Chapter - V

Role of Judiciary in Protection of Human Rights

in Armed Conflicts situation

5.1 Introduction

Prosecution of the perpetrators of crimes during an armed conflict and holding them accountable for violation of human rights and humanitarian law has been a matter of great concern for the international community for a long time. Investigation and trials of powerful leaders whether political or military, responsible for violation of human rights help in strengthening the rule of law and also indicate that such crimes will not be tolerated in a right-respecting society. It is prime duty of the government of a country to protect human rights of its people and to implement the humanitarian laws during the period of armed conflicts. To this end, the States should prosecute those who are responsible for violation of human rights. If such prosecutions are held domestically within the society, where crimes occurred, then it has more potential impact than prosecution by an international body. But, while the government of a country itself involves in a armed conflict, particularly, in armed conflict of non-international nature, there may lack of political will to prosecute the criminals.

Moreover, societies emerging from conflict or in transition may also reluctant to prosecute such criminals and legal system may be in disarray. Even sophisticated legal systems which mainly deal with ordinary crimes, may lack the capacity to effectively address such crimes. These problems naturally invite assistance from international organization. This chapter analyses the various international tribunals established for prosecution of war criminals as well as the role of Indian Judiciary in protecting the rights of people in armed conflict situations of North-east India.
5.2 International Military Tribunal on Armed Conflict Situations

Prosecution of the perpetrators of crimes during an armed conflict started only after World War II by establishment of Nuremberg Military Tribunal. Infringement of the rules of warfare during this war promoted the Government of the US, UK and USSR to make a declaration in 1943 in Moscow to try German officers and men of Nazi party. In 1945, the UN War Crimes Commission was constituted under Lord Wright and an agreement was signed in London between US, UK, USSR and France for establishing an International Military Tribunal. This led to the trial of Nazi leaders at Nuremberg. This trial was conducted under the Charter of the International Military Tribunal, 1945. The Judges were from the four victorious States namely the US, UK, USSR, and France. Twenty-two leaders of the Third Reich (Germans) were tried. Out of these the tribunal had sentenced 12 important Nazi officials to death, for committing crime against peace, crime against humanity and war crimes, particularly in terms of genocide of millions of Jews, 3 were given life imprisonment, and 4 were given imprisonment for various terms. Three accused persons were acquitted.

Following the Nuremberg Tribunal, the International Military Tribunal for Far East (IMT) popularly known as Tokyo Tribunal was established on 19th January 1946, by eleven of the Allied powers namely Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom and United States to hold Japan responsible for crimes committed in Southeast Asia during armed aggression between 1928 and 1945. In the Tokyo Tribunal, the trial was conducted under the Charter of the International Military Tribunal for the Far East 1946. The significant feature of this tribunal was that its judges were not only from

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the victorious States, but some of the Judges belonged to other States also. In this trial, there were 28 accused persons. Two accused persons died during the trial and one was discharged on account of mental instability. Twenty-three accused were found guilty and out of these, 12 persons were sentenced to death and 11 were awarded different terms in prison².

After the Nuremberg and Tokyo Tribunals, a tribunal was set up to try 195 Pakistani prisoners of war for their crimes in the Bangladesh war. This, however, did not materialize since a diplomatic solution was arrived at between India, Pakistan and Bangladesh in 1971³.

In the Vietnam war which aggravated since 1965, the US armed forces violated the rules of warfare amounting to war crimes. The US tried its own army units posted in Vietnamese village Mai Lai. The trial held in Georgia (US) from 16 November 1970 to 15 March 1971 for killings in the village. Out of 25 accused persons, only one Lt. Calley was awarded life imprisonment, and others were acquitted due to insufficient evidence against them⁴.

The United Nations Security Council has established two ad-hoc International Criminal Tribunals for former Yugoslavia and Rwanda in 1993 and 1994 respectively, for the trial of persons responsible for atrocities and grave violation of humanitarian laws in these territories. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established to prosecute the Serbian army for commission of grave breaches of Geneva Conventions, violations of laws of war, genocide and crime against humanity during the break-up process of Yugoslavia. The tribunal held that

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²Supra note 1, p 365
³ Ibid, p.364
⁴ Ibid
Slobodan Milosevic as main accused for murder, deportation and persecutions and violations of the 1949 Geneva Conventions during his rule in the 1988-1989 Serb crackdown on ethnic Albanians in Kosovo. He had been charged on 66 counts while undergoing trial for five years died in March, 2006. As of February 2013, the Tribunal has indicted 161 individuals, of which 69 has been sentenced, 13 individuals accused transferred to countries in the former Yugoslavia for trial, 36 cases have been terminated either because indictments were withdrawn or because the indictees died before or after transfer to the Tribunal, 18 acquitted and 25 proceedings are still going on.

The United Nations Security Council established the International Criminal Tribunal for Rwanda to investigate the crimes committed in 1994 in Rwanda after President Juvenal Habyarimana of Rwanda was killed in an air crash. About 5,00,000 members of the Tutsi minority were slaughtered by Rwanda’s army and militia within two-and-a-half months. A person’s ethnic identity became his or her death warrant or a guarantee of survival. In request of the Government of Rwanda the Security Council, on November 8, 1994, decided to adopt the statute of the International Criminal Tribunal for Rwanda for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian laws committed in the territory of Rwanda. The Tribunal delivered its first judgement in September, 1998. It found Jean-Paul Akayesu, the former Mayor of Taba, guilty of genocide. The tribunal also found Jean Kambananada, former Prime minister of Rwanda, guilty of genocide and crime against humanity and sentenced him to life imprisonment.

