THE CONSTITUTIONALITY OF EXTRA JUDICIAL ACTION BY ARMED FORCES

Written By ***Sanjana Rao***, ***Suryakiran G*** *&* ***Tejas C Shetty***

(4th Year BA LLB Students, School of Law, Christ University)

Abstract:

In a first instance of a cross-border operation, special forces of the Indian Army in coordination with the Air Force on 9th June 2015, carried out a strike inside Myanmar, killing 38 insurgents believed to be responsible for the deadly ambush in Manipur that killed 18 soldiers on June 4th 2015. Seven others were also injured. The strike was carried out by a crack team of about 70 commandos of the Indian Army who finished the operation within 40 minutes. An action of the state such as this begets the question of the constitutionality of the said action. Can the state avoid the scrutiny of such an action in the guise of "national security?" In this paper we shall put forth arguments in favour of the state and shall present arguments to the contrary as well. We come to the conclusion that such action can indeed come under the purview of our national courts and also how such action could violate the peremptory norms of international law.

INTRODUCTION

Human rights' means 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 of India. In the event of a gross violation of a catena of human rights by the Executive, in arresting and detaining as well as shooting down alleged insurgents or terrorists; violating their fundamental human rights, the citizens of the nation have the right to file a PIL demanding justice for the same. The normative structure of the international law consists of customary international law and *jus cogens* norms which are peremptory in nature and are non-derogable. The actions by such violation of certain wings of the armed forces may lead to a violation of jus *cogens* norms like the right to life. These acts committed by the elite force are thus arbitrary in nature and the state shall be held responsible for these acts of the elite force under the Responsibility of State principle. Article 51 of the Charter of the United Nations states thus

"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." Often states take the protection of this particular article of the UN Charter to justify their extrajudicial actions. It has been held that any matter which concerns with the "National Security" of the state is a non – justiciable issue. [1] It has also been held that matters relating to defence such as the decision to take military action are not justiciable in Court nor the conduct of foreign policy and relations with other states.[2]

JURISDICTION OF NATIONAL COURTS

Art. 32 of the Constitution allows for the filing of a PIL and the scope of this is quite wide, Public Interest Litigation was intended to mean nothing more than what the words themselves said, viz., litigation in the interest of the public. The Supreme Court has held on numerous occasions that, this Hon'ble Court will not deal with any question other than that relating to a fundamental right in a proceeding under Art. 32.[3] Public Interest Litigation was evolved basically to protect the human rights of the poor, the ignorant and the oppressed who due to lack of resources and knowledge were unable to seek legal redress. A petition filed under the guise of public interest with an oblique motive and is intended to utilize the solemn institution of courts for publicity or for media attraction are not to be entertained.[4] Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking.[5] Only a person acting *bona fide* and having sufficient interest in the proceeding of PIL will alone have *locus standi* to file a PIL. He must come to the court with clean hands, with a clean heart, clean mind and a clean objective. The person who comes to the court with a PIL with vested interests, improper

[1] Council of Civil Service Union v. Minister of civil Service, (1985) AC 374; R. v. Secretary of State for the Home Department, (1991) 2 All ER 319.
[2] R. (Abbasi) v. Secreatary of State for Commonwealth Affairs, (2003) UK HRR 76; Council of Civil Service Union v. Ministry for Civil Service, (1985) AC 375.
[3] Coffee Board v. Jt. C.T.O., Madras, AIR 1971 SC 870(877); Star Sugar Mills v. State of U.P, AIR 1984 SC 37; Express Newspaper v. Union of India, (1986) 1 SCC 633; Laxmanappa v. Union of India, AIR 1955 SC 3.
[4] M.S. Rajendran vs. The Union of India, 1998(1) CTC 156
[5] Dattaraj Nathuji Thaware v. State of Maharashtra and Ors., AIR 2005 SC 540

motions or actuated by a desire to win notoriety or cheap popularity are not entitled to file a PIL.[6]

Thus a common argument by the state is that in a lot of instances, the petitioners merely seek to gain publicity and that such PIL's merely impede the efforts of the state to protect the interests of the state. On the other hand, the Supreme Court in exercise of its powers under Art. 32 of the Constitution can entertain a petition filed by any interested person in the welfare of the people who is in a disadvantaged position and thus not in a position to knock the doors of the court. The court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the state to fulfil its constitutional promises. According to the jurisprudence of Article 32 of the Constitution of India, "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed". Ordinarily, only the aggrieved party has the right to seek redress under Article 32, but, the rule of *locus standi* have been relaxed and a person acting bonafide and having sufficient interest in the proceeding of Public Interest Litigation will alone have a *locus standi* and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions.[7] The Supreme Court has held that " A PIL by a public spirited organization on behalf of persons belonging to socially and economically weaker sections of society complaining violation of their human right is maintainable"[8]

It is submitted that the an incident of killing of individuals by means of an extrajudicial action, and as all offences committed within the territory of India is subject to the jurisdiction of Supreme Court of India, the Hon'ble Court has jurisdiction. The writ of mandamus can be issued against any instrumentality or agency of the State coming within the definition in Art. 12.[9] The elite team constituted by the State Authority falls well within the ambit of this definition provided under Art. 12 of the Constitution and their act of committing extrajudicial actions may violate Art. 21 of the Constitution. Further, such actions may be in denial of principles of natural justice which violates Art. 14 of the Constitution. In addition, in the event of an extrajudicial action being committed in a foreign land does not bar the jurisdiction of our national courts. The apprehension of a suspect by state agents acting in the territory of another

