the submission by Ms S. Janani, the learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organizations, that they have been indulging in a number of crimes affecting the public order indeed, affecting the security of the State. It is submitted that there have been regular encounters and exchange of fire between police and terrorists on a number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought.

The Court cannot be blind to the fact that even after fifty years of our independence our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. Administrative liquidation was certainly not a course open to them. The Supreme Court opinioned that award of compensation of Rs. 1,00,000 (Rupees one lakh only) to the families of each of the deceased would be appropriate and just. The same shall be paid by the Government of Manipur. The Collector/District Magistrate, Churachandpur shall hand over the cheques to the respective families of the deceased, namely Lalbeiklien and Saikaplien, within two months from today.

The People's Union for Civil Liberties, which has filed this writ petition and pursued it all these years shall be entitled to its costs, assessed at Rs. 10,000. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, the Apex Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two? A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first the criminal or society, the law violator or the law abider; of meeting the challenge which Supreme Court so forthrightly met when it wrestled with a similar task of balancing individual rights against society's rights. The society came first, and that the criminal should not go free because the blundered investigation of police.

The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the delinquent police officer. There are dangers in any choice. The rule of law strikes a balance between opposing interests. The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise. The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

In *Extrajudicial Execution Victim Family Association and Another V. Union of India*[21] the Supreme Court reiterate what was earlier said by the Court in Peoples Union for Civil Liberties. In 1997, in the Peoples Union for Civil Liberties the Court, dealing with the case of killing of two persons in Manipur had cautioned the State against Administrative liquidation. But, after 15 years in this case, Apex Court faced with similar allegations on a much larger scale. The Supreme Court observed that the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgency are indeed the most grievous loss. But to the State it is not open to cite the numbers of policemen and security forces killed to justify custodial death, fake encounter or what this Court had called Administrative liquidation. It is simply not permitted by the Constitution. And in a situation where the Court finds a person’s rights, especially the right to life under assault by the State or the agencies of the State, it must step-in and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution. That is the role of this Court and it would perform it under all circumstances. We, thus, find that the third plea raised in the counter affidavit is equally without substance. The writ petitioners make the prayer to constitute a Special Investigation Team comprising police officers from outside Manipur to investigate the cases of unlawful killings listed in the writ petition and to prosecute the alleged offenders but at this stage we are not

[21] (2013) 2 SCC 493

inclined to appoint any Special investigation Team or to direct any investigation under the Code of Criminal Procedure. Instead, we would first like to be fully satisfied about the truth of the allegations concerning the cases cited by the writ petitioners. To that end, we propose to appoint a high powered commission that would tell us the correct facts in regard to the killings of victims in the cases cited by the petitioners. The Supreme Court, accordingly, constitute a three-member commission as under:

1. Mr. Justice N. Santosh Hegde, a former Judge of the Supreme Court of India, as Chairperson
2. Mr. J. M. Lyngdoh, former Chief Election Commissioner, as Member
3. Mr. Ajay Kumar Singh, former DGP and IGP, Karnataka.

The Commission have to make a thorough enquiry in the first six cases as detailed in Compilation 1, filed by the petitioners and record a finding regarding the past antecedents of the victims and the circumstances in which they were killed. The State Government and all other concerned agencies are directed to hand over to the Commission, without any delay, all records, materials and evidences relating to the cases, as directed above, for holding the enquiry. It will be open to the Commission to take statements of witnesses in connection with the enquiry conducted by it and it will, of course, be free to devise its own procedure for holding the enquiry. In light of the enquiries made by it, the Commission will also address the larger question of the role of the State Police and the security forces in Manipur. The Commission will also make a report regarding the functioning of the State Police and security forces in the State of Manipur and in case it finds that the actions of the police and/or the security forces transgress the legal bounds the Commission shall make its recommendations for keeping the police and the security forces within the legal bounds without compromising the fight against insurgency.[22]

The commission found that all six cases the encounter of the victim was not genuine not a true encounter with the police or security forces. The commission held that Md. Azad Khan was not killed in the genuine encounter nor he was killed in exercise of exercise of right of private defence. Nor there is

[22]ibid

evidence that the deceased was the activist member of banned organization. The High Court of Manipur awarded 5 lac as the compensation to the mother of deceased as reported by NHRC since Assam Rifles and Manipur Police was held responsible. In case of Khumbongmayum Orsonjit it was held by the commission the incident in which the deceased died is not the case of not encounter nor can security forces that it was in the exercise of their right of private defence. The deceased did not had any adverse criminal antecedents. In the third case of Nameirakpam Govind Meitei & Namerakpam Nobo Meitei the incident in question is not encounter but an operation by security forces wherein death of victim was caused knowingly. The two deceased had no criminal antecedents. In case of Elangbam Kiranjit Singh the security forces their exceeded their right of private defence. The adverse antecedents against the deceased were not found. In the case of Chongtham Umakanta was killed in an encounter or in self-defence cannot be accepted. In case of Akoijam Priyobrata @ Bochou Singh it was held by Commission that the deceased did not died in the encounter. The Court laid down 3 broad principles after the discussion- (1) the public order situation in Manipur is, at best, at internal disturbance. There is not threat to the security of the country or a part thereof either by war, external aggression or armed rebellion. (2) For tackling the internal disturbance, the armed forces can be deployed in aid of civil power. The armed forces do not supplant the civil administration but also only supplements it.(3) The deployment of armed forces is intended to restore normalcy and it would be extremely odd if normalcy was not restored in some reasonable period ,certainly not indefinite period or indeterminate period.

A distinction must be drawn between the right of self-defence or private defence and use of excessive force or retaliation. Very simply put, the right of self-defence or private defence is a right that can be exercised to defend oneself but not to retaliate.[23] This view was reiterated but expressed somewhat differently in *Rajesh Kumar v. Dharamvir*.[24] When it was said: "To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused

[23] (2014) 5 SCC 697
[24] (1997) 4 SCC 498

persons of the charges levelled against them by bestowing on them the right to retaliate and attack the complainant party." A similar opinion was expressed somewhat more lucidly in *V. Subramani v. State of Tamil Nadu*.[25] when it was said: "Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negative. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact." Reference may be made to *Darshan Singh v. State of Punjab*.[26] Wherein the Court held: "When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also a settled position of law that a right of self-defence is only a right to defend oneself and not to retaliate. It is not a right to take revenge." From the above, it is abundantly clear that the right of self-defence or private defence falls in one basket and use of excessive force or retaliatory force falls in another basket. Therefore, while a victim of aggression has a right of private defence or self-defence (recognized by Sections 96 to 106 of the IPC) if that victim exceeds the right of private defence or self-defence by using excessive force or retaliatory measures, he then becomes an aggressor and commits a punishable offence. Unfortunately occasionally, use of excessive force or retaliation leads to the death of the original aggressor. When the State uses such excessive or retaliatory force leading to death, it is referred to as an extra-judicial killing or an extra-judicial execution. Society and the courts obviously cannot and do not accept such a death caused by the State since it is destructive of the rule of law and plainly unconstitutional. The problem before the courts tends to become vexed when the victims are alleged to be militants,

[25] (2005) 10 SCC 358
[26] (2010) 2 SCC 333

insurgents or terrorists. In such cases, how does anyone (including the court) assess the degree of force required in a given situation and whether it was excessive and retaliatory or not? Scrutiny by the courts in such cases leads to complaints by the State of its having to fight militants, insurgents and terrorists with one hand tied behind its back. This is not a valid criticism since, and this is important, in such cases it is not the encounter or the operation that is under scrutiny but the smoking gun that is under scrutiny. There is a qualitative difference between use of force in an operation and use of such deadly force that is akin to using a sledgehammer to kill a fly; one is an act of self-defence while the other is an act of retaliation.

This concern, both from the perspective of the State and from the perspective of preserving and protecting human rights of a citizen is adverted to by Prof. Aharon Barak a former President of the Supreme Court of Israel who acknowledges that sometimes a democracy must fight with one hand tied behind its back in the following words: “While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our Court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts: “We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.” It is this preservation of the rule of law, recognition of human rights and check on the abuse or misuse of power that has been the highlight of a few decisions placed before us. In *Matajog Dobey v. H.C. Bhari*[27] a cautious step by step approach was advocated by the Constitution Bench of this Court in the matter of grant of sanction to prosecute an official under the provisions of the Code of Criminal Procedure, 1898. The first step is to ascertain whether the act complained of is an

[27] (1955) 2 SCR 925

offence and the second step is to determine whether it was committed in the discharge of official duty. "There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits.

Whether the act and the official duty are so inter-related that one can postulate done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation." Causing the death of a person is certainly an offence, but whether there was a "reasonable connection" between the death and the official act or whether excessive force or retaliatory force was used in the act has to be determined at an appropriate stage. It does not matter whether the victim was a common person or a militant or a terrorist, nor does it matter whether the aggressor was a common person or the State. The law is the same for both and is equally applicable to both. It is for this reason that with regard to the abuse or misuse of power by the State the Supreme Court expressed the following view in Naga People's Movement of Human Rights[28] in paragraph 61 of the Report:

"In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act [the AFSPA] should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the State and the requisite sanction under Section 6 of the Central Act should be granted for instruction of prosecution and/or a civil suit or other proceedings against the person/persons responsible for such violation."

In other words, the decision of the Constitution Bench requires that every death caused by the armed forces, including in the disturbed area of Manipur "should be thoroughly enquired into" if there is a complaint or allegation of abuse or misuse of power. All of us are bound by this direction of the

[28] (1998) 2 SCC 109

Constitution Bench which has been given to assure the people that there is no abuse or misuse of power by the armed forces.

In *PUCL v. State of Maharashtra*[29] the Supreme Court of India heard on the question of the procedure to be followed in the investigating police encounter held that:

Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.

If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under Section 157 of the Code without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code shall be followed.

- An independent investigation into the incident/encounter shall be conducted by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek:
- To identify the victim; colour photographs of the victim should be taken.
- To recover and preserve evidentiary material, including blood-stained earth, Hairs, fibres and threads, etc., related to the death.
- To identify scene witnesses with complete names, addresses and telephone numbers and obtain their statements (including the statements of police personnel involved) concerning the death;

[29] AIR 2014 SCC 119

- To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and time of death as well as any pattern or practice that may have brought about the death;
- It must be ensured that intact fingerprints of deceased are sent for chemical analysis. Any other fingerprints should be located, developed, lifted and sent for chemical analysis;
- Post-mortem must be conducted by two doctors in the District Hospital, one of them, as far as possible, should be In- charge/Head of the District Hospital. Post-mortem shall be video- graphed and preserved;
- Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases should be taken and preserved. Wherever applicable, tests for gunshot residue and trace metal detection should be performed.
- The cause of death should be found out, whether it was natural death, accidental death, suicide or homicide.

A Magisterial inquiry under Section 176 of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to Judicial Magistrate having jurisdiction under Section 190 of the Code.

The involvement of NHRC is not necessary unless there is serious doubt about independent and impartial investigation. However, the information of the incident without any delay must be sent to NHRC or the State Human Rights Commission, as the case may be.

The injured criminal/victim should be provided medical aid and his/her statement recorded by the Magistrate or Medical Officer with certificate of fitness.

It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc., to the concerned Court.

After full investigation into the incident, the report should be sent to the competent court under Section 173 of the Code. The trial, pursuant to the chargesheet submitted by the Investigating Officer, must be concluded expeditiously.

In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.

Six monthly statements of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs. It must be ensured that the six monthly statements reach to NHRC by 15th day of January and July, respectively. The statements may be sent in the following format along with post mortem, inquest and, wherever available, the inquiry reports including

- Date and place of occurrence.
- Police Station, District. Circumstances leading to deaths: Self-defence in encounter. In the course of dispersal of unlawful assembly. In the course of affecting arrest.
- Brief facts of the incident.
- Criminal Case No.
- Investigating Agency.
- Findings of the Magisterial Inquiry/Inquiry by Senior Officers: disclosing, in particular, names and designation of police officials, if found responsible for the death; and
- Whether use of force was justified and action taken was lawful.

