Chapter – I

Introduction, Scope and Methodology

1.1 Introduction

Human rights are such fundamental rights of people which are conferred on them by nature irrespective of their caste, creed, religion or otherwise whatever might be. Unlike other legal rights granted by a State to its people, human rights impose upon duty on the State to take effective steps to protect these basic rights. This principle of protection of human rights is derived from the concept of man as a person and his relationship with an organized society. So, almost every civilized country of the contemporary world incorporates basic human rights in their Constitution to make such rights available to their people.

Humanitarian laws on the other hand, aim at protection of human rights during an armed conflict situation. As, during an armed conflict, rate of violation of human rights increased to a high level, the international humanitarian law lays down certain norms to be followed during an armed conflict, so that, sufferings of war can be minimized. Such laws mandate firstly, for humanitarian treatment to the people affected by armed conflict and secondly, for imposing restrictions on the use of weapons indiscriminately to limit the sufferings of war. In other words, humanitarian laws complement human rights laws during an armed conflict situation by imposing certain obligations on the parties involving in an armed conflict.

All major religions of the world are prescribed for human rights and observance of humanitarian principles. Various ancient epics, Shastras etc. also reveal the fact of recognition of human rights and humanitarian laws at the ancient times. But, with the development of human civilization and evolution of concept of State,
human being came under the control of the government of that State. Gradually, with the passages of time, control over man’s action by the State increased in such a way that need for protection and safeguard of basic rights of human being even against the government has arisen. At the same time, consciousness on the part of human beings, as to their rights, has also necessitated the protection of rights by the State. But, this process of recognition of rights and adoption of measures for safeguarding the rights took a period of struggle over 4000 years. It is only after the World War II, which led to the formation of United Nations, there have been tremendous developments at the international level for protection of these rights.

At present, almost all the Nations recognize the rights of their people and make relevant provisions in their Constitutions to avail the same to their people. However, despite the fact that human rights and the principle of humanitarian laws are adumbrated by the most of the countries in their legal system, the violation of basic rights of the people of different parts of the world could not be minimized or prevented. The main hurdle towards the protection of human rights is that the governments of different countries adopt all the measures for protection of human rights only in papers, not in the field of war. In fact, it is the most disgraceful practice of the contemporary world that the governments of different countries themselves involve in widespread violation of human rights and humanitarian laws, despite their great concern to universal respect for observance of the same. Most of the countries though signed and ratified the international documents on human rights and humanitarian laws, but do not follow the norms laid down in such instruments when their turn come to follow the same. The Government of India also keeping shoes in the same footing observe this practice for a long time.
Being the largest democracy of the world, the Constitution of India confers
India’s sovereignty on the people of the country. Accordingly, the very Preamble
incorporates principles of justice, liberty, equality, fraternity to protect the dignity of
the individual. Provisions of Part III, namely, the Fundamental Rights and Part IV, the
Directive Principle of State Policy make provisions reflecting these principles and
thereby make certain basic human rights available to the people of India. An
integrated study of the provisions of these two parts along with the Preamble to the
Constitution leads to an idea that human rights have been treated not merely as legal
entitlements or claims of the people on the State, but they are intended to bring about
structural changes in graded society.

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 exercising their power to destroy the basic
structure of the Constitution. Moreover, 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.

Further, the Constitution of India confers power on the Parliament to enter into
any international agreements, treaties and become party to any international
documents and to enact laws for implementing provisions of such documents. Article
253 of the Constitution of India provides that the Parliament has power to make any
law for the whole or any part of the territory of India for implementing any treaty,
agreement or convention with any other country or countries or any decisions made in any international conference, association or other body. The power of the Parliament under entries 13 and 14 of list I of Seven Schedule of the Constitution further confers plenary powers on the Centre to enter into legislations to effectuate the same.

India has ratified a number of human rights instruments and thus has shown to the world its intention to provide human rights to the people. But the Government of India has not enacted enabling legislation in respect of most of the ratified conventions. For instance the Government of India has been a state party to the Genocide Convention since 1959. But, the Government, till date has not enacted any law to implement the same in India, nor any other laws in India incorporate genocide as a crime and provide punishment for the same.

India has signed some of the most of the important human rights instruments with some reservations of her own. For example, while signing the Genocide Convention the Government of India kept the reservation that for submitting any dispute to the jurisdiction of the International Court of Justice, consent of all the parties to the dispute is required in each case. She has not become party to some other most important international instruments such as 1st Optional Protocols of International Covenant on Civil Political and Cultural Rights, 2nd Optional Protocol to the Geneva Conventions, Rome Statute of 1998 etc.

Moreover, sometimes, when domestic laws are enacted in India to implement the provisions of an international instrument, it takes a different colour than the original document. For example, the Government of India has passed the Geneva Convention Act, 1960 to give effect the Geneva Conventions of 1949 to which India has been a Party. But, under section 17 of the Act, any court to take cognizance of commission of any offence under the Act, the complaint should be moved on the part
The Supreme Court of India, while playing its duty as a guardian of the fundamental rights of her people, adopts a very creative role and thereby, the ambi
tests of rights of the people are extended day by day. The Court asserted that article 21 of the Constitution 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.

On many occasions, the Supreme Court has also taken into consideration the international instruments of human rights while interpreting domestic law on the touchstone of fundamental rights. In Nilabati Behera Vs. State of Orissa, the three judge Bench of the Supreme Court invoked Article 9(5) of the International Covenant on Civil and Political Rights, 1966 in awarding compensation in a 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. In Guruvayoor Devaswom Managing Committee vs. C. K. Rajan, the Court said that, it will not hesitate to invoke international Conventions on human rights to protect group rights of people.