The international tribunals at Nuremberg and Tokyo were established to prosecute perpetrators of crimes during international armed conflict and thus, dealt

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5 ICTY facts and figures, available at www.icty.org, updated: March 2013, last visited on 2nd April, 2013
with only government or ruling party officials. The question of the criminal responsibility of the leaders of armed opposition groups did not come before these international tribunal. But, the Yugoslavia and Rwanda Tribunal established to prosecute criminals involved in non-international armed conflict has changed this legal situation as the Statutes and jurisprudence of these two tribunals envisage criminal responsibility for non-state leaders, whether in a purely military context or not. According to the practice of the Yugoslavia Tribunal, leaders of armed opposition groups in internal conflict can incur criminal responsibility not only for violations of Common Article 3 to the Geneva Conventions and Protocol II, but for violations of other humanitarian norms also.

Besides, such ad-hoc tribunals, sometimes in different parts of the world “hybrid” courts or tribunals have also been created which are composed of international and domestic justice actors to prosecute the international criminals in their area. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea were established pursuant to an agreement between the United Nations and Sierra Leone and Cambodia respectively. Recently, in 2009 the International Crime Tribunal (ICT) formed in Bangladesh to investigate and prosecute suspects for genocide committed in 1971 by the Pakistani Army and their local collaborate, during Bangladesh Liberation War. It is a national court, based on a Bangladesh statute passed in 1973 and amended in 2009 and 2012 which has received widespread international support and the UN offered support with the planning.

The International Criminal Court (ICC) established in the year of 2002 by the Rome Treaty is the first permanent court to investigate and prosecute individuals responsible for genocide, war crimes and crimes against humanity and aggression
committed since July 1, 2002 in any parts of the World in cases where countries where crimes committed are unwilling or unable to do so. Article 5 of the Rome Statute provides crimes within the jurisdiction of the ICC as the crimes of genocide, crimes against humanity, war crimes and the crimes of aggression. What constitute genocide, crime against humanity and war crimes are described elaborately in Article 6, 7, 8 of the Statute respectively. Clause (c) of Article 8 of the Statute provides jurisdiction of the Court over non-international armed conflict situation. The prosecutor of ICC can initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court or if the State Party or the UN Security Council refers the case to the prosecutor. The ICC will not replace national tribunals, but will complement them by offering an arena for hearing claims that may be too complicated or extensive for a national court. Thus, under the Rome Statute’s “complementary” principle, domestic courts continue to have the duty to deliver justice so that the ICC remains a court of last resort.

### 5.3 Role of Judiciary in India in protecting rights of the people against the National Security Laws

The Constitution of India as being the supreme law of the country confers India’s sovereignty on the people of the country. Accordingly, the very Preamble of the constitution assures the dignity of the individuals and this dignity has been well protected by the rights and freedoms guaranteed in part III of the Constitution. The Constitution not only elaborates the basic human rights in Part III, it also secures them by extra-ordinary constitutional remedies provided in Articles 32 and 226 of the Constitution. The right to move to the Supreme Court for enforcement of fundamental right is a fundamental right in itself. The entire responsibility is cast upon the judiciary to see that the other two organs of the government i.e. the legislature and the
executive are not exercise their power to destroy the basic structure of the Constitution. Further, Article 13 of the Constitution of India entrusted the power of judicial review to the highest judicial organ of India to declare any law as unconstitutional if it violates any provisions of the part III of the Constitution of India.

The Supreme Court of India while interpreting various functions of legislature and executive has established its role as that guardian of constitutional values, and its duty as that of protecting Fundamental Rights. Emphasizing that individual rights are superior to other social concerns, the Court has held that its duty is to “zealously and vigilantly” protect civil rights and liberties of citizens against legislature and executive action. The Court asserted that article 21 is the heart of the Fundamental Rights. It has expressed the view that in order to treat a right as a Fundamental Right it is not necessary that is should be expressly stated as a Fundamental Right in the part III of Constitution of India. Accordingly, the Supreme Court has implied a whole bundle of human rights out of Article 21 by reading the same with some Directive Principles. In fact, the judiciary has diluted the theoretical distinction between the Fundamental Rights and the Directive Principles of the Constitution of the India by way of judicial interpretation over a period of time.

The Court has been interpreting the provisions of the Constitution in a very liberal way to make the benefits of such provisions accessible to the common man. To this end, the Court has encouraged the public participation in the judicial process by

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7 I. R. Coelho vs. State of Tamil Nadu, (2007) 2SCC1
8 Ashok Kumar Thakur vs. Union of India, (2008)6 SCC1; Garg vs. Hotel Association of India,(2008)SCC1
9 Raja Ram Pal vs. Hon’ble Speaker, Lok Sabha,(2007)3SCC184
11 ibid
12 Unni Krishnan vs. State of Andhra Pradesh, AIR1993SC2178
creating a new system of jurisprudence called Public Interest Litigation (PIL) which has relaxed the standing in which the third party has been allowed to propagate the cause of others in the Court. In S. P. Gupta vs. Union of India\textsuperscript{13} the Court has made it clear that traditional adversarial system of justice had failed to deliver justice to the helpless as they cannot legally represent their cases and produce relevant evidence before the court. In other words, the Court has broaden the scope of *locus standi* and its application as a mass jurisprudence. In subsequent times, the PIL has emerged as its main instrument to reshape the meaning and relevance of various human rights and obligation of State authorities for protecting the same.