If on the conclusion of investigation the materials/evidence having come on record show that death had occurred by use of firearm amounting to offence under the IPC, disciplinary action against such officer must be promptly initiated and he be placed under suspension.

As regards compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357-A of the Code must be applied.

The police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis, including any other material, as required by the investigating team, subject to the rights under Article 20 of the Constitution.

An intimation about the incident must also be sent to the police officer's family and should the family need services of a lawyer / counselling, same must be offered.

No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officers is established beyond doubt.

If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above mentioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein.

The Supreme Court directed that above requirements /norms must be strictly observed in all cases of death and grievous injury in police encounter by treating them as law declared under Article 141 of the Constitution of India.

The Supreme Court in *Raghubir Singh v. State of Haryana*[30] while dealing with torture in police custody observed: We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torture some poignancy (when) the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order.

Similarly, in *Gauri Shanker Sharma etc. v. State of U.P.*[31] etc., the Supreme Court held it is generally difficult in cases of deaths in police custody

[30] AIR 1980 SC 1087
[31] AIR 1990 SC 709

to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case. The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.

In *Munshi Singh Gautam V. State of M.P.*[32] the Supreme Court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Court observed as under: Rarely in cases of police torture or custodial death, is direct ocular evidence available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues....The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged... The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law

[32] 2005 Cri LJ 320

unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve; otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.

In the *State of U.P. v. Mohd. Naim*[33], State of U.P. filed an appeal before this Court for expunging the following remarks made by the Allahabad High Court: That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.' Where every fish barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks. This Court held that such general remarks could not be justified nor were they necessary for disposal of the said case. The Court expunged the aforesaid adverse remarks. Undoubtedly, the Apex Court has been entertaining petition after petition involving the allegations of fake encounters and rapes by police personnel of States and in a large number of cases transferred the investigation itself to other agencies and particularly the CBI. Thus, in view of the above, in absence of any research/data/ material, a general/sweeping remark that a "substantial majority of the population in the country considered the police force as an institution which violates human rights" cannot be accepted. However, in a given case if there is some material on record to reveal the police atrocities, the court must take stern action against the erring police officials in accordance with law.

In *Brijlala Pd Sinha V. State of Bihar*[34] the Supreme Court held that the judgment of the High Court starts with the expression that the case may be treated " as one of the most sensational trials of the recent years, so far as the State of Bihar is concerned and according to the High Court the murder is a diabolical one because three innocent persons have been killed by the police

[33] AIR 1969 SC 703
[34] (1998) 5 SCC 699

officers who were supposed to be the protectors of law abiding citizens." We are constrained to observe that the High Court has not kept in view the several decisions of this Court and has not examined the circumstances proved while considering the question of sentence but on the other hand have been swayed away with the fact that trial is a sensational one, and therefore, the officials must be awarded the extreme penalty of death. We do not find that it is a correct appreciation of the law on the subject dealing with award of death penalty, even if a conviction under Section 302/34 I.P.C. is sustained. The learned Sessions Judge also came to the conclusion that the case can be treated to be a rarest of rare cases as police officials on whose shoulders the safety of citizens lie and are being the protectors of the society are accused for killing of three civilians without any provocation and resistance.

In *Andhra Pradesh Civil Liberties Committees and others V. State of A.P.*[35] the constitutional bench of A.P. High Court held that:

Where a police officer causes death of a person, acting or purporting to acting discharge of official duties or in self-defence as the case may be, the first information related to such circumstances (even when by a Police/Public Official; whether an alleged perpetrator is named or not) shall be recorded and registered as FIR, enumerating the relevant of Law,[36] and shall be investigated.[37]

The existence of circumstances bringing a case within any of the exception in the Indian Penal Code including the exercise of the right of private defence (a general exception in chapter IV IPC),cannot be conclusively determined during investigation. The opinion recorded by the Investigation Officer in the final report forwarded to the Magistrate[38], is only an opinion. Such opinion shall be considered by the Magistrate in the context of the record of investigation together with the material and evidence collected during the course of investigation. The Magistrate (not withstanding an opinion of the investigating officer, that no cognizable offence appears to have been committed ;that one or more or all of the accused are not culpable; or that the investigation discloses

[35] 2009 (1) ALD (Cri) 291
[36] Section 154 Criminal Procedure Code
[37] Section 156,157 Criminal Procedure Code
[38] Section 173 Criminal Procedure Code

that the death of civilian in a police encounter is not culpable in view of legitimate exercise by the police of the right of private defence), shall critically examine the entirely of the evidence collected during Investigation to ascertain whether the opinion of the Investigating Officer is borne out by the record of investigation. The Magistrate has the discretion to disregard the opinion and take cognizance of the offence.[39]

A Magisterial enquiry (inquest)[40] is neither a substitute nor an alternative to the obligation to record the information as FIR and to conduct investigation into facts and circumstances of the case and if necessary to take measure for the discovery and arrest of the offender.[41]

In view of the conclusion on issues No's 1 to 3 and in view of our declaration [that the information conveyed to the officer in charge of the police station[42] or a complaint made to the Magistrate[43] need not mention the name of the police officers who the complainant believes is the perpetrator of the offence complaint of , it is not necessary to pronounce on whether the state, the police Establishment or the Police Officer has immunity from the obligation to disclose the identity (of a police officer who had committed an act causing the death of a person), to a person aggrieved by such death to effectively seek justice. Whether the investigating officer is required to disclose the names of the police officer who are involved in the operation resulting in civilian casualty when a request for such information is lodged by an individual, is an issue not within the spectrum of the issues falling for our determination. The obligation to disclose to the investigating officer the identity of police officer involve, is however absolute and there is no immunity what so ever from this obligation. Withholding of any information or material that impedes effective or expeditious investigation violates several provisions of the Indian Penal Code and the Criminal Procedure Code.

[39] Section 190 Criminal Procedure Code
[40] Section 174 to 176 Criminal Procedure Code
[41] Section 154(1),156 and 157 Criminal Procedure Code
[42] Section 154(1) Criminal Procedure Code
[43]chap XV Sec 200 Criminal Procedure Code

A Special Leave Petition was filed immediately by Police Officers Association of Andhra Pradesh against final judgment passed by A.P. High Court in Supreme Court of India named as M/S A.P. Police Association V.A.P. Civil Liberties Committees and others. The Supreme Court of India passed interim stay in the A.P. High Court judgment in the SLP. The matter is sub-judice since 2009 before the full bench of Supreme Court of India.

In *Paramjit Kaur V. State of Punjab and Others*[44] the Supreme Court laid down following principle:

Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to future public duty. However authority cannot be camouflaged to commit crime.

Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent 197 Cr.P.C has to be construed narrowly and in restricted manner.

Even in fact of the case when public servant has exceeded in his duty if there is reasonable connection it will not reprieve him of protection u/s 197 Cr.P.C. There cannot be universal rule to determine whether there is a reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under section197 Cr.P.C, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit crime. In case offence was incomplete without proving, the official act, ordinarily the provision of 197 Cr.P.C would apply.

[44] (1996) 7 SCC 20

In case sanction is necessary it has to be decided by the competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not the sanctioning authority.

Question of sanction should be dealt with stage of taking cognizance, but if the taken cognizance erroneously and same comes to notice of court later stage, finding to the effect is permissible and such a plea can be taken on first time before appellate court. It may arise at inception itself. There is no requirement that accused must wait till the framing of charge.

Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in the light of evidence adduced after conclusion of trial or any other appropriate stage.

Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial.

In *Devinder Singh and others V State of Punjab*[45] case, the allegation as per the prosecution case it was a case of fake encounter or death caused by torture whereas the defence of the accused person is that it was a case in discharge of official duty and as the deceased was involved in the terrorist activities and while maintaining law and order the incident has taken place. The incident was in the course of discharge of official duty. Considering the aforesaid principles in case the version of the prosecution is found to be correct there is no

[45] Criminal appeal no 190 of 2003 S.C.

requirement of any sanction. However it would be open to the accused persons to adduce the evidence in defence and to submit such other materials on record indicating that the incident has taken place in discharge of their official duties and the orders passed earlier would not come in the way of the trial court to decide the question afresh in the light of the aforesaid principles from stage to stage or even at the time of conclusion of the trial at the time of judgment. As at this stage it cannot be said which version is correct. The trial court has prima facie to proceed on the basis of prosecution version and can re-decide the question afresh in case from the evidence adduced by the prosecution or by the accused or in any other manner it comes to the notice of the court that there was a reasonable nexus of the incident with discharge of official duty, the court shall re-examine the question of sanction and take decision in accordance with law. The trial to proceed on the aforesaid basis. The Supreme Court disposed of the petition with the direction.

In General Officer Commanding, *Rashtriya Rifles v. Central Bureau of Investigation & Another*[46] in which this Court has observed that it is for the competent authority to decide the question of sanction whether it is necessary or not and not by the court as sanction has to be issued only on the basis of sound objective assessment and not otherwise. Prior sanction is a condition precedent. The Supreme Court has laid down that the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have a reasonable connection, interrelationship or is inseparably connected with discharge of his duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without

[46] 2012(6) SCC 228

sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority.

In *Om Prakash v. State of Jharkhand*[47] and observed that the question, whether sanction is necessary or not, may arise on any stage of the proceedings, and in a given case, it may arise at the stage of inception The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. In the case allegation against the accused persons was that the complainant's son was killed by them in a fake police encounter. The Court held that the encounter was a genuine one though NHRC guideline for photography of the autopsy was not complied with.

[47] 2012 (12) SCC 72

5.3 ROLE OF GOVERNMENT IN PROTECTION FROM UNLAWFUL KILLING

In *Prakash Singh V Union of India*[48] the Supreme Court gave following guidelines for police reforms. The following directions to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislations:

5.3.1 State Security Commission

The State Governments are directed to constitute a State Security Commission in every State to ensure that the State Government does not exercise unwarranted influence or pressure on the State police and for laying down the broad policy guidelines so that the State police always acts according to the laws of the land and the Constitution of the country. This watchdog body shall be headed by the Chief Minister or Home Minister as Chairman and have the DGP of the State as its ex-officio Secretary. The other members of the Commission shall be chosen in such a manner that it is able to function independent of Government control. For this purpose, the State may choose any of the models recommended by the National Human Rights Commission, the Ribeiro Committee or the Sorabjee Committee, which are as under: The Chief Minister as chairman of the commission .The recommendations of this Commission shall be binding on the State Government. The functions of the State Security Commission would include laying down the broad policies and giving directions for the performance of the preventive tasks and service oriented functions of the police, evaluation of the performance of the State police and preparing a report thereon for being placed before the State legislature.

5.3.2 Selection and Minimum Tenure of DGP:

The Director General of Police of the State shall be selected by the State Government from amongst the three senior-most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and range of experience for heading the police force. And, once he has been selected for the

[48] (2006) 8 SCC 1

job, he should have a minimum tenure of at least two years irrespective of his date of superannuation. The DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission consequent upon any action taken against him under the All India Services (Discipline and Appeal) Rules or following his conviction in a court of law in a criminal offence or in a case of corruption, or if he is otherwise incapacitated from discharging his duties.

5.3.3 Minimum Tenure of I.G. of Police & other officers

Police Officers on operational duties in the field like the Inspector General of Police in-charge Zone, Deputy Inspector General of Police in-charge Range, Superintendent of Police in-charge district and Station House Officer in-charge of a Police Station shall also have a prescribed minimum tenure of two years unless it is found necessary to remove them prematurely following disciplinary proceedings against them or their conviction in a criminal offence or in a case of corruption or if the incumbent is otherwise incapacitated from discharging his responsibilities. This would be subject to promotion and retirement of the officer.

5.3.4 Separation of Investigation

The investigating police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, be ensured that there is full coordination between the two wings. The separation, to start with, may be effected in towns/urban areas which have a population of ten lakhs or more, and gradually extended to smaller towns/urban areas also.

5.3.5 Police Establishment Board:

There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State

Government may interfere with decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorized to make appropriate recommendations to the State Government regarding the posting and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotion / transfer / disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.