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1 Unni Krishnan vs. State of Andhra Pradesh, AIR1993SC2178
2 (1993)2SCC746
3 (2003)7SCC546
Many fundamental rights are interpreted by the judiciary in the light of international documents ignoring the Government of India’s reservations in this regard. But, the same judiciary, while interpreting the National Security Laws establishes its role as a mediator between competing claim of national security and fundamental rights. The Court never engage in the debate on the extent of intrusion permissible into the protective realm of civil liberties. Moreover, the Court never brings any reference to international human rights and humanitarian law documents while interpreting such security laws. Doctrine of Due Process is not considered within the ambit of ‘Procedure Established by Law’ while interpreting the national security laws.

On the other hand, India has been facing onslaught of armed conflicts on her different parts particularly in the Northeast region for more than 50 years. No other parts of India or South Asia have been subjected to such prolonged violent struggle. Many tribal groups in the area never ever been considering themselves as a part of the mainstream India and have been claiming sovereignty by adopting violent means even before India got independence from the British colony. The Government of India to curb insurgency has been imposing some of the most draconian laws such as the Armed Forces Special Power Act, 1958 in the area in the name of ‘national security’ and thereby creating emergency like situations for a prolonged period of more than 50 years. Such laws violate the basic fundamental right to life and judicial guarantee. Violation of human rights and humanitarian laws on a larger scale has been going on in the area by the insurgents groups as well as by the government’s armed forces which are specially empowered to do anything whatever they want, even to take life of a person on mere suspicion. Government of India considers the situations in the Northeast India, as law and order situation and never considers as armed conflicts
situation of non-international nature and thereby discarded any obligations under the International Human Rights and Humanitarian Laws to be followed in such situations.

The security laws provides immunity from prosecution to the man in uniform for any act, even to shoot on mere suspicion. Such provisions express the intention of discrimination on the part of the Government to the people of conflict prone areas. The people of NE have suffered an era of impunity due to the legally conferred immunity to the soldiers or army chief or a guerrilla leader of the non-state actors committing heinous international crimes. Even if the government manages to establish some form of cease-fire with particular armed groups and in some of the States there have seen significant declines in insurgent operations, this does not necessarily indicate that these violations will end forever.

So, when the Government of India is not showing the sincere interest to provide protections to the victims of the armed conflict situations of the Northeast India, the alternative left to the people of the area to take resort to the provisions available under international law. The Rome Statute of 1998, by which the International Criminal Court has been established, under its complementary jurisdiction can interfere when a State Party is unable and unwilling to investigate and prosecute the perpetrators of crimes committed in a non-international armed conflict situations.

Therefore, this research work is an attempt to find out, the relevance of Rome Treaty and international humanitarian law in the armed conflict situation of North-east India and to suggest for improvement of the existing legal system in India for better protection of the rights of the people of North-east India.
Chapter two of this research work gives an overview of the concept of human rights and humanitarian laws, their development with special emphasis to the laws of non-international armed conflict.

Indian Constitution, being the longest Constitution of the world, provides a bundle of human rights to its people. The founding fathers of the Constitution of India were very much influenced by the UDHR while drafting the Constitution. The Constitution also provides power to Parliament to enter into international Instruments and enact laws for implementing the same in the country. A number of obligations flow from such international instruments that must be respected by the Government while enacting laws. Chapter three analyses the different constitutional provisions that reflect the adumbration humanitarian laws to our legal system. It also analyze how far the laws enacted by the Government to face the insurgency problems fulfill the international standard of human rights and humanitarian laws.

Chapter four analyses the nature of armed conflict prevailing in the North-east India by bringing a reference to the definitions provided in the international documents and in judicial pronouncements. It also covers the international laws applicable in non-international armed conflict and Indian law in this aspect.

The Constitution of India makes the Supreme Court of India as a guardian of the Constitution by entrusting the noble duty of protecting the rights of the people from the hands of legislature and executive. Chapter five analyses the role played by the judiciary of India for protecting the rights of the people of armed conflict situation.

Chapter six gives an overview of the role of Independent Agency in protecting human rights during Armed Conflicts. Article 3 common to the four Geneva Conventions of 1949 entrusted on the International Committee of Red Cross, the duty
to take steps to minimize the sufferings of the victims of war and to strengthen respect for IHL by different countries. This chapter covers the role played by the ICRC in the areas where armed conflicts of non-international in nature are going on.

Chapter seven analyses the functioning of International Criminal Court and its decisional impact. The Court since establishment has been prosecuting the persons responsible for widespread violation of human rights in non-international armed conflict of different parts of the world. So, the chapter covers a brief description of prosecution by ICC of each such situation and impact of its decision.

Chapter eight incorporates suggestions and recommendations of the researcher.

1.2 Scope

Armed Conflict of non-international in nature in India is a very complex issue and spreads over in different parts of the territory of India. Therefore, the scope of this thesis is principally limited to the conflict of North-east India. Even in North-east India also number of insurgent groups has been increasing day by day and it is not possible to cover all of them while discussing the nature of the conflict in the area. In discussion regarding nature of armed rebellion in North-east India under Chapter IV, covers only three armed movements in three different states of the area where the problem is more violent then the other parts.

1.3 Hypothesis

The existing national security laws in India are deficient and fail to maintain the international standard of human rights.
1.4 Research Methodology

The researcher has been adopting primarily doctrinal method for her research and attempts to verify the hypothesis by a firsthand study of authoritative sources. The research is based mainly on the theoretical analysis of the topic and uses only the secondary sources such as books, research articles, newspapers, journals etc. also taken resort to on need base manner. However, the researcher has been adopting an empirical method to study the nature of human rights violations under Chapter IV of the thesis.