The Apex Court, in many times, has also taken into consideration the international instruments of human rights while interpreting domestic law on the touchstone of fundamental rights. On various occasions, the Court has held that although ratified international treaties do not automatically become part of domestic law they are nevertheless relevant to constitutional interpretation, with reference to Article 51 of the Constitution which directs the State “to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another”. In *Keshavananda Bharati* case\textsuperscript{14} the then Chief Justice of India, Justice Sikri while deciding the case said that in view of Article 51 of the Directive Principle the Court must interpret language of the Constitution, if not intractable, which is after all an intractable law, in the light of UN Charter and the solemn declaration subscribed to by India. Further, in 1996 in *T.M.A Pai Foundation vs. State of Karnataka*\textsuperscript{15} the Supreme Court extensively drew inspiration from the General

\textsuperscript{13} AIR1982SC149

\textsuperscript{14} Keshavananda Bhatrati vs. State of Kerala(1973) Supp. SCR1

\textsuperscript{15} 1996 AIR 2652
comment adopted by the Human Rights Committee to decide upon the question of reservation.

Considering the question of domestic applicability of the principles of customary international law the Court did not have any hesitation in holding that,

‘…once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law’. 16

The Court has evolved concept of compensatory jurisprudence with the help of international document and created an obligation on the part of the State to compensate the victim and relatives of the one whose death occurs in the custody of the police. In Nilabati Behera Vs. State of Orissa17, the Apex Court held,

‘Where the infringement of fundamental rights is established, the Court cannot stop by giving a mere declaration….To repair the wrong done and given judicial redress for legal injury is a compulsion of judicial conscience’

The three judge Bench of the Supreme Court, in this case, invoked Article 9(5) of the International Covenant on Civil and Political Rights, 1966 in awarding compensation in case of custodial death, even though the Government of India had made a reservation for not accepting the obligation of payment of compensation while signing ICCPR. The Court held that, this reservation was irrelevant because compensation could be awarded for public wrong which involved infringement of a citizen’s fundamental right to life under Article 21 of the Constitution of India.

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16 Vellor Citizens Welfare Forum vs. Union of India et al., 1996 AIR2715
17 (1993)2SCC746
In *Guruvayoor Devaswom Managing Committee vs. C. K. Rajan*\(^\text{18}\), the Court said that it will not hesitate to invoke international Conventions on human rights to protect group rights of people.

The above study makes it ample clear that the Supreme Court of India has traveled beyond its traditional boundary in order to put human rights jurisprudence at the centre of the constitutional governance of India. In doing so, the Court has assumed new responsibilities. The Judgement of the Court in *Nilabati Behra* represents the finest example of judicial craftsmanship and also of responsiveness and sensitivity to the cause of human rights.

But, this doesn’t mean that all is well in the judicial set up regarding human rights. The Apex Court of the country so long has been adopting a very narrow interpretation in case of terror-related constitutional adjudication. While interpreting such laws, the Supreme Court has always been tended towards identifying its role as a mediator between competing claims of national security and Fundamental Rights; rather than as a guardian of Fundamental Rights. It broadly defers to legislative wisdom on where the line between the two should be drawn and does not engage in the larger debate on the extent of intrusion permissible into the protected realm of civil liberties. The Court also tends to check for procedural safeguards and compliance rather than substantive review of the provisions. It prefers to engage in statutory interpretation rather than constitutional adjudication in deciding upon the vires of particular provisions\(^\text{19}\).

\(^{18}\)(2003)7SCC546

This approach of the Court is very much clear in the judgements on preventive detention laws and other national security laws. From 1950’s to the mid 1980’s various preventive detention legislations as well as executive actions under these legislations were challenged wherein the conflicts between the national security and civil liberties were the main issue. In the subsequent period with the enactment of anti-terror laws, the focus shifted from preventive detention to state action in the context of terrorism.

In *A. K. Gopalan vs. State of Madras*\(^2\), the Supreme Court upheld the vires of the Preventive Detention Act, 1950 by rejecting a due process interpretation of the phrase “procedure established by law” in Article 21. The Court held that any procedure enacted by Parliament do deprive a person of his right to life or personal liberty, came within the purview of Article 21 and was constitutionally valid. It felt that the substantive justness and reasonableness of the procedure was for the Parliament to consider. Thus, the Court provided deference to the legislative branch in enacting legislation depriving citizens of their life and liberty.

The judgement of the Supreme Court in *Makhan Singh vs. Punjab*\(^2\) is another such example whereby the Court emphasized that the determination of whether the conditions justifying the Emergency were still prevalent, how long the Emergency should be in force and what right ought to be suspended during an Emergency should be left to the executive, and Courts should not interfere in such determinations. It was held that effective safeguard against abuse of executive powers

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\(^2\) AIR 1982 SC710  
\(^2\) AIR1964 SC 381.
“is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion”\textsuperscript{22}.

The judgement of Supreme Court of India in \textit{A. D. M. Jabalpur vs. Shivkant Shukla}\textsuperscript{23} is the most controversial one in this regard whereby the Court held that Article 21 of the Constitution of India is the “sole repository” of the right to life and personal liberty and any claim to a writ of \textit{hebeas corpus} on any ground amounted to enforcement of the right to life and personal liberty, which has been suspended by Presidential order. The most crucial question arose in this case was whether a writ of \textit{hebeas corpus} under Article 226 could be issued to released a detenu on the ground that his detention was inconsistent with the provisions of Maintenance of Internal Security Act or was mala fide. Various High Courts referring to the earlier decisions of the Supreme Court held that such pleas could not be affected nor be brought within the scope of Article 359 by a Presidential Order. It was further held that even during the operation of a Proclamation of Emergency, an Executive action must be supported by law and that its validity must be tested with reference to the law under which it was taken\textsuperscript{24}.