5.3.6 Police Complaints Authority

There shall be a Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police. Similarly, there should be another Police Complaints Authority at the State level to look into complaints against officers of the rank of Superintendent of Police and above. The district level Authority may be headed by a retired District Judge while the State level Authority may be headed by a retired Judge of the High Court/Supreme Court. The head of the State level Complaints Authority shall be chosen by the State Government out of a panel of names proposed by the Chief Justice; the head of the district level Complaints Authority may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of the High Court nominated by him. These Authorities may be assisted by three to five members depending upon the volume of complaints in different States/districts, and they shall be selected by the State Government from a panel prepared by the State Human Rights Commission/Lok Ayukta/State Public Service Commission. The panel may include members from amongst retired civil servants, police officers or officers from any other department, or from the civil society. They would work whole time for the Authority and would have to be suitably remunerated for the services rendered by them. The Authority may also need the services of regular staff to conduct field inquiries. For this purpose, they may utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organization. The State level Complaints

Authority would take cognizance of only allegations of serious misconduct by the police personnel, which would include incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority would, apart from above cases, may also inquire into allegations of extortion, land/house grabbing or any incident involving serious abuse of authority. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority.

5.3.7 National Security Commission

The Central Government shall also set up a National Security Commission at the Union level to prepare a panel for being placed before the appropriate Appointing Authority, for selection and placement of Chiefs of the Central Police Organisations (CPO), who should also be given a minimum tenure of two years. The Commission would also review from time to time measures to upgrade the effectiveness of these forces, improve the service conditions of its personnel, ensure that there is proper coordination between them and that the forces are generally utilized for the purposes they were raised and make recommendations in that behalf. The National Security Commission could be headed by the Union Home Minister and comprise heads of the CPOs and a couple of security experts as members with the Union Home Secretary as its Secretary. The aforesaid directions shall be complied with by the Central Government, State Governments or Union Territories, as the case may be, on or before 31st December, 2006 so that the bodies afore-noted became operational on the onset of the new year. The Cabinet Secretary, Government of India and the Chief Secretaries of State Governments/Union Territories are directed to file affidavits of compliance by 3rd January, 2007.

5.4 RELEVANT DOMESTIC LAW PROTECTIONS

As provided above, under international law, the right to a remedy includes a comprehensive set of state obligations, of which India has assumed some, but not all.[49]

The right to justice obligates India to prosecute perpetrators of genocide and individuals who commit grave breaches during times of international armed conflict. For the right to truth, as a state that has signed but not ratified the CED, India arguably should not frustrate mechanisms that facilitate an individuals' ability to access the truth about enforced disappearances. Additionally, persuasive sources increasingly recognize the right to truth, and advocates can point to such non-binding legal authority as part of their advocacy strategy in India. Concerning the right to reparation, India must end the violations of rights set out in the treaties to which it is a party, including the ICCPR[50] and CERD,[51] and provide redress that aims to wholly restore the harmed individual. India also has a duty to provide guarantees of non-recurrence that effectively prevent future violations of the human rights norms established in these treaties.

This section analyzes the extent to which India's domestic law is consistent with the country's obligations under international human rights and international humanitarian law. Although the right to a remedy, as guaranteed in the ICCPR, encompasses judicial, administrative, and legislative remedies, this paper focuses exclusively on Indian legislative remedies and analyzes the extent to which these comport with international norms.

Because India is a dualist country,[52] international treaties do not automatically become law until Parliament legislates the provisions into binding

[49]India has completed these steps for the treaties it has ratified, including the Genocide Convention, the Geneva Conventions, and the ICCPR.
[50]Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 11, U.N. Doc.
[51]Art. 14; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, G.A. Res. 2106 (XX)
[52]Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law*, *in* max planck encyclopedia of public international law 2 (2011). Dualism is the theory that international law and municipal law are separate, independent legal orders that require special provisions to function together; this differs from monism, which is a theory combining international law and municipal law into one legal order. *Id.* at 4-18.

legal obligations enforce able by municipal courts.[53] The discussion in this section begins with an examination of the Indian Constitution and the human rights conferred therein. It then examines six domestic instruments that affect the individual's right to a remedy for enforced disappearances in India. Finally, through an analysis of the weaknesses in India's legal structure and enforcement mechanisms, the paper argues that India fails to fulfil its international legal obligations to guarantee the right to a remedy for enforced disappearances.

The Constitution of India, adopted in 1950, provides a comprehensive legal framework for human rights enforcement. Part III of the Constitution on Fundamental Rights provides justiciable civil and political rights, including the right to equality and freedom from discrimination.[54] Part IV of the Constitution on the Directive Principles of State Policy outlines social, economic and cultural rights that are non-justiciable and serve as guidelines to frame laws.[55] The Supreme Court has interpreted these non-justiciable rights, for example, interpreting the right to life in Article 21 of the Constitution to guarantee the right to life with dignity. The Constitution also provides individuals with the right to file a claim with the highest court of the land when a justiciable rights violation of the Constitution or another law, has occurred.[56]

In 1994, India adopted the Protection of Human Rights Act (PHRA), which defines "human rights" as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."[57] While international treaties are not self-executing and do not entitle individuals to bring international legal claims in domestic courts, under this Act, India is expected to "foster respect for international treaties."[58]

---

[53]S.K. Verma, *National Attitudes Towards International Humanitarian Law in South Asia*, *in* International Humanitarian Law In South Asia 52 (V.S. Mani ed., 2007)

[54]Special Rapporteur on the Situation of Human Rights Defenders, *Mission to India*, 13, *delivered to the Human Rights Council*, U.N. Doc., and A/HRC/19/55/Add.1. (by Margaret Sekaggya) [hereinafter Sekaggya]

[55]Id para 10

[56]India Const. art. 32 (a similar provision exists for the States and their High Courts under Article 226); *see also* Office of the High Commissioner of Human Rights, *Summary: India*, 21, U.N. Doc., A/HRC/WG.6/13/IND/1 (June. 30, 2017) [hereinafter *OHCHR Summary*].

[57]Sekaggya, *supra* note 45, at 11.

[58]*Id.* at 25 (*citing* India Const. art. 51(c)).

India has passed several pieces of legislation that may be used by victims of enforced disappearances to access their international right to a remedy. These domestic laws include the Right to Information Act, the Prevention of Torture Bill, and the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill. Together, these acts protect the right to truth and the right to justice by enabling individuals to request that the state provide information and investigate violations.

India also created the National Human Rights Commission through the PHRA, which, as discussed below, protects the right to a remedy in a variety of ways. At the same time, India has passed several restrictive acts such as the Armed Forces Special Powers Act and the Prevention of Terrorism Act that curtail the right to a remedy by creating a widespread system of impunity for human rights violations.

5.5 CONCLUSION

The international legal framework applicable to right to remedy for enforced disappearance offers advocates for domestic reform in India important guidance and support. India has assumed obligations under international law that require the state to guarantee the right to a remedy for this serious human rights violations, including enforced disappearances. The contemporary understanding of the right to a remedy encompasses the rights to justice, truth, reparation, and guarantees of non-recurrence.

Furthermore, remedies provided by the state must be effective in order to comport with international law. Measured against these standards, India's domestic laws and practice are not consistent with international law and human rights standards. By identifying both the applicable standards and shortcoming of the Indian state in the area of the right to remedy, this paper provides human rights advocates with a tool to aid their efforts to ensure that India ensures victims are able to exercise their right to a full and effective remedy for enforced disappearances.

The role of Indian Judiciary and the scope of judicial interpretation have expanded remarkably in recent times, partly because of the tremendous growth of statutory intervention in present era. The Judiciary plays an important role in the protection of the fundamental rights of citizen. The Supreme Court constructed Article 21 of the Constitution to include the prohibition of torture and inhuman and degrading treatment. The efforts of the Supreme Court to incorporate the prohibition on torture and inhuman and degrading treatment into the domestic law, the Court has, in the absence of specific laws regarding the treatment of detainees and prisoners, intervened and ordered reforms and improvements to the system to prevent abuses in custody. In addition to giving expansive readings to fundamental constitutional rights, the Supreme Court has issued a number of guidelines - predominantly cases of custodial death, fake encounter and custodial torture – that seek to give added practical protection for citizens from violations of their constitutional rights. The Supreme Court has provided compensation to the kith & kins of the victim of extrajudicial killing. It has constituted the judicial enquiry to the alleged fake encounter cases & dealt with the iron hands against the violators.

Chapter 6

CONCLUSION AND SUGGESTIONS

Respect for human rights lies at the heart of good governance. In a democratic society, it is the responsibility of the State to protect and promote human rights. All State institutions whether they are the police department, the army, the judiciary or civil administration have a duty to respect human rights, prevent human rights violations, and take active steps for the promotion of human rights. The role of the police is especially significant in this respect. The police is charged with the responsibility of maintaining order and enforcing laws.

Unfortunately, many a time, while discharging this duty, actions of the police conflict with human rights. Police officers are pressured to get quick results, often with unofficial guarantees that they may use any means possible to accomplish the task at hand. However, the police as protectors of the law have both a legal duty and a moral obligation to uphold human rights standards and act strictly in accordance with the law and the spirit of our Constitution.

The presumption that everyone knows the law is a myth that causes needless suffering to millions of people in India. Especially those who are unlettered. Ignorance of laws. And the rights guaranteed by them. Facilitates blatant misuse of authority by law enforcers, whose job is to protect people's rights. Merely putting in place, provisions for the protection of human rights without empowering people through human rights education about the means to ensure their compliance is meaningless. Rule of law to be meaningful must meet the end of legal awareness.

One of the essential functions of the National Human Rights Commission (NHRC) is to spread a human rights culture, and to aid the empowerment of people for the better protection of human rights in the country. Non-governmental organizations in particular have been making a valuable contribution in this respect by sharing the responsibility of the State and the

NHRC. The Commonwealth Human Rights Initiative (CHRI) is one such organization actively involved in this effort.

While police officers must know the limits and nature of their authority, citizens too, must know their rights, even when they have to answer to the law. A proper balance of individual rights and public interest has to be achieved through the mechanism of the rule of law.

The law laid down by the Supreme Court is the law of the land and binds everyone. The Supreme Court decisions included in this compilation relate to matters impinging on the basic human rights of individuals to life and liberty, which are sacrosanct. The NHRC guidelines are meant to inform citizens as well as the police about their rights and duties; to enable people to protect themselves with this knowledge; and to guide the police in the performance of their task by indicating that any transgression would be illegal.

The Constitution - the supreme law of our country - entitles everyone living in India to protection of their human rights. Part III, the chapter on Fundamental Rights, which is referred to as the heart of the Constitution, guarantees basic human rights to all. It pledges that the State will safeguard human rights and will protect citizens from undue invasions on their liberty, security and privacy. The Supreme Court has over the years, explained and elaborated the scope of Fundamental Rights. They have strongly opposed intrusions upon them by agents of the State, by asserting that the rights and dignity of individuals must always be upheld. The Court has laid down certain directives for law enforcement. These directives deal with various aspects of police work at the station house or cutting edge level, such as registration of a case; conduct of an investigation; carrying out of an arrest; treatment of an arrested person; grant of bail; questioning of a suspect; and protection of the rights of women, poor and the disadvantaged. They also have the force of law. An officer who willfully or inadvertently ignores Supreme Court directives can be tried in court under relevant provisions of the Indian Penal Code and under the Contempt of Courts Act, 1971.

Apart from this the National Human Rights Commission [NHRC] too has issued guidelines for police officers. The Commission has been established under a special Act of Parliament to protect and promote the human rights of all people living in India. The National Human Rights Commission addresses violations of human rights by recommending registration of criminal cases against the guilty; disciplinary action against errant officers; and payment of compensation to the victims. Because an overwhelming majority of complaints received by the National Human Rights Commission concern the police, the Commission has made it mandatory to report any case of custodial death or rape within 24 hours and to provide it with a video-film of the post-mortem examination. The Commission has also issued guidelines to the police on encounter deaths; lie detector tests; arrest; and police-public relations. Guidelines of the National Human Rights Commission are increasingly being subject to positive interpretation by the courts. This means that officers accused of violating human rights may be called upon to explain why these guidelines were not followed.

While the directives/ guidelines mentioned here do comprise the core of the jurisprudence on human rights and policing, this is by no means an exhaustive list. The directives/ guidelines mentioned here lay out the correct procedure to be followed by Station House in the conduct of their official duties. Non- adherence to these judgements/guidelines is taken to be a sign of malafide intention and breach of good faith. It also invites legal and disciplinary action against the officer concerned.

The protection of Section 197 of the Code of Criminal Procedure only applies to acts done in the discharge of official duty. Assaulting a suspect during investigation; fabricating a false case; using abusive or threatening language; demanding a bribe; or indulging in unruly conduct are not a part of official duty. It is no part of an official’s duty to commit an offence and never can be.[1]

An unlawful killing by state forces is known as extra judicial killing or extrajudicial execution. It is the killing of a person by governmental authorities without the sanction of any legal process or judicial proceedings. Extrajudicial punishments are mostly seen by humanity to be unethical, since they bypass the due process of the legal jurisdiction in which they occur. Extrajudicial

[1] Ratan Lal & Dhirajlal: Code of Criminal Procedure, Wadhwa & Company, Nagpur 2002, page 636

killings often target leading political, trade union, dissident, religious, and social figures and it is carried out by the state government or other state authorities like the armed forces or police force, as extra-legal fulfillment of their prescribed role. This does not include cases where aforementioned authorities act under motives that serve their own interests and not the State's, such as to eliminate their complicity in crime or commissioning by an outside party.[2]

Major human rights problems included reported extrajudicial killings of persons in custody, killings of protesters, and torture and rape by police and other security forces. Investigations into individual abuses and legal punishment for perpetrators occurred, but for many abuses, a lack of accountability due to weak law enforcement, a lack of trained police, and an overburdened court system created an atmosphere of impunity; lengthy court backlogs prolong the latter. Poor prison conditions and lengthy detentions were significant problems. Unlike in previous years,[3] there were no instances of officials using antiterrorism legislation to justify excessive use of force; however, indiscriminate use of force by Border Security Forces was a problem. Corruption existed at all levels of government and police. There were reports of delays in obtaining legal redress for past attacks against minorities. The law in some states restricted religious conversion, but there were no reports of convictions under these restrictions. Violence associated with caste bias occurred. Domestic violence, child marriage, bonded labour, dowry-related deaths, honour crimes, and female feticide remained serious problems.

In order to eradicate extrajudicial punishments the United Nations investigates the cases of extrajudicial punishments, responds immediately to reports of such activity, negotiates and discuss the violations with the country's government, and employs suitable international legal procedure and human rights protection.

Moreover, many jurisdictions lack reliable counts of extra-judicial killings over time. Data difficulties such as these inhibit confident conclusions, but the available evidence does seem to suggest that the trajectories of capital

---

[2] Reyes, Ruben. "Extrajudicial Killings and Unexplained Disappearances". Court of Appeals. Retrieved 17 July 2017

[3] In the year of 2008 and 2009

punishment and proactive extra-judicial killing tend to track each other. This finding is important because it indicates that Asia's recent death penalty declines may reflect improvement in other spheres of state activity, and because it means Asian governments tend not to "compensate" for reductions in their use of capital punishment by conducting more extra-judicial executions.[4] There are two observations about the distribution of Asian nations across the two categories of state killing which is discussed in the above chapters. First, there are at most five nations that conduct judicial executions at a "high" level of frequency (China, North Korea, Vietnam, Pakistan, and Singapore, and the last three of those could be considered borderline in some recent years), and four of the five also rank "high" on the index of extra-judicial killing The only exception is Singapore, where judicial executions are common but extrajudicial killings are all but unknown. Were it not for this city-state, I would be tempted to conclude that governments that kill a lot legally have little compunction about killing illegally as well. Second, even though the large majority of Asian nations conducts few or no judicial executions, extra-judicial killing remains common in many parts of the region, including nations that have formally abolished the death penalty, such as the Philippines and Cambodia, and nations that seldom conduct judicial executions, such as in India.[5]

In many countries, the law says minimum force should be applied to arrests and every person has the right to seek a trial. I the cases of "crossfire" and "encounters", however, we find that these legal provisions are being totally ignored.

The constitution of Bangladesh states, "To enjoy the protection of law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property person of any person shall be taken except in accordance with the law".

[4]"Document – India: Jammu/Kashmir government should implement human rights program | Amnesty International". *Amnesty.org. 27 October 2002*. Retrieved 2017-07-18.
[5]Mehta, Suketu. 2004. Maximum City: Bombay Lost and Found. New York: Vintage Books.

A law providing for the deprivation of life or personal liberty must be objectively reasonable, and the court will inquire whether for an ordinary prudent person such a law is reasonable, having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the state or of society necessitates the deprivation of one's life and personal liberty.

Extra-judicial killing persists in several Asian nations that have abolished capital punishment or nearly abandoned the practice of judicial execution. One result is that there appears to be little correlation between a state's level of extra-judicial killing and its death penalty policy, at least when the two types of killing are examined at a single point in time. But a different pattern emerges in temporal perspective, for judicial and extrajudicial executions seem to have declined over time in several Asian jurisdictions, including Japan, South Korea, Taiwan, China, Cambodia, Indonesia, Burma, Bangladesh, the Philippines, and probably Nepal.

The evidence is too thin and the relationship between judicial and extra-judicial killings too fuzzy to tell whether a similar historical pattern obtains in countries such as India and Thailand. Over the past several years there has been considerable proactive state killing in both of these nations.

India has had a long and complex history of administrative detention, and there are three detention regimes currently place in India. First under the Armed Forces (Special Powers) Act ("AFSPA"), the military may make warrantless arrests leading to preventive detention up to two years in officially declared "disturbed areas." Those arrests- which occur essentially outside judicial review-have led to widespread reports of torture and extrajudicial killings.

Second, the National Security Act ("NSA") permits state and federal officers to detain any individual up to twelve months "with a view to preventing him from acting in any manner prejudicial to" various state interests, including national security and public order. Those arrests include administrative review and offer modest procedural protections, but have been employed in practice to suppress dissent and to target minority groups. The use of prolonged detention without trial under these regimes has fostered human rights violations and enormous social unrest. The continued violations associated with the expanded military power have prompted widespread demonstrations and calls from numerous actors from the U.N. High Commissioner for Human Rights to local and international NGOs – for the AFSPA‟s repeal.

Third, India has recently experimented with a specific detention regime for terrorism suspect. The Prevention of Terrorism Act (POTA) effectively instituted a modified regime of detention without trial. The statute was often used to justify the incarceration without charge or trial of terrorist suspects for up to 180 days.

Moreover, the statute reversed the burden for bail so that a detainee had to show that there were reasonable grounds to believe that the accused was not guilty and unlikely to commit to commit any other offence while on bail. Judicial review was guaranteed, but *ex parte* evidence could be considered on a finding that disclosure could jeopardize public safety. Facing increased criticism and evidence of widespread abuses, legislators repealed POTA in 2004.

Despites their decades-long experimentation with preventive detention, there is no evidence that India and Israel have succeeded in reducing violence. Rather, their history suggests that long-term detention without trial contributes to a cycle of violence and crackdowns resulting in widespread abuse which, in turn, flames unrest and provides recruitment tools for terrorist organizations. And so on for decades, all without abating violence. It is familiar scenario, evoking the failed British experiments in Northern Ireland and the repressive regime of South Africa.

The number of cases in which the police personnel are accused of illegally detaining and torturing citizens is on the rise. The Supreme Court, in *Munshi Singh vs. State of MP*, decided in 2004, regretted that the concern it had shown two decades ago regarding custodial torture and deaths had fallen on deaf years. The situation did not seem to be showing any noticeable change, it said.

The Supreme Court, in *Sahadevan vs. State* (2002), said: "It is a pity that some police officers have not shed such methods even in the modern age. They must adopt some scientific methods instead of resorting to physical torture. If the custodians of law themselves indulge in committing crimes, no member of society is safe. If police officers who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more heinous than a game-keeper becoming a poacher."

In the latest case, *Sube Singh vs. State of Haryana* (2006) the Supreme Court lamented that the police have given room for an impression in the minds of the public that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased in the event of a murder) and subjecting them to third degree interrogation in the hope that someone will spill the beans.

More than a decade ago, the Law Commission said: "The alarming rise in custodial crimes has pricked the conscience of society and has evoked public outcry against the law-enforcing agencies".

The commission observed that it was mostly the poor and the downtrodden who were the victims. They are illegally detained and harassed in custody for days together without recording the arrest, in order to avoid legal procedures. There are no accurate figures of such incidents as most such incidents are hushed up. The public and the press have become more vigilant, and communications have become faster. Therefore more and more cases are exposed and taken to the court. This compilation of leading cases from the Supreme Court and the high Courts is only a sample. They are selected as they lay down the law and highlight certain common occurrences. The variety of situations in which the hapless victims are hounded cannot be exhaustive and compressed in a compact volume like this.

The Law Commission report gives some reasons why only the tip of the ice-berg is visible. Even if the police record the arrest and custody of a victim, a death in the police station is made to look like a suicide or accident and the body is disposed of quickly, with the connivance of a doctor. Records are manipulated to shield the police personnel responsible. The local politicians, landlords and warlords join the conspiracy. The relatives and friends of the victim are unable to seek justice because of fear, poverty and ignorance. Police atrocities and custodial violence have become so much part of our lives that films and novels have recently made them staple themes.

The Constitution and the criminal laws have elaborate provisions to prevent police brutalities. Therefore, the police resort to cover-ups and fudging of records when they are caught in the act. Let us look at some of the provisions which protect the citizens from the protectors.

Article 21 of the Constitution states that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. The Supreme Court has interpreted this provision very liberally. Even the procedure has to be just and reasonable. The accused has a right to a counsel of his choice, free legal aid wherever necessary, and is entitled to meet his family members.

Article 22 says in part that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice." The other key provision in this Article is that “every person is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the magistrate”.

Most of the torture and custody deaths occur while the police try to extort confessions from the detenu which suit their theory of crime. The evil is so old and perennial that the Indian Penal Code of 1860 and the Indian Evidence Act of 1872 take special care to prevent such acts. But it has remained a mere wish so far. Let us consider these provisions.

Section 330 of the Indian Penal Code says: “Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

The code gives two illustrations to explain the law. 'A', a police officer, tortures 'Z' in order to induce 'Z' to confess that he committed the crime. 'A' is guilty under this section. Again, 'A', a policeman, tortures 'B' to induce him to point out where a stolen property is deposited. 'A' is guilty under this provision.

Another provision of the Indian Penal Code which protects suspects from third degree methods by the police to extort confessions is Section 331. It is similar to Section 330, except that it deals with "Grievous hurt" and the sentence may extend to ten years in jail and fine. The guilty policeman can also be booked under the other provisions of the Indian Penal Code like causing hurt (Section 323) and murder (Section 300 to 302).

Apart from these sections, several other provisions of Indian Penal Code in Chapter XVI relating to "offences Affecting Human Body" especially sections 319 to 352 are relevant here. Section 339 making "wrongful restraint" covers illegal custody. Giving or fabricating evidence to procure conviction and using evidence knowing it to be false are covered in Section 191 to 196 of Indian Penal Code. As these offences are common among the police force, the guilty may be prosecuted in appropriate cases. But this is easier said than done.

The Indian Evidence Act discourages forced confessions. *Section 24* says that "a confession made by an accused is irrelevant in the criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain an advantage or avoid any evil of temporal nature in reference to the proceedings against him." In short, any attempt by a person in authority to bully an accused into making a confession or any threat or coercion would invalidate it if the fear was operating in the mind of the accused while making the confession. The Court will accept only a voluntary confession.

Section 25 of the Evidence Act categorically states that “no confession made to a police officer shall be proved as against a person accused of any offence”. Section 26 further states that “no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate shall be proved as against such person”. The Act goes on to the details in the four of the following sections.