But, the Supreme Court of India, by a majority of five judges ruled that Courts did not have the power to review orders of detention, even if they were \textit{ultra vires} the legislation under which they had been imposed or on grounds of mala fide, since exercising such a review, and granting the writ of \textit{hebeas corpus} would amount to the enforcement of Article 21 which was suspended during the emergency. The Court held no person had any \textit{locus standi} to move any High Court under Article 226, for a writ of \textit{habeas corpus} or any other writ to challenge the legality of a detention order.

\textsuperscript{22} Makhan Singh vs. Punjab, AIR 1964 SC381
\textsuperscript{23} AIR1976SC1207
\textsuperscript{24} K.M, Ghatage Vs. Union of India, AIR 1975 Bom 324; K.K. Modi vs. UOI, AIR 1976 Cal 26
on any ground that the order was not under or in compliance with the Maintenance of Internal Security Act or was illegal or was vitiated by mala fides, factual or illegal or had based on extraneous considerations. Though this decision of the Supreme Court of India subsequently overruled, considering the same a to be incorrect decision, but it remains an apt example of judiciary’s submission to the executive.

Various provisions of the Terrorist and Disruptive Activities (Prevention) Act (TADA) and Prevention of Terrorism Act (POTA) were challenged in the Kartar Singh vs. State of Punjab25 and Peoples’ Union for Civil Liberties vs. Union of India26. In these cases also the Court upheld the constitutionality of provisions, but laid down procedural safeguards to prevent misuse. Section 11 of TADA, gave the executive the power to transfer cases from one court to another without giving the accused a right of hearing. However, the concurrence of the Chief Justice of India was required for this purpose, and this was held to be an adequate safeguard, negating the requirement of audi alteram partem. The Court upheld the section 15 of the Act, which made confessions to a police officer admissible in court, as constitutional and stated that such provision was required in light of national security concerns, but laid down detailed procedural guidelines to prevent misuse. The Court further recommended for setting up of executive Review Committee to provide a “high level of scrutiny” so as to evaluate the imposition of TADA in individual cases and the working of the Act in general.

But, in R. M. Tewari vs. State27 the Court held that even where the executive Review Committee found, in a given instance that TADA had been wrongly applied, this finding could not lead to the automatic withdrawal of a case pending before a

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25 (1994)3SCC569  
26 (2004)9SCC580  
27 (1996)2SCC610
TADA court. The final decision to permit withdrawal would rest with the designated court.

In *PUCL vs. Union of India*\(^{28}\), section 14 of Prevention of Terrorism Act (POTA), which permitted a police officer to compel any person to furnish information was challenged as being violative of Articles 14, 19, 20(3), and 21 of the Constitution of India. The Court, however, held that since the section required that such information could be asked only after obtaining a written approval from an officer not below the rank of Superintendent of Police, and since such a provision was necessary for the detection of terrorist activities, sufficient safeguards existed and hence the section was not unconstitutional\(^{29}\). Similarly the Court upheld section 18 and 19, dealing with the notification and de-notification of terrorist organizations, on the grounds that-

1. Such provision was necessary to protect the unity and sovereignty of India and was therefore a reasonable restriction under Article 19(4).
2. That there might be occasions when the Government felt the need to declare an organization a terrorist organization without waiting to give them an opportunity to be heard.
3. That even though there was no provision for pre-decisional hearings, the principle of *Audi alterem partem* was not violative as there was provision for post decisional hearings\(^{30}\).

In the same vein, the Court further upheld section 27 (power to direct the accused to give bodily samples)\(^{31}\); section 30 (keeping identity of witness secrete)\(^{32}\);

\(^{28}\) (2004)9SCC580

\(^{29}\) PUCL Vs UOI,(2004)9 SCC580 Para 36-38

\(^{30}\) Supra note 29 at para40-44

\(^{31}\) Ibid, para50-53
and section 32 (admissibility of confessions made to police officers)\textsuperscript{33}; on the ground that these provisions were needed to combat terror, and that there were enough procedural safeguards to ensure that they were not misused.

Thus, the Supreme Court of India uphold the constitutionality of terror-related legislations by engaging in statutory interpretation to read in clauses so as to meet constitutional requirements. Where the Court felt that provisions might be open to misuse or cause unwarranted hardship, instead of striking down such provisions, it made recommendations to the political branches to look into the matter\textsuperscript{34}.

5.4 Judiciary on Armed Forces Special Power Act

The Armed Forces Special Power Act, (AFSPA) has been in force in the substantial regions in the North-eastern States of India, since its enactment in 1958. The Act provides enormous powers to the military personal to detain persons use lethal force and enter and search premises without warrants. Such powers are conferred on the military personnel after declaring an area as disturbed area. Whenever there is an attack on the security forces and the police by the insurgents, a combing operation is conducted in the adjoining area which eventually resulted in the highest degree of human rights violation by inflicting torture on people including women who were also raped. Torture, rape, arbitrary detention, forced migration and displacement has become part of life. But, the Act provides virtual immunity from prosecution for any such violation of rights by requiring prior permission from the Central Government before security personnel can be prosecuted. Thus, the Act in the name of controlling insurgency has only intensified the insurgency in the region and

\begin{footnotesize}
\begin{enumerate}
\item Ibid, para54-61
\item Ibid, para62-64
\item Supra note 19 at 72.
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legitimized thousands of gross human rights violations of the innocent people of North-east India.