The Code of Criminal Procedure fortifies these procedures by providing more safeguards. Section 163 of Criminal Procedure Code says that “no police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act.” Section 164 empowers an appropriate magistrate to record any confession or statement in the course of the investigation. The procedure and form are given in detail in the section.

Naturally, the police are not happy with these provisions and therefore they try to circumvent them by illegal means. The National Police Commission report of 1980 even urged the government to remove these from the statute books. According to it, the bar on admissibility of confessions before policemen is a “hangover from the past”. It has placed the police at a great disadvantage, said the report. It argued that when the Evidence Act was passed in 1872, the police was notorious for its malpractices. More than hundred years have rolled by since then. Now there is greater vigilance over the police by the public and the press, said the report. It called for a “small positive step” to remove this stigma on the police and make it possible for a confession made before a police officer to be admissible in evidence.

If proof were needed that the recommendation of the Police Commission was preposterous, the 113th Law Commission report provided it. It suggested wide ranging amendments to the Indian Penal Code, Criminal Procedure Code and the Indian Evidence Act to control the menace posed by “criminals in uniform” as a high court called the police force. According to it, the existing law was inadequate and ineffective in dealing with custodial crimes.

There have been many conclusive studies that suggest police have played highly partisan role while tackling terrorism or performing duty to ensure law and order in the society. The finding of Justice Nanavati Commission Report of 1984, Justice Srikrishna Commission Report and National Police Commission Report are some instances.

The Indian Constitution provides all citizens with the "right to equality before the law," the right to "the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth," and the "right to freedom of speech and expression."[6] Further, it specifies that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest" and that every person arrested be presented to the nearest magistrate within 24 hours of the arrest.[7]

Fake encounters are a symptom of the failure to hold security forces accountable for their crimes, but they are also a consequence of other problems. An overloaded justice system makes each trial a very long, drawn-out process. Witnesses are often threatened, yet there is no effective system of witness protection. Repeated and lengthy hearings mean that many witnesses no longer want to testify. Without proper training and equipment to secure evidence, the police rely on torture to secure confessions. The police often admit privately that they engage in fake encounters because they are frustrated that criminals captured after much effort simply walk away.

The Supreme Court of India has stated that it holds "the state government responsible for being negligent at the initial stage and in not anticipating the communal violence in Uttar Pradesh and for taking necessary steps for its prevention." According to news reports, it "rebuked the central government, saying that the violence could have been prevented if Indian intelligence agencies had alerted the district administration in advance."[8]

[6]U.N. Human Rights Council, National report available at http://ap.ohchr.org/documents/ alldocs.aspx? doc_id=13940, 4, para 15.

[7]Article 22 of the Constitution of India, 1950

[8]Supreme Court criticizes Uttar Pradesh Govt for Muzaffarnagar Riots, Live Mint & the Wall Street Journal, Mar. 27, 2014, http://www.livemint.com/Politics/3yUYjIuP1GmLtWGqLDikDP/ Supreme-Court-criticizes-Uttar-Pradesh-govt-for-Muzaffarnaga.html. "'We prima facie hold the state government responsible for being negligent at the initial stage and in not anticipating the

All too often in India, the government does nothing about abuses until there is broad public outrage. We have seen this with the response to sexual violence. But just as people are feeling squeamish about their private communications stored and available for scrutiny, so, too, they should be worrying about security forces that kill at will, simply because they can, in the guise of national security.

According to India's federal interior ministry, India experienced a 17% increase in communal violence in 2015, compared to the previous year (751 vs. 644 incidents). In 2015, 97 people were killed and 2,246 people injured.[9] States that have significant instances of communal violence are Uttar Pradesh, Bihar, Maharashtra, Madhya Pradesh, Karnataka, and Gujarat.

In the case of *Munshi Singh v. State of Madhya Pradesh*[10], the observations of the Supreme Court are significant. Therefore some passage are reproduced below.

> "Custodial violence, torture and abuse of power of the police power are not peculiar to this country, but it widespread… if it is assuming alarming proportions now a days all around, it is merely on the account of the dervish devices adopted by those at the helm of affairs who proclaim from the roof tops to be the defenders of democracy and protectors of the people's rights and yet lose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviors of citizen's right."

The Supreme Court expresses its distress over the alarming increase in cases of custodial violence, police torture and abuse of power in *Shakila Abdul Gafar v Vasant Raghunath*[11],

communal violence and for taking necessary steps for its prevention,' an apex court bench headed by chief justice P. Sathasivam said."

[9] Ministry of Home Affairs (India), Annual Report 2015-16, by Departments of Internal Security, States, Home, Jammu & Kashmir Affairs, and Border Management (New Delhi: Royal Press, 2016), para 6.63, 85, available at: http://mha.nic.in/sites/upload_files/mha/files/AR(E)1516.pdf.

[10] AIR 2005 SC 402

[11] AIR 2003 SC 4567

> "The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new unwarranted peril because the guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when the functionaries of the state whose paramount duty is to protect the citizens and not to commit gruesome offence against them, in reality perpetrate them."

International human-rights law prohibits the arbitrary deprivation of life under any circumstances, and Article 3 of the Universal Declaration of Human Rights states that "everyone has the right to life, liberty and security of person." Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 4 of the ICCPR states that this right cannot be waived "even in times of public emergency threatening the life of the nation." Moreover, under Article 2(3) (a) and (b) of the ICCPR, state parties have the obligation to ensure that remedies are made available to the victims of human-rights violations, and that those remedies are effective. Extra-judicial killings clearly contravene the right to life.

The Indian government ratified ICCPR in 1979. By ratifying an international treaty that enshrines the right to life, India is obliged not only to respect that right in principle, but also to take effective measures to ensure that extra-judicial killings do not occur in practice. Although the right to life is enshrined in Article 21 of the Indian constitution, the increasing incidence of extra-judicial killings in the country demonstrates that the government has failed to take effective measures against the police force, or to bring them to book. It must be remembered that respect for human rights is the sine qua non of any civilized society, and that disrespect for human rights is equal to denying civil liberties guaranteed to citizens by the state.

The special rapporteur on unlawful killing by state forces have visited many countries and submitted its report on the response and responsibility of various states on such issue. The impact of impunity for acts against accused, suspect of any offence should not be underestimated. As well as constituting an infringement of the rights of an individual, impunity has an adverse systemic effect. A number of quasi- judicial bodies have noted the 'chilling effect' of the failure to investigate, with deleterious consequences for information flows in the public sphere. Impunity denies the rule of law and suggests violence is an appropriate response to disagreement, an approach to dispute resolution which could clearly threaten political and social stability. Conversely, the ending of impunity is the start of a virtuous cycle whereby human rights are embedded as values that are respected, rather than means to achieve recompense when a violation has already occurred. The initiatives so far embarked upon by inter-governmental and non-governmental agencies have failed to safeguard the right of accused, suspect of any offence which is aimed at deterring dignity of accused person and providing evidence or disseminating views unwelcome to those who are in a position of authority. It is to explore viable international solutions to prevent, and stop impunity for, the unlawful killing by state forces and intimidation of accused, suspect of any offence as well as for the suppression of their human rights. The lacuna has to be identified, the gaps, whether in scope or application, in the existing international mechanisms designed to counter human rights violation of the accused, suspects of any offence. In the conflict and non-conflict situations, general mechanisms to protect personal security and right to life of person killed cannot be drawn. The situation of unlawful killing by state forces, taking into account the threats deriving from State inaction can be ignored. This has not limited to instruments which describe themselves as being for the protection of human rights but consider also those which may have that effect notwithstanding their stated purpose.

Killings by law enforcement officials and other security forces can take many forms. Very common form is intentional murders where police shoot to kill alleged criminals without proper implementation of appropriate measures. In countries where the security forces may be directly controlled by politicians, security officials may conduct politically motivated killings, including of political opposition members or supporters, and election related killings.[12] In

[12] *The Special Rapporteur of Human Rights Council, Philip Alston's report, 2010*

many other countries, police kill people while they are in off duty, for profit even.

Suicides, deaths resulting from prison conditions, including poor health care, overcrowding and inadequate food, death resulting from torture, killing of prisoners by guards, inter-prisoner violence etc. are common in most of the countries. The responsibility of the State is not only to stop and prosecute the death by guards but also to find out the cause of the deaths and its prevention. Obligation of the State include: providing adequate health care to the detainees,[13] ensuring appropriate prison oversight and monitoring; providing appropriate budgets to prisons,[14] stopping practices of prisoners running prisons, ensuring accurate records of detainees and their sentences and to prevent inter-prisoner violence.

The Special rapporteur on the promotion and protection of the right to life against unlawful, summary, arbitrary execution by state forces has very limited powers: it gathers information on violations of the right to life including issues of threats, violence, harassment against persons seeking to exercise the right to life against unlawful killing by state forces; seeks, receives and responds to Governments, NGOs, and any other parties regarding these issues; provides recommendations and suggestions including technical assistance; undertakes fact-finding country visits; sends urgent appeals and letters to members states on alleged violations which are summarized in its annual report submitted to the Human Rights Council. The Special rapporteur merely reminds States of their obligations, but has no authority to go beyond this exhortative function. A second problem with the possible contribution of the Security Council lies in the existence of a veto right, amongst other things benefiting countries with notorious problems in terms of repression of suspects or accused, such as the Russian Federation, U.S.A, and China.

Most of the countries of the world still follow death penalty as highest punishment. Also no prohibition is imposed over it by international laws. However, considering the fundamental right of right to life, the lawful

[13]*The Special Rapporteur of Human Rights Council, 2004*
[14]Ibid

application of death penalty has some limits. Death penalties carried out in violation of those limits are unlawful killings.

Governments have failed to describe the legitimacy of above mentioned categories of extra judicial and unlawful killing of individuals and to explain why the attacks are in conformity with international law. The usual justification is that these policies are a necessary and proportionate response to terrorism and warfare and that the terms “illegal assassinations” and “legal efforts to kill specific individuals” are different.

Deliberate Unlawful killing by state forces runs contrary to the principle that civilians and non-military objectives cannot be targeted during armed conflict, provided they do not take active part in the hostilities. However, the extant enforcement mechanisms under the Geneva Conventions are particularly scarce. Options include designating “protecting powers” to monitor the belligerent parties’ compliance with the laws of war and humanitarian law, but this mechanism is seldom used in practice. If a party to the conflict alleges that the other party has acted in breach of its obligations, they can resort to classical international law diplomatic (non-binding) dispute-settlement procedures.

Human rights law, humanitarian law and international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations.[15] International law requires that States must ensure that victim’s families are able to enforce their right to compensation, through judicial remedies where necessary. Constitutions of almost all the countries or legal systems have prohibited death penalty without the fair trial and the decision of a competent judge. The United Nation’s International Covenant on Civil and Political Rights (1966) has declared the same:

> *“Every human being has the inherent right to life. The right shall be protected by law. No man shall be deprived of his life arbitrarily.”*

[15]*HR Committee Report, 2004*

To minimize or stop extrajudicial killings the United Nation and other international organizations have implemented so many rules and regulations as well as several techniques to minimize the unlawful or extrajudicial killings.

Dealing with the inter-State armed conflict situations, United Nations must be stricter to make States follow its regulations. In recent times, the United States and Israel are the prime user of drone technologies and UN has been quite unable to show effective measures to stop them or held them responsible for the killing of innocent individuals. In case of inter-State armed conflict, UN is in the better position to impose war regulations towards the States and held states responsible to justify its every war conduct. Also States should value the life and securities of civilians of other State as its own.

The existing international humanitarian law instruments do not take away status of accused person or suspect. The accused person must be humanely treated, acts or omissions by the detaining power causing death or seriously endangering their health are prohibited, must be protected against acts of violence or intimidation and against insults and public curiosity. Further, common Article 3 of the four Geneva Conventions, applicable to non-international armed conflicts, stipulates that persons who do not take active part in the hostilities must be treated humanely and without discrimination; in particular, they cannot be subjected to cruel treatment, outrages upon personal dignity or taken hostages.

Considering the relevant international instruments relating to prohibition of torture, inhuman and degrading treatment, extra-judicial killings and forced disappearances, it is apparent that India has clear obligations under international law to prosecute and investigate allegations of human rights violations.

In case of killings by non-State actors, deaths in custody, death penalty, killings with sexual violence, killings because of corruption, State must be more cognizant to punish the offender so that it creates an example for others. Fair trial and justice must be ensured in every States to reduce the amount of intra-State unlawful killings.

Victim's family must have adequate access to information about investigations, prosecutions and their outcomes. Transparency must be ensured by the State of its Governmental bodies like police department, judges, and other security forces. To prevent deaths in custody prison condition must be improved and the international standard of minimum rights of the prisoner must be provided by the State.

The UN Human Rights Committee has specifically referred to the issue of forced disappearances as a violation of the right to life and the need to establish "effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life". In recent years, there has been evidence of the scale of custodial death, fake encounter, forced disappearance in world as well as of incidents affecting the ability to exercise their right to life – threats of prosecution, arrest, denial of journalistic access, and failures to investigate and prosecute crimes against accused, suspects, deceased killed in such encounter .It has been repeatedly brought to the attention of the international community by inter-governmental organizations, NGOs and various stakeholders. Numerous resolutions and reports, from Amnesty International, the UN Special Rapporteur on the promotion and protection of the right to life from unlawful killing by state forces, the Parliamentary Assembly of the Council of Europe, have identified the spread of a climate of impunity in some States as a threat to human rights and the democratic process, and called for urgent action to bring it to an end. Statistical data provided by the amnesty international and, human right watch, also indicate high numbers of unlawful killing by state forces in the world.

States undertaking targeted killings and extrajudicial, arbitrary or summary executions should hold accountable under international law and they must justify the basis of their actions. Furthermore, before taking any action towards suspects or criminals they should respect their rights and take measures to eliminate the use of force and seek ways to bring them under fair trial rather the ultimate thought of killing. Executions by governmental authorities without the proper judicial proceedings are unlawful and constitute a violation of international humanitarian law, as well as numerous human rights principles. To minimize or stop extrajudicial killings the international Organizations and States should take collective measures respecting the rights of the innocent civilians, suspects or criminals.

The first and most obvious step in developing solutions is to consider the key problems regarding the issue. Some, but not all of which are:

1. Lack of methods for collecting information about extrajudicial punishments, due to reasons such as but not limited to; unwillingness to report such actions for fear of retribution, witness intimidation, subversion of such cases due to the ascendancy of bodies/individuals delivering such punishments.
2. The attempts, of nations where extrajudicial punishments is unacceptable, to conduct such punishments overseas, in other member nations, where these extrajudicial actions are overlooked.
3. Extrajudicial punishments on the basis of gender identity and sexual orientation by certain social and cultural groups.
4. The use of extrajudicial punishments as a weapon in the war against terrorism, by punishing/executing people deemed ‘suspicious’ by governments, with a special concern regarding its misuse and overuse.
5. The prevalence of such extrajudicial measures being employed in nations facing political unrest, where the judicial system is dysfunctional. This is an extremely pressing problem considering the situation in the Middle East, in countries such as Syria, and the high possibility that during such times governments and other political groups are likely to use extrajudicial methods of punishments due to the lack of proper judicial frameworks.

Due to the ambiguity regarding the issue delegates must establish a succinct definition of what cases constitute “extrajudicial punishments” and come up with a framework to identify and investigate cases in which such activity has taken place. Delegates must consider possible, dependable channels through which information can be transferred to the necessary regulatory authorities and the manner in which these bodies should act in order to determine a suitable course of action to deal with the issue. Concurrently delegates must pay special attention to cases in which such punishments are carried out overseas in nations where regulations are particularly lax against such activity, as these are particularly difficult to identify and take action against.

There is nothing wrong with taking more time to consider the nature of what it is for the state, a state official, or a political organization to kill an individual and to determine which actions are legitimate and which are not. This article has specifically sought to the limit the concept of what an extrajudicial killing is to exclude killings that are governed by the law of armed conflict, executions that pass through the judicial organs of the state, and killings that occur for public safety reasons. Although the first and last should be dealt with by the discreet bodies of law that govern them, the second concept, procedural fairness, is not so easily dismissed. Many of the illiberal executions that occur in the transitional or corrupted societies of the world do pass through some amount of judicial process that clearly does not meet an even minimum standard of procedural fairness and due process. Many of these murders are politically motivated. But, political motivation should not be a factor. If there is a place in the world where officers of the state have impunity to execute people for non-political reasons that impunity should not continue.

The Indian station-based model has encouraged police neglect and abuse of crime victims. Victims of violence, particularly violence that is gender-based, frequently fail to report crime because they fear being physically harmed at the police station or while traveling to it, especially at night. Those who do attempt to report crime are often rebuffed: repeatedly told to return when the officer-in-charge is available, solicited for a bribe, and told that what occurred is a “private matter” or does not otherwise warrant police attention. Crime victims who are poor and without legal counsel are especially vulnerable to police intimidation.

Victims, who succeed in getting police to register the initial complaint, or First Information Report (FIR), face further obstacles at the investigation stage, including police extortion and unwillingness to investigate due to indifference and bias.

In contrast, the call center model ensures that a record of a complaint is made because calls are automatically recorded. Victims who phone call centers can avoid the police discouragement and harassment that occurs at stations, since trained and monitored call center personnel perform initial intake. When call centers maintain databases regarding actions taken and officers assigned to investigate, it is easier for crime victims and the community to hold individual police accountable for inaction and to detect failures and delays motivated by bribery or bias.

Police failure to register and investigate cases is detrimental to police work. In a vicious cycle, the problem starts when crimes go unreported and unpunished. The public loses confidence in the police's ability to do their job, and the community's fear of crime increases.

In the climate of public fear, individuals are afraid to cooperate with and provide information to the police, who may be unable or unwilling to protect them from retaliation by criminals.

Delegates must also recognize the concerns of nations that believe extrajudicial punishments are justified against individuals who pose a threat to their nation and/or to international peace and use this as grounds for carrying out such punishments. Delegates must decide the extent to which such claims are reasonable and what must be done in such cases. In doing so delegates must first establish whether there should be partial or complete prohibition of extrajudicial punishments and suggesting and defining cases, if applicable, in which cases such punishments may be acceptable and employed as a last resort. Alternately delegates may decide to advocate means through which such cases may be processed though the judiciary.

Considering that a major problem with identifying and prosecuting cases of extrajudicial punishments is witness intimidation and in certain cases execution it is advised that delegates consider a UN monitored mechanism of witness protection. Delegates must decide consider where the accountability for the witness protection programme lies and whether national governments and judiciary, the international community, or non-governmental bodies should be responsible for witnesses in such cases.

Another challenge within the issue is the lack of methods to prosecute government officials and bodies carrying out extrajudicial punishments and executions, due to the transcendence of their position. Delegates must consider an international judicial framework to try government or non-government actors in such special cases, outside the already existing courts since they too are no longer impartial. Delegates must also consider what must be done to countries where such

The most important issue that delegates must keep in mind is the lack of UN involvement in extrajudicial punishments outside of executions. It is imperative that delegates come up with solutions that recognize the distinctions between types of extrajudicial punishments, such as arbitrary detention, harassment, death threats and executions. They must determine the gravity of each type of punishment and decide suitable measures that need to be taken against each. Delegates may suggest solutions, such as extending the mandate of the Special Rapporteur on extrajudicial, summary and arbitrary executions to include other forms of extrajudicial punishments, that ensure that other forms of extrajudicial punishments are also condemned by UN member nations and that action be taken against states violating the norms against such activity.

- To continue to examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason, and to submit his or her findings on an annual basis, together with conclusions and recommendations, to the Council and the General Assembly, and to draw the attention of the Council to serious situations of extrajudicial, summary or arbitrary executions that warrant immediate attention or where early action might prevent further deterioration;
- To continue to draw the attention of the High Commissioner for Human Rights to serious situations of extrajudicial, summary or arbitrary executions that warrant immediate attention or where early action might prevent further deterioration;
- To respond effectively to information which comes before him or her, in particular when an extrajudicial, summary or arbitrary execution is imminent or threatened or when such an execution has occurred;

- To enhance further his or her dialogue with Governments, as well as to follow up on recommendations made in reports after visits to particular countries;
- To continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto;
- To apply a gender perspective in his or her work. In carrying out his/her mandate, the Special Rapporteur:
    - Transmits urgent appeals to States in cases that evince a fear of imminent extrajudicial, summary or arbitrary executions and transmitting alleged cases of extrajudicial, summary or arbitrary executions to concerned Governments in the form of case summaries;
    - Undertakes fact-finding country visits;
    - Submits annual reports on activities the mandate and methods of work to the Commission and the General Assembly.

SUGGESTIONS

Good policing involves respecting human rights and upholding the Rule of Law. This has been strongly emphasised by the Supreme Court and the National Human Rights Commission. As protectors of people’s rights, police officers are expected to display integrity, transparency, accountability and most of all respect for human dignity. Rule of Law requires that the police as an integral part of the criminal justice system ñ must respect and uphold the rights and liberty of individuals. Sadly, despite democracy and freedom for over fifty years now, there still is a lot of distrust between the public and the police. People see the police as an authoritarian organisation, removed from society, with little or no respect for the rights of the ordinary person. However, today we live in a democratic country and the police as a vital component of the State must operate according to democratic norms. Individual rights occupy a pride of place in our constitutional culture. Any encroachment upon them, whether it is non-registration of a First Information Report [FIR]; launching a malicious investigation; illegally detaining suspected persons or their families; carrying out an improper arrest; using excessive force; or torturing suspects to extract confessions goes against the basic principles of democratic policing. Sharing information with the public, securing their cooperation in policing, and acknowledging that individuals have a right to privacy and security of their person are essential elements of democratic policing- the furtherance of which, is the aim of this compilation.

In a democratic society, the police serve to protect, rather than impede, freedoms. The very purpose of the police is to provide a safe, orderly environment in which these freedoms can be exercised. A democratic police force is not concerned with people's beliefs or associates, their movements or conformity to state ideology. It is not even primarily concerned with the enforcement of regulations or bureaucratic regimens. Instead, the police force of a democracy is concerned strictly with the preservation of safe communities and the application of criminal law equally to all people, without fear or favour.

1. The police must bear faithful allegiance to the Constitution of India and respect and uphold the rights of the citizens as guaranteed by it.
2. The police should not question the propriety or necessity of any law duly enacted. They should enforce the law firmly and impartially, without fear or favour, malice or vindictiveness.
3. The police should recognise and respect the limitations of their powers and functions. They should not usurp or even seem to usurp the functions of the judiciary and sit in judgement on cases to avenge individuals and punish the guilty.
4. In securing the observance of law or in maintaining order, the police should as far as practicable, use the methods of persuasion, advice and warning. When the application of force becomes inevitable, only the irreducible minimum of force required in the circumstances should be used.

5. The prime duty of the police is to prevent crime and disorder and the police must recognise that the test of their efficiency is the absence of both and not the visible evidence of police action in dealing with them.
6. The police must recognise that they are members of the public, with the only difference that in the interest of the society and on its behalf they are employed to give full time attention to duties which are normally incumbent on every citizen to perform.
7. The police should realise that the efficient performance of their duties will be dependent on the extent of ready cooperation that they receive from the public. This, in turn, will depend on their ability to secure public approval of their conduct and actions and to earn and retain public respect and confidence.
8. The police should always keep the welfare of the people in mind and be sympathetic and considerate towards them. They should always be ready to offer individual service and friendship and render necessary assistance to all without regard to their wealth and / or social standing.
9. The police should always place duty before self, should maintain calm in the face of danger, scorn or ridicule and should be ready to sacrifice their lives in protecting those of others.
10. The police should always be courteous and well-mannered; they should be dependable and impartial; they should possess dignity and courage; and should cultivate character and the trust of the people.
11. Integrity of the highest order is the fundamental basis of the prestige of the police. Recognising this, the police must keep their private lives scrupulously clean, develop self-restraint and be truthful and honest in thought and deed, in both personal and official life, so that the public may regard them as exemplary citizens.
12. The police should recognise that their full utility to the State is best ensured only by maintaining a high standard of discipline, faithful performance of duties in accordance with law and implicit obedience to the lawful directions of commanding ranks and absolute loyalty to the force and by keeping themselves in the state of constant training and preparedness.