A batch of habeas corpus and other writ petitions were filed before the Guwahati High Court challenging the various provisions of the Act. In several cases, Court found that persons who had been arrested by the military under the Act disappeared subsequently\textsuperscript{35}, which suggests that they have become victims of enforced disappearances.

The case of \textit{Luitukla vs. Rishang Keishing}\textsuperscript{36}, a habeas corpus case exemplifies the total lack of restraint on the armed forces when carrying out arrests. The case was brought to ascertain the whereabouts of a man who had been arrested five years previously by the army. The Court found that the man had been detained by the army and that the forces had mistaken their role of “aiding civil power”. The Court said that the army may not act independently of the district administration. Repeatedly, the Guwahati High Court has told the army to comply with the Code of Criminal Procedure (Cr.P.C.), but there is no enforcement of these ruling.

\textit{Bacha Bora vs. State of Assam}\textsuperscript{37}, is another case where the High Court held the detention order of Rituraj Borah and Padmaraj Borah to be illegal, being violation of Section 5 of the AFSPA as well as the constitutional and legal rights, as they were produced before police only on 16/12/90, although they were arrested on 1/12/90 and 2/12/90 respectively. Torture in respect of Padmaraj was medically established and compensation was awarded to him as a palliative.

\textsuperscript{35} Nungshitombi Devi vs. Rishang Keisbang, CM Manipur, (1982)1 GLR 756
\textsuperscript{36} (1988)2GLR 159
\textsuperscript{37} (1988)2GLR119
In *Pranab Jyoti Gogoi vs. State of Assam*\(^{38}\) the custodial death of Dhrubojoyoti Gogoi of Digboi was referred for investigation to the Central Bureau of Investigation and an ex-gratia amount of Rs. Two lacs was ordered to be paid.

Such observations of the judiciary on the *habeas corpus* petitions indicate a clear picture of human rights violations in North-east India by the armed personnel while conducting the counter insurgency operations. Peoples arrested under the Act were detained for a long time which is not permissible even under a preventive detention law. Despite that, while the different provisions of AFSPA have been challenged as being unconstitutional, the higher judiciary of India expresses its unwillingness to declare the same. It is evident from the judgement of Delhi High Court in *Indrajit Barua Vs. State of Assam*\(^{39}\) case and of the Apex Court in *NPMHR*\(^{40}\) case.

In *Indrajit Barua* case, the term “dangerous and disturbed condition” as used in section 3 of the AFSPA to declare an area as a disturbed area was challenged as there is no definition of these terms. The Delhi High Court held that the lack of precision to the definition of disturbed area was not an issue because the government and the people of India understand its meaning. However, since the declaration depends on the satisfaction of the government officials, it is not subject to judicial review\(^{41}\). The court further held that the State has the duty to assure the protection of rights under Article 21 of the Constitution to the largest number of people. In doing so, if to save hundred lives one life is put in peril or if a law ensures and protects the greater social interest then such law will be wholesome and beneficial law although it

\(^{38}\) (1991)2GLR210
\(^{39}\) AIR1983 Del 513
\(^{40}\) Naga Peoples Movement of Human Rights etc. Vs. Union of India, 1998, AIR431
\(^{41}\) www.hrdc.net/sahrdc/resources/armedforces.htm
may infringe the liberty of some individuals. This judgement clarifies that while judiciary consider the need to protect ‘greater good’ forget that article 21 is also a fundamental right of the people of North-east. This deference of the Delhi High Court to the legislature demonstrates a lack of judicial independence.

In 1980, a Manipur group named Human Rights Forum filed a public interest litigation in the Supreme Court, challenging the constitutional validity of the AFSPA. The Naga Peoples Movement for Human Rights and the People’s Union for Democratic Rights also moved separate writ petitions on the same issue in 1982. However, the Supreme Court did not proceed in the matter for 15 years. In 1997, a five member bench headed by Chief Justice J. S. Verma finally ruled on the petitions challenging the Act. The various petitions were combined into the case of *Naga People’s Movement of Human Rights etc. Vs. Union of India*42.

The Supreme Court of India adopted this step only because of strong concluding observation of the UN Human Rights Committee over Government of India’s 3rd periodic report under the International Covenant on Civil and Political Rights in 1997. The Human Rights Committee emphasized that all measures taken by India in order to protect its population against terrorist activities must be in full conformity with its obligation under the ICCPR43. The Committee further observed that in applying AFSPA, the Government of India is in effect exercising emergency powers without resorting to Article 4 and 3 of the Covenant44. It expresses its concern on the continuing reliance on these special powers and violations of non-derogable human rights including right to life, right against torture, right against arbitrary

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42 Naga Peoples Movement of Human rights etc. Vs. Union of India, Supreme Court of India, Writ petition (Crl) 550 of 1982 with Writ Petition (c ) Nos. 5328/80, 9229-30/82, Civil Appeals Nos. 721 to 724 of 1985, 2173-76/1991, 2551/81 and Writ Petition (C ) Nos. 13644-45/84.
44 Ibid, at Para 19.
detention, right to fair trial etc. and requested the Supreme Court of India to examine the covenant compatibility of the Act. The Committee urges that judicial enquiries be mandatory in all cases of death at the hands of security and armed forces and that the judges in such enquiries including those under the Commission of Enquiry Act of 1952, be empowered to direct prosecution of security and armed forces personnel. The Committee further recommended for an early enactment of legislation for mandatory judicial enquiry into cases of disappearances and death, ill treatment or rape in police custody.