13. As members of a secular, democratic state, the police should strive continually to rise above personal prejudices and promote harmony and the spirit of common brotherhood amongst all the people of India, transcending religious, linguistic or sectional diversities and to renounce practices derogatory to the dignity of women and disadvantaged sections of society.

In many cases, the guilty officers go scot free because the complainant's inability to prove the case against them. Some of the recommendation to tighten the laws are:-

- Insertion of the new provision that is Section 357 A in the Code of Criminal Procedure laying down that the government would be jointly and severally liable with the guilty officer to pay the compensation to the victim. The civil court shall award an amount not less than Rs. 25000 in the case of injury and Rs. 1 lakh in case of death.
- The court may award interim relief in the case of death or permanent disablement of the victim. It can assess the amount taking into account the estimated annual income of the victim, multiplied by the number of years of his estimated life span.
- A police officer who refuses to record rapes and allied offences shall be punished under the new provisions of Indian Penal Code.
- Whenever a person is arrested by police officer, intimation of the arrest shall be immediately sent to a relative, friend or to a known person or the local legal aid committee. Such intimation shall be recorded as sent by the officer under the signature of the arrested person.
- The police officer shall prepare the custody memo and body receipt of the arrested person duly signed by him and two witnesses of the locality to be delivered to a relative of the arrested person
- During the interrogation, a lawyer should be allowed to be present. The arrested person shall also have the rights to be medically examined to record any injury caused by the police officer.

- If the police officer refuses to record the First Information Report (FIR) regarding the custodial crimes, the aggrieved person shall have the right to file a petition before the Chief Judicial Magistrate.
- The evidence law should be amended to provide that the confessions made to the public servants cannot be proved as in the case of confessions to the police officers, unless it is made in the presence of the judicial magistrate.

These are at present only a recommendation and therefore the public and human rights groups should agitate to get these suggestions incorporated in the law. The task of complaining against the policemen is indeed formidable. Though the provisions quoted above help the aggrieved, it is difficult to get evidence. The policemen are adept in destroying and tempering with the evidence and individuals are pitted against the mighty state apparatus. But social activists, the press, and concerned citizens can join hands to highlight police atrocities and pursue them to the end. If procedures in the sub-ordinates courts fail, they can appeal to the high court or Supreme Court. In hard cases, habeas corpus writ petitions may be moved in the high court or the Supreme Court. Local organizations and groups of citizens may also move public interest cases.

Earlier, the reliefs granted by the courts were limited. The cases of illegal custody, they released the victim and merely ordered the authorities to inquire into the allegations and punish those who found guilty. If the government inquiry was not reliable, the case was handed over to the CBI. However, from the 1980's, the Supreme Court developed the concept of constitutional tort and started awarding compensation to the victims or their families. The seeds were sworn in what are called the 'Bhagalpur blinding cases'[16] and Rudal Shah Case,[17] then developed in Sebastian Hongaray judgement.[18] The right to compensation when the police violate a citizen's fundamental right to life and liberty was fully developed by the Supreme Court in Nilabati Behra judgement in the year of 1993.

[16]Khatri II v. State of Bihar, 1981(1)SCC 627
[17]AIR 1983 SC 1086
[18]AIR 1984 SC 571

Another significant Supreme Court Judgement, *D. K. Basu v. West Bengal*[19] has laid down detailed safeguards against the custodial violence. Therefore, the law is marching forward in the direction of the human rights, giving protection to the citizens against the violation of their rights by the arm of the state. However, it is not enough that the courts lay down benevolent principles; they should be known to the public and social activist groups.

Therefore, the onus of bringing those who break the law including laws which protect people's human rights before the criminal justice system lies on the police.

[19]AIR 1997 SC 610

BIBLIOGRAPHY

Books

- Ahmed Ali; *"Reconciling AFSPA with the Legal Spheres",* Institute for Defence Studies and Analyses (IDSA), Vol 5. No 2. (April 2011)
- Alderson J.C & Stead John Philip; "*The Police we deserve"*, Wolf Publishing Limited, London, UK, 2H, 9LP, 1973.
- Asian Legal Resource Centre (ALRC), *"Thailand: Arbitrary Detention and Harassment under the Emergency Decree in Thailand"* (August 2010) Human Rights Council, Vth Session, Agenda Item 4.
- Ben Kiernan. 2007. *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*. New Haven: Yale University Press.
- Bentham David; *"Defining and measuring democracy";* ed., Sage Modern Politics Series, Volume 36,
- Bradstaller A.F & Radelet Louis A; "*Police and Community Relations, The Glencoe Press, A Division of The Macmillan Company"*, California, 1968.
- Brewer J D ; Guelke A ; "*Police, Public Order and the State*" (1988) NCJ 117569 NCJRS.
- Chakrabarty B; *"Mahatma Gandhi: A historical biography"* (New Delhi: Lotus Collection, 2007).
- Chambliss William J; *"State-Organized Crime*." Criminology. Vol.27, No.2. 1989
- Chevigny Paul; *"Police power, Police abuses in New York"* Vintage Books, A Division of Random House, New York, 1969.
- Chossudovsk Michel, *"The Use of The Armed Forces in America Under a National Emergency - Unrestricted & Arbitrary Powers*

Conferred to the President & Vice President" (June 2007) Global Research.

- Clark-Decès Isabelle*; A Companion to the Anthropology of India*, Publisher- John Wiley & Sons (2011)
- Dobhal Harsh & Mathew Jacob; *"Rugged Road to Justice: A Social Audit of State Human Rights Commissions in India"*, Volume 1, Publisher, Socio Legal Information Centre, New Delhi.
- Eckert Julia; *"Death and the Nation: State Killing in India.*" In Austin Sarat and Christian Boulanger, eds., *The Cultural Lives of Capital Punishment: Comparative Perspectives.* Stanford, CA: Stanford University Press. Pp.195–218.
- Finkelman Paul, *"Limiting Rights in Times of Crisis: Our Civil War Experiences – A History Lesson for a Post- 9-11 Experience"* (2003 – 2004), 2 Cardozo Pub. L. Pol'y & Ehics J. 25.
- Forcese Craig, "*Canada's National Security "Complex": Assessing the Secrecy Rules*" (June 2009) IRPP Choices. Vol. 15. No. 5.
- Gareth Evans; *"The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All"* (Washington, D.C., Brookings Institution Press, 2008) at xvi.
- Gaur V. P., *"Mahatma Gandhi: A Study of his Message of Non-Violence"*, New Delhi: Sterling Publishers, 1977.
- Ghoshray Dr. Saby; *"Targeted Killing In International Law: Searching For Rights In The Shadow Of 9/11"*, Vol. 24, 2014.
- Grace Pelly; *"State Terrorism: Torture, Extra-judicial Killings and Forced Disappearances in India*", Published by: Human Rights Law Network (HRLN), New Delhi, 2009.
- Granville Austin; "*Working of a Democratic Constitution: The Indian Experience",* New Delhi*:* Oxford University Press, 1999
- Gurry J.C; "*The Indian Police",* New Delhi, Manu Publication, 1977.

- Horowitz & Louis Irving; "*Taking Lives: Genocide and State Power"*, 2001, New Brunswick, NJ: Transaction Haley Duschinski, "Destiny Effects: Militarization, State Power, and Punitive Containment in Kashmir Valley", (Summer, 2009) *Anthropological Quarterly,* Vol. 82, No. 3, pp. 691-717.
- Kanungo Sujata; "*Echoes From Beyond the Banihal Kashmir Human rights and Armed Forces",* Vij Books India Pvt. Ltd. New Delhi.
- Kingsbury Damien, "Sri Lanka and the Responsibility to Protect: Politics, Ethnicity and Genocide" in Taylor and Francis (2012)
- Krishna Iyer V.R; *"A Judge's Extra-Judicial Miscellany*", B.R. Publishing Corporation, Delhi, 2001
- Leigh L.H, "*Police powers in England and Wales"*, Butterworth & Comp. Publishers Ltd. 1975
- Luce Edward; "*In Spite of the Gods: The Strange Rise of Modern India"*, New York: Doubleday. 2007.
- Mishra, Pankaj; "*Temptations of the West: How to be Modern in India, Pakistan, Tibet, and Beyond*" New York: Picador. 2006.
- Misra Shailendra; *"Police Brutality: An analysis of Police behavior"*, Vikas Publishing House, New Delhi, 1986.
- Mukherjee J.R.; "*An Insider's Experience of Insurgency in India's North-East"* xvi Anthem Press 142. (2005)
- Muzumdar H. T., "Mahatma Gandhi: Peaceful Revolutionary" (New York: Scribner, 1952).
- Noorani A.G; Challenges to Civil Rights Guarantees in India, 2012 Oxford University Press, New Delhi.
- Patricia Gossman; *"Police Killings and Rural Violence in Andhra Pradesh"*, Publisher- Human Rights Watch, 1992
- Penny Green and Ward Tony; "*State Crime: Governments, Violence, and Corruption"*. London: Pluto Press, 2004.

- Potholm Christian P. & Morgan Richard E*; "Focus on Police"*, Schenkman Publishing Comp, INC, 1975.
- Power Paul F; *"Towards a Re-evaluation of Gandhi's Political Thought"*, (March 1963) Political Research Quarterly, 16 (1), pg. 99-108.
- Pranjape, N.V; "*Criminology and Penology", * Allahabad: Central Law Publications. (2008).
- Rao.R.Prabhakar; *"Police in a developing society*", Osmania University Publication, 1972.
- Rashid Afsana; "*Widows and Half Widows: Saga Of Extra-Judicial Arrests and Killings In Kashmir", * Pharos Media & Publishing Pvt Ltd (2 May 2011)
- Ratanlal and Dhirajlal;. "*The Commentary on the Code of Criminal Procedure", * 18th edn. Vols.1 and 2. New Delhi: LexisNexis Butterworths, 2006
- Rayner Jeremy, "*The Constitutional Law: Legality in Time of Emergency*" (2006) Cambridge University Press, pp. xv, 250.
- Reith Charles; *"The Police idea: Its History and Evolution in England in 18th Century and After*", Oxford University Press, London, 1938.
- Ross, Jeffrey Ian; "*Varieties of State Crime and Its Control*', Monsey, NY: Criminal Justice Press 2000
- Saikrishna Prakash; "*The Separation and Overlap of War and Military Powers*" (December 2008) Texas Law Review Vol. 87. No. 2.
- Samad Ishmael; *"Oh Gord! Doh Shoot Meh Nah!": The Tragedy of Extrajudicial Killings in Trinidad & Tobago",* AuthorHouse Publisher(14 November 2011)
- Sarat, Austin; "*The Killing State: Capital Punishment in Law, Politics, and Culture*", New York: Oxford University Press, 1999

- Saxena, A.K and P.S.V. Prasad and Sankar Sen; "*Custodial Deaths in India (A Research Study*)", 1st Ed, 1994
- Sen Shankar; *"Indian Police Today"*, New Delhi, Ashish Publishing House, 1994
- Sethna, M.J; "*Society and the Criminal".* Mumbai: N.M.Tripathi. (1989).
- Singh M.P; *"Police Problems and Dilemmas in India",* New Delhi, Mittal Publications, 1989.
- Sheoran K.S.; "*Human Rights and Armed Forces in low intensity conflict"*, K.W. Publishers Pvt. Ltd, New Delhi, 2011
- Srivastava, S.S; "*Criminology Criminal Administration",* Allahabad Central Law Agency (2007).
- Stohl, Michael; *"States, Terrorism and State Terrorism: The Role of Superpowers."* In Robert O. Slater and Michael Stohl, editors. *Current Perspectives on International Terrorism*. New York: Macmillan Press. Pp.155-205, 1988
- Tadsad Kamlesh G. & Ramaswamy Harish; Human Rights and Police Administration, Concept Publishing Company Pvt. Ltd., 2012
- Vadackumchery James, Indian Police 2001; What went wrong here, New Delhi, A.P.H.Publishing Corporation, 1998
- Zaidi S. Hussain, Bayculan to Mumbai, Manjul Publishing House Private Limited, Bhopal 2015