However, the Apex Court of the Country ignores the request of the Human Rights Committee and upheld the AFSPA in- toto. The Court held that the Parliament had been competent to enact the Act and provisions of the Act were compatible with the pertinent provisions of the Indian Constitution. The Court said that the application of the Act should not be equated with the proclamation of a state of emergency, which led to the finding that the constitutional provisions governing such proclamations had not been breached. The Court emphasized that the military forces had been deployed in the disturbed areas to assist the civilian authorities and as these authorities continued to function even after the military’s deployment, so constitutional balance between the competencies of the military and the civilian authorities had not been upset. The Court, however, set out some precautions for the implementation of the Act. It said that while exercising the powers conferred under Clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of Do’s and Don’ts issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950. The Court further said that a complaint containing an allegation

45 Ibid, at Para 18
46 Ibid, Para 22,
about misuse or abuse of the powers conferred under the Central Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central Act.

However, the Court did not address the Act’s compatibility with international human rights law ignoring the specific request of the Committee. It is interesting to note that the Supreme Court of the country which had been very much liberal in reading in international human rights jurisprudence to be applied at the domestic level did not adopt the same approach while pronouncing judgement in *NPMHR* case. Even in August 1997, in *Vishaka v. State of Rajasthan* the Supreme Court of India held that any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee. But, in *NPMHR* case which was decided in November 1997 the Court took a complete different approach and ignored the recommendations of Human Rights Committee. Thus, within a period of three months the Court fell short of its own established practice and failed to interpret the Act in compliance with India’s international human rights obligation and the treaty obligation under the ICCPR in particular.

The judgement of the Court in *NPMHR* case, further, indicates failure of Indian judiciary to uphold the federal nature of the country in areas relating to internal conflict situations. In the original version of the AFSPA only the State Governments had the power to declare an area as disturbed area. That was consistent with article 246 of the Constitution of India to be read with entry I of the State List of the 7th
Schedule of the Constitution which places “public order”. But, in 1972 this power was conferred to the Central Government and Governor of a State or Administrators of the Union Territories by amending the AFSPA. This is despite the fact that the President can proclaim emergency under Article 356 of the Constitution of India. However, the Supreme Court in NPMHR case held that the conferment of the power to make a declaration under Section 3 of the AFSPA is not violative of the federal scheme as envisaged by the Constitution of India.

Imposition of the AFSPA to the North-east and some other parts of India only has created a sense of discrimination among the people of North-east India which is clear violation of the basic human rights i.e. right of non-discrimination. Moreover, Clauses (a), (b), (c), and (d) of Section 4 of the AFSP Act which give extraordinary power to even a non-commissioned officer of the armed forces to shoot to kill; to enter; search; and destroy any building and arrest anyone on suspicion without warrant directly violates Articles 21 and 22 of the Constitution of India, which provide for the “protection of life and personal Liberty” and “protection against arrest and detention in certain cases”. However, in NPMHR the Apex Court held that, “powers conferred under clauses (a) to (d) of section 4 and section 5 of the AFSP Act on the officers of the armed forces, including a Non-Commissioned Officer, are not arbitrary and unreasonable and are not violative of the provisions of Articles 14, 19 and 21 of the constitution…. While exercising the powers conferred under Section 4(a) of the Central Act, the officer in the armed forces shall use minimal force required for effective action against the person /persons acting in contravention of the prohibitory order”.

The Court further uphold section 6 of the AFSPA which provides impunity to the armed forces for anything done in exercise of power conferred by the Act, by
holding that, “section 6 of the Central Act in so far as it confers a discretion on the Central Government to grant or refuse sanction for instituting prosecution or suit or proceeding against any person in respect of anything done or purported to be done in exercise of powers conferred by the Act does not suffer from the vice of arbitrariness. Since the order of the Central Government refusing or granting the sanction under section 6 is subject to judicial review, the Central Government shall pass an order giving reasons”

The Apex Court of India which is usually prompt to strike down, at a moment’s notice, incompatible statutes or executive action sou motu or otherwise in normal course, did not adopt same approach in case AFSPA though the same violates the most of the provisions of Part III of the Constitution of India. The Court is not displaying any judicial activism on this Act. While the Act was passed by the Parliament in 1958, the Lok Sabha acknowledged that if the AFSPA were unconstitutional, it would be for the Supreme Court to determine. But, the Supreme Court of India, has for a long time, despite various opportunities coming before it, been expresses its unwillingness to do the same and upheld the constitutional validity of the Act.

Of late, in January 2013, for the first time in the history of AFSPA, a three members Judicial Commission48 headed by Santosh Hegde, a retired Supreme Court Judge, was set up by the Supreme Court of India to look into the gross violation of human rights by security forces operating under AFSPA in response to a Public Interest Litigation (PIL) seeking investigation into 1,528 cases of alleged extrajudicial executions committed in the State of Manipur between 1978 to 2010. The

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48 The Commission was headed by Santosh Hegde, Former Judge of Supreme Court and J. M. Lynglo, former Chief of Election Commission and A. K. Singh, retired IPS Officer are the members.
Commission was established to determine whether six cases identified by the court were ‘encounter’ deaths- where security forces fired in self-defence against members of armed groups- or extrajudicial executions. The Commission submitted report in April 2013 stating that all six cases of encounters resulting in the killing of seven persons were fake and the victims did not have any criminal background.

The Commission in its findings stated that,

‘the Act provided sweeping powers to the security forces even to the extent of killing the suspected person with protection against prosecution etc., the Act does not to provide any protection to the citizens against the possible misuse of these extra-ordinary powers’.

The Commission also noted that-

Normally, the greater the power, the greater restraint and stricter the mechanism to prevent its misuse or abuse. But, in case of the AFSPA in Manipur this principle appears to have been reversed.

The Commission also reportedly recommended withdrawal of the AFSPA. The Commission said that the continued operation of the AFSPA in Manipur has made “a mockery of the law” and that security forces have been “transgressing the legal bounds for their counter-insurgency operations in the State of Manipur”

In Naga People’s Movement for Human Rights case the Supreme Court of India held that the decision of the Central Government allowing or rejecting prosecution of the armed force personnel is subjected to judicial review. Despite this, there have been few opportunities to seek judicial review on sanction decisions made by the Central Government. Till 2010, there were no available records of the number of sanction applications received, or decisions issued on those applications by either

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50 Ibid, at Para 4.13
the Ministry of Home Affairs or Ministry of Defence. Additionally, lack of transparency in the sanction application process, resulting in an acute lack of awareness, has precluded many families of victims from seeking judicial review of decisions issues by the Ministry of Home Affairs or Ministry of Defence.\textsuperscript{51}

The Justice Hegde Commission also said that no action had been taken against any Assam Rifles personnel since 1998 for violating the legally binding “Do’s and Don’ts” issued by the Indian Army. Assam rifles authorities told the Commission that the force had received 66 complaints against its personnel stationed in Manipur in the last five years, of which only three have been disposed of. It is not known what action was taken. The Assam Rifles have informed the Commission that, in the last five years, only in one case, the Manipur government has sought permission to prosecute an Assam Rifles officer for alleged human rights violations under the AFSPA. Permission was denied by the Central Government. The Commission held that, the report provided by the Assam Rifles reveal that, in the last five years 17 writ petitions have been filed against paramilitary personnel from the Assam Rifles: 10 pertaining to custodial death, four cases of missing persons, and one case of torture. But it received no information on any action having been taken in any case.\textsuperscript{52}

Prior to Justice Hedge Commission, two other Committees were also appointed by Central Government, one for review of the AFSPA namely, the Jeevon Reddy Committee and another, the Justice Verma Committee to review the laws against sexual violence in India. Both these Committees have recommended for repeal of the AFSPA, as well as for removal of the provision of prior sanction from the


\textsuperscript{52} Supra note 49, at Para 4.14
Central Government, to start any prosecution, against military personnel, from the different laws in India. Here, it is interesting that the judiciary in India who has been acting as a silent spectator of human rights violation by the government armed personnel as well as by the insurgent groups in the North-east India for more than a period of 50 years, some members of the same judiciary while acting as a member of a commission appointed by the Central Government or the Court itself adopts a completely opposite stand than that of the earlier. Such double standard adopted by judiciary implies lack of independence of judiciary in India.

5.5 Jurisdiction of ICC on Non-international Armed Conflict

The failure of Indian judiciary in protecting the rights of the people in armed conflict situations of different parts of India brings a reference in the minds of the civilians in the area to approach to an international body with a plea for protecting their rights. The International Criminal Court established by the Rome Statute of 1998 may be proper platform in this respect if the Government of India would have sign the treaty. The Statute provides many provisions for prosecuting perpetrators of crimes in a non-international armed conflict. Article 8(2)(c) to (f) identifies several acts as war crimes when committed in internal armed conflict. Article 8(2)(c) specifically criminalizes the serious violations of common Article 3 as war crimes. Besides that Article 8(2) (e) the Statutes laid down a list criminal activities that are considered as war crimes while committed in a non-international armed conflict as they are serious violation of the laws and customs within the established framework of international law. Such acts includes-

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva conventions in conformity with international law;

c. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

d. Pillaging a town or place, even when taken by assault;

e. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f) of the Rome Statute, enforced sterilization, and other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

f. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate activity in hostilities;

g. Ordering the displacement of civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

h. Killing or wounding treacherously a combatant adversary;

i. Declaring that no quarter will be given;

j. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest,
and which cause death to or seriously endanger the health of such
person or persons;
k. Destroying or seizing the property of an adversary unless such
destruction or seizure be imperatively demanded by the necessities of
the conflict.

The ICC can exercise its jurisdiction over such crimes, only if the State parties
are unwilling to prosecute the criminals or the national judicial system of the State
unable to bring to justice the perpetrators of crimes. The Rome Statute established the
Court as a complementary to the National Court that will act where a state with
jurisdiction is ‘unable’ or ‘unwilling’ to act itself. The onus is, therefore, placed on
the national courts to take responsibility. This principle of complementary is outlined
in the Preamble and Articles 1, 17, 18 and 19 of the Rome Statute. Both the Preamble
and Article 1 of the Rome Statute say that the jurisdiction of ICC “shall be
complementary to national criminal jurisdiction”. Thus, it refers to the duty of every
State (not limited to State Parties) to exercise its criminal jurisdiction over those
responsible for international crimes. Only in particularly defined circumstances,
enumerated in article 17 of the Rome Statute, cases are admissible in the ICC. Article
17 of the Rome Statute specifies four such situations in which the ICC must defer to
national proceedings. It says that the Court shall determine that a case is inadmissible
where-

a. The case is being investigated or prosecuted by a state which has
jurisdiction over it, unless the state is unwilling or unable
genuinely to carry out the investigation or prosecution.

b. The case has been investigate by a state, which has jurisdiction
over it, and the state has decided not to prosecute the person
concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.

c. The person concerned has already been tried for conduct, which is the subjects of the complaint, and a trial by the court is not permitted under Article 20(3)53.

d. The case is not of sufficient gravity to justify action by the Court.