Acts and Statutes

- Armed Forces Special Powers Act (AFSPA) 1958
- Armed Forces (Jammu & Kashmir) Special Powers Act (AF (J&K) SPA) 1990
- Chhattisgarh Special Public Security Act of 2005 (CSPSA)
- Code of Criminal Procedure , 1973

- Conservation of foreign exchange and prevention of smuggling activities Act (COFEPOSA) 1974
- Constitution of India, 1950
- Indian Evidence Act 1872
- Indian Police Act, 1861
- Maintenance of Internal Security Act (MISA) 1971
- National Security Act (NSA) 1980
- Prevention of terrorism Act 2002
- Preventive Detention Act 1950
- Protection of Human Rights Act, 1993
- Terrorism & Disruptive Activities (Prevention) Act 1985
- Unlawful Activities (Prevention) Act (UAPA) of 1967
- Unlawful Activities (Prevention) Act (UAPA 2004) of 2004

<u>International Conventions and Treaties</u>

- African Charter of human and people's rights, 1981
- American Convention on Human rights, 1969
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- European Convention for the protection of Human Rights and Fundamental Freedoms, 1950
- Geneva Convention 1949
- International Covenant on Civil and Political Right,1966 ICCPR
- Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions 1989
- United Nations Charter

- United Nations code of Conduct for law-enforcement officials 1979 Adopted by General Assembly resolution 34/169 of 17 December 1979
- Universal Declaration of Human Rights (UDHR)

Reports

- Amnesty International Report "The State of World's Human Rights" (2012).
- Asian Human Rights Commission Report 2013, State of Human Rights in India
- Extra-judicial Killing, Summary, and Arbitrary Executions, Human Rights Yearbook 1997-98: Burma
- HRLA BURSARY REPORT, Grace pelly, India Centre for Human Rights and Law [human rights law network], Mumbai, India.
- Human Rights Watch, World Report 2014.
- Guidelines given by the Supreme Court of India on Encounter killings.
- Justice Malimath Committee Report, 2003
- Jeevan Reddy Commision Report, Submitted to the Government of India June 2005
- National Police Commission Report, 1981
- National report submitted by India to Human Rights Council, (21 May–4 June 2012) Human Rights Council, Working Group on the Universal Periodic Review, Thirteenth session, Geneva.
- Padmanabhaiah Committee Report, 2000.
- Record of Discussion of the Interaction between NHRC, India and the UN Special Rapporteur on Extra- Judicial, Summary or Arbitrary Executions held on 22-03-2012 at 11:30 Hrs in the NHRC Conference Room under the Chairmanship of Justice Shri G.P.Mathur, Menber, NHRC..

- Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to the Human Rights Council, dated 28 May 2010
- Ribeiro Committee Report, 1998.
- 'The Cry of Blood', Report on Extra-Judicial Killings and Disappearances, Kenya National Commission on Human Rights- September 2008.

<u>Journals/ Articles</u>

- Ahmad Sayeed Vickhar. "Fake Justice-Karnataka" Frontline Magazine 26 September 2009
- Ahmed Ali S; *"A look at police career of Pradeep Sharma, who killed 105 people in encounters",* Times of India, July 6, 2013
- Akhtat S., *"Intra-Kashmir dialogue: Need for Consensus" (2012*) *Strategic Studies, XXXII* (2-3), online: http://search.proquest.com/docview/1313183147?accountid=14771.
- Amnesty International, "*Broken Promises – Egypt's Military Rulers Erode Human Rights"* (November 2011).
- Asian Centre for Human Rights, *"India Fails UN Human Rights Test"* (March 2013).
- Bhelari Kanhaiah, *"Living by the Gun*", The Week, Feb 21, 2010 : 35
- Bidwai Praful, "*Why extrajudicial killings will never bring lasting peace*," Available at: http://www.rediff.com/news/column/why-extrajudicial-killings-will-never-bring-lasting-peace/20130712.htm
- Belur, jyoti; '*Why Do the Police Use Deadly Force? Explaining Police Encounters in Mumbai',* British Journal of Criminology, 5 November 2009
- Bidwai Praful*; 'The Delhi "Encounter",* Frontline Magazine 6 December 2002.

- Bukhari Sujata, *"Fake Justice Jammu and Kashmir",* Frontline Magazine page number 20-26, 26 September 2009.
- Balagopal K; *"Death in Police Custody: Whom and Why Do The Police Kill?"* Economic and Political Weekly, Vol 21, 1999, Pg. 2028
- Burra Srinivas*; "Chhattisgarh Killings: What if they were/were not Maoists",* Economic and Political weekly, Aug 18, 2012, Page No. 15-17.
- Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 16, 2009, http://www.nytimes.com/ 2009/03/17/business/17uav.html?_r=1&hp, *archived at* http://perma.cc/N96B-LJA9.
- Chaudhary, Rohit; *"A culture of Integrity in Police",* The Tribune (Oct. 24, 2011) 13
- David T. Johnson, Professor of Sociology, University of Hawaii, State Killing in Asia: "*On the Relationship between Judicial and Extra-Judicial Executions"* The Next Frontier: National Development, Political Change, and the Death Penalty in Asia (New York: Oxford University Press, 2009, pp.443-451).
- Dodge, Meghan E. "India Questioning "Encounter" Execution, Impunity Watch Asia, 5 October 2009.
- Drug War Chronicle; "Most Killed in Thailand's 2003 Drug War Not Involved With Drugs, Panel Finds." Issue 512 (November 30) 2007
- *"Encounter Killings in India and Human Rights Violations*", Vigil India Move, Available at http://www.vigilindia.info/ 2011/10/encounter-killings-in-india-and-human.html
- *"Fake Encounters must be punished with death",* Crimes 1(2), February 2012, Page No. 361-364.
- Gazala Peer; "*In persuit of Justice Pathribal Fake Encounter Case"*, 2012, July28, Vol-XLVII No.30.

- Ghosh S.K, *"Police: A Severely damaged instrument",* Indian Democracy Derailed, APH Publishing House, New Delhi, 374 (1997)
- Imroz Parvez; *"Judicial Impunity"* Economic & Political Weekly, (19 May 2012)
- Indian Express; *"Mumbai Police pats itself as encounter deaths double"* 29 December, 2001
- India Time; *"Police Brutality in India",* 26 May, 2007. http://www.indiatime.com/ 2007/05/26/ police-brutality-in-india/
- International Journal of Criminology and Sociological Theory, Vol. 3, No. 2, December 2010, 401-418
- International Journal Of Research In Education Methodology Council For Innovative Research Vol.1, No.2, August 2012, Available at: www.cirworld.com
- International Commission of Jurists, "*More Power, Less Accountability: Thailand's New Emergency Decree"* (August 2005).
- Iqbal K; "*Simmering Kashmir"* (2012) Defense Journal, 15(9), 81-82. Online: http://search.proquest.com/docview/1023449095?accou nted =14771.
- Joshi Sandeep; "*555 fake encounter cases registered across India in last four years"*, The Hindu, 15 July, 2013.
- Johar, Suhel; "*Super Cop Daya Nayak, Subject of 3 Films,"* available at *SmashHits.com*. 7 September, 2010
- Journal of Human Rights Practice, Oxford University Press, Volume 2, Issue 3, pp. 355-374.
- Kaleem Kawaja; "*Police Brutality in India: Why? What can be Done?",* Available at http://www.twocircles.net/2013may30/ police_brutality_india_why_what_can_be_done.html#.VtLPj7Fc61 s

- Kalhan Anil, *"Human Rights: Quantifying India's Encounters Deaths and Disappearances".* SAJA Forum 2009. 13 March.
- Kanwal Gurmeet, *"Internal security scenario may detereorate"*, The Tribune (January 26, 2010) 13
- Katakam Anupama, *"Fake Justice Maharashtra*", Frontline Magazine, 26 September 2009.
- Lakhanpal, KR, "*Take up gauntlet of governance*", Hindustan Times (Nov. 14, 2011) 9
- Mark Stern, *"What makes a Policeman go wrong?",* Journal of Criminal Law, Criminology and Police Science, 53, 1962, No. 1.National Seminar on "Delay in Criminal Justice System", Shri. K. G. Balakrishnan, Chief Justice of India, 17 March 2007, New Delhi.
- Narain Siddhartha; *"Rights and Criminal Justice",* Frontline, Aug.-Sept. 2003
- *"Not Free to Starve; India's Wretched State of Manipur*" (Nov. 7, 2009) The Economist, 393.8656 p56(EU).
- National Workshop on *"Media and Police Reforms",* CHRI and Press Institute Of India, New Delhi, 23-24 March 2005
- National Project on Preventing Torture in India, "*Torture and Impunity in India"* Madurai: People's Watch, 2008
- Ningthouja Malem (Editor) Armed Forces Special Powers Act 1958, Manipur Experience 2010, Complain for Peace and Democracy (Manipur), Classic Offset Printers & Packagers, East Rohtasnagar New Delhi, 2010
- *"Policing since Independence*" Pioneer, 1st Oct 1995
- Prasad Devika And Navaz Kotwal, Complains Authority: Police Accountability in Action, Commanwealth Human Rights Initiative, Better Policing Series India 40. Year 2009.
- "Previleges to Armed Forces in present scenario", Civil Services Times, January 2012, Page 37-41.

- PUCL Bulletin, January 2008, Vol XXVIII, No. 01
- Puneeth P; "*Martial law and Human Rights: Perspective on Art 34 of the Constitution of India",* Delhi Law Review, Aug 30, 2011, Page No. 115-126.
- Ramakrishnan, Venktesh. "Political patronage" Frontline Magazine 26 October 2009.
- Rao P. Shrikrishna deva, "Encounter Killings in Andhra Pradesh", Economic And Political Weekly, June 1995.
- Roy Arundhati; *"Walking with the Comrades",* (29 March 2010) online: http://www.outlookindia.com/article.aspx?264738-0.
- Rowlett Justin; *"Why India's 'fake encounters' are shockingly common*", Available at http://www.bbc.com/news/world-asia-india-32282054
- *"Repeal AFSPA, PSA from Kashmir and North East: UN Special Rapporteur*" (2013, May08) *Tehelka,* Online http://search.proquest. com/docview/ 1349114095?accountid =14771.
- Siddiqui Salim Akhtar, 'Hashimpura nyay ki haar hai', Samayantar, April 2015R. Deb; "Police Investigation: A Review ", Journal of the Indian Law Institute, New Delhi, 1997
- S Ahmed Ali, A look at police career of Pradeep Sharma, who killed 105 people in encounters, Times of India, July 6, 2013
- Seminar On "*Police Public Interface: Making It Happen",* Organized By Ministry Of Home Affairs and CHRI, 2nd Nov 2005
- *"Sri Lanka's Return to War- Limiting the Damage"* (Feb. 2008) International Crisis Group, Asia Report N' 146.
- Subramaniam S; "*Human Rights and Police, Hyderabad Association for advancement of Police Security Science"*, 1992, Page 11-15.
- Subramnium K; *"Flawed Security Planning",* The Tribune (January 25, 2010) 8

- "Truth and Justice: Buried in the Ground; With Laws like the AFSPA, When will Truth and Justice Prevail in Jammu and Kashmir?" *Economic & Political Weekly* (26 Nov 2011).
- The Hindu; *"Manmohan for non-lethal crowd control measures"* 26 August, 2010 http://www.thehindu.com/news/national/ article595716.ece>
- Venkatesan, V. "Murder Most Foul" Frontline Magazine, 26 September 2009.
- Victor V. Ramraj; Arun K. Thiruvengadam*, "Emergency Powers in Asia" (2009*) Cambridge University Press, Cambridge Books. Online: http://dx.doi.org.myaccess.library.utoronto.ca/10.1017/CBO9780511770630
- Vohra N.N; *"What The States Can And Must Do".* The Tribune (March 4, 2012) 13.