Thus, the ICC can interfere only in case of lack of genuine national investigation and prosecution on the part of the State. If the crime has been genuinely prosecuted and tried, the ICC has no jurisdiction on the same. Article 17(2) provides the test to determine the unwillingness of a state. It lays down that in order to determine unwillingness on the part of the State in a particular case, the Court shall consider having regard to the principles of the due process recognized by international law, whether one or more of the following exist as applicable.

a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court referred to in article 554.

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53 Article 20(3) of the Rome Statute incorporate the fundamental principle of criminal justice i.e. ne bis in idem which says that, ‘No person who has been tried by another court for conduct also prescribed under Articles 6, 7 or 8 shall be tried by the court with respect to the same conduct unless the proceedings in the other court-

a. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court, or

b. Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

54 Article 5 of the Rome Statute provides crimes within the jurisdiction of the Court as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.
b. There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with intent to bring the person concerned to justice.

c. The proceedings were not or are not being conducted independently or impartially and they are being conducted in a manner which in the circumstances is inconsistent with intent to bring the person concerned to justice.

Thus, unwillingness shows a State’s lack of positive attitude towards prosecution and trying perpetrators of international crimes.

**Inability is defined under article 17.3 of the ICC statute.** It says that,

‘in order to determine inability in a particular case, the Court shall consider whether, due to total substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’.

Thus, inability includes the non-functioning of a judicial system to such an extent that investigation, prosecution and trials of perpetrators are impossible.

The Government of India, till date has been denying to become a party to the Rome Statute, as it may be subjected to trial before the ICC under Article 17(2) of the Rome Statute. Many recent episodes of the Government of India reflects unwillingness on her part to prosecute the criminals. Whenever there is crime against humanity or genocide in any part of her, the Government appoints commission after commission to inquire the matter with no result for prosecution of the criminals. Furthermore, the apparent immunity of prosecution for the armed force personnel, provided under the AFSPA as the prior permission of the government is required for such prosecution reflects directly the “unwillingness” to prosecute on the part of the
government, one of the principles of complementarity which allows interference in state sovereignty, is considered by the Government of India as a major threat to its sovereignty.

5.6 Concluding Remarks

In a democratic country strength of the country lies in protecting rights of the people by maintaining rule of law. This responsibility is primarily vested in the judiciary and so the judiciary of a democratic country should be independent and it should not be the mouthpiece of legislature or the executive. The Asian Human Rights commission in its report on the human rights situations in ten Asian Countries published on the occasion of Human rights Day of 2011, held that failure of these countries justice institutions to deliver justice and protection of human rights is the main factor that propagates the widespread abuse of human rights by state agents as well as non-state actors. As long as these justice institutions remain dysfunctional, the perpetrators of human rights violations will continue to enjoy impunity for their action55.

In India, though the Armed Forces Special Power Act violates basic tenets of criminal justice system in any civilized society, the Indian judiciary always expresses its inability to declare the same as unconstitutional. The matter is not only about one particular Act only. Even though this Act is repealed out of public pressure, the government may enact another draconian law to solve the problems of armed conflict situation. The experience of last more than fifty years reveals that Government of India is not very much interest to solve the root cause of such insurgency problems. Though Government of India has already initiated unconditional political Dialogue

with certain section of hill insurgents since August 1997, such step has been left out with many other groups. Moreover, even when any leader of an insurgent group is captured by the Government it has been seen that such leaders subsequently get special care and treatment from the Government rather than any punishment for crimes committed by them. There has not been a single instance which signifies active role on the part of the judiciary to prosecute and punish such perpetrators of crimes.

Rule 158 of the Customary International Humanitarian laws says that the States must investigate war crimes allegedly committed by their nationals or armed forces, on their territory, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. This norm of customary international law is applicable in both international and non-international armed conflicts.

The Geneva Conventions to which India is a state party also require States to search for persons alleged to have committed, or ordered to have committed, grave breaches and to try or extradite them. The government of India can’t escape herself from this responsibility. Despite that, the Government of India for more a period of more than 50 years, has not enacted any legislation for prosecution of perpetrators of crimes in a armed conflict situation, and it eventually evinced in the mind of the people of NE region a keen interest in international law and possibility of seeking justice at the international level as there is no hope in the domestic level.

The interest is further fueled by the entry into force of the ICC treaty on July 1, 2002 and its establishment in the Hague in March 2003. The statute of International Criminal Court is so designed that the jurisdiction of ICC is complementary the national courts of a country, it will not replace or supersede national courts. The Court may initiate prosecution for crimes committed during a
non-international armed conflict situation *sou-motu* when a complaint is received from any source, including governmental or non-governmental person, body or organization. Matters of human rights violations in North-east India may be therefore be referred to the International Criminal Court for prosecution of perpetrators of human rights violations if the Government of India would have sign the Rome Treaty of 1998 by which the Court has been established. If the judiciary of India is unwilling to prosecute the perpetrators of human rights, it may be urged to the Government of India to sign the Rome Treaty of 1998 so that justice is not denied to the people of any part of the country.