[6] Ashok Kumar Pandey v. State of West Bengal, AIR 2004 SC 1923.
[7] S.P. Gupta v. Union of India, AIR 1982 SC 149.
[8] Bandhua Mukti Morcha v. Union of India, (1991) 4 SCC 174.
[9] Chander v. NCERT, AIR 1992 SC 76.

state is not a bar to the exercise of jurisdiction.[10] Such apprehension would, of course, constitute a breach of *jus cogens* and the norm of non-intervention involving state responsibility[11], unless the circumstances were such that the right of self-defense could be pleaded.[12] The US Court of Appeals in *Ker v. Illinois* held that the jurisdiction was unaffected by an illegal apprehension.[13] Under the universality principle[14], each and every state has jurisdiction to try particular offences. The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole. The Hon'ble Supreme Court of India has also pointed out in the case of *Apparel Export Promotion Council v. A.K. Chopra,15* that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. In other words, Courts in India would apply the rules of international law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law.16 The Court has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature.17 In the Italian marine's case,18 the Supreme Court of India used the principle laid down in the SS Lotus case19 to establish its jurisdiction. Fundamental Rights are guaranteed under the Part III of our constitution to all citizens and Article 14 and Article 21 of the Constitution has been guaranteed to non – citizens as well. Section 15 of the Unlawful Activities (Prevention) Act, 1967 defines a terrorist act as, "Whoever does 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 in India or in any foreign country…." Section 16 in The Unlawful Activities (Prevention) Act, 1967 speaks about the punishment for a terrorist act. According to this section, "Whoever commits a terrorist act shall, if such act has resulted in the death of any person, be punishable with death or imprisonment for life, and shall also be liable to fine;" The Supreme Court has held in *Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors*

[10] Malcolm shaw , 680
[11] article 2(4) of the United Nations Charter and Nicaragua v. US, ICJ Reports, 1986, p. 110; 76 ILR, p. 349.
[12] Malcolm shaw , 680
[13] Ker v. Illinois 119 US 436 (1886) and Frisbie v. Collins 342 US 519 (1952)
[14] Malcolm Shaw, 668.
[15] Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 SCC 759
[16] National Legal Services Authority v. Union of India, (2014) 5 SCC 438
[17] Ashok Kumar Pandey vs The State Of West Bengal on 18 November, 2003
[18] Republic of Italy v. Union of India, (2013) 4 SCC 721
[19] The S.S. Lotus (France v Turkey) (Judgment), [1927] PCIJ (ser. A) No. 10

that "The Rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of non- citizen also, those Rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. Interest of the Nation and security of the State is supreme."[20]

STANDING OF INTERNATIONAL LAW IN EXTRAJUDICIAL ACTIONS

According to the state, Human rights are not absolute and are subject to certain limitations in the interest of the sovereignty and security of the nation. The need for limitations to human rights is acknowledged by the omnibus provisions in article 29(2) of the Universal Declaration, while the ICCPR[21] and the European Convention on Human Rights[22] append specific limitations each of the fundamental freedoms, apart from some generic provisions. The International Covenant, The European Convention used the ground of 'national security' in various articles [23] as a permissible limitation in the freedom of right public trial. In the United Kingdom, where the state justifies an act, prima facie sustainable, on the plea that it was necessary in the interest of the defence[24] (national security), the court cannot go further to enquire whether the particular step was necessary to protect national security, for –

a. It is the Executive and not the judges who are responsible for maintaining National Security. Those who are responsible for the National Security are the sole judges of what the National Security requires.[25]
b. The interest of National Security require that such matters should not be disclosed to the public or be made the subject of evidence in the Court of law.[26]
c. It is beyond the competence of a court to access the requirements of defence, military action or the like.[27]

[20] Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors., AIR 2000 SC 988
[21] International Covenant, Articles 12(3), 14(1), 18(3), 19(3), 21, 22(2).
[22] European Convention on Human Rights, 1950, Articles 8(2), 9(2), 10(2), 11(2).
[23] Art. 12(3), 14(1), 19(3), 21, 22(2) D.C
[24] Chandler v. DPP, 1962 3 All ER 142(1, 157) (HL).
[25] The Zamera, 1960 2 AC 77 (107) PC.
[26] The Zamera, 1960 2 AC 77 (107) PC.
[27] Chandler v. DPP, 1962 3 All ER 142(1, 157) (HL).

In the United States the Supreme Court in interpreting the constitution has, invented, the doctrine of 'police power' of the state28, under which states the inherent power to impose such restrictions upon the Fundamental Rights as are necessary to protect the common good, e.g., public health, safety and morals. Further under the ICCPR, in times of "war or other public emergency", a state is free from the obligation imposed by Human rights.29 This is called Derogation.30 Derogation, in effect means that though a law violates a guaranteed human right, it will not be unconstitutional or invalid during a period of war, or proclamation of emergency.31. The exercise of the right of derogation again is subjected to two conditions by the International Instruments (i) the measures taken must be such as are strictly required by the exigencies of the situation; and (ii) such measures must not be inconsistent with the other obligations of the state under international law.32 Needless to say in India, courts also attempt to interpret statutes to conform to rules of International law or conventions to which India is a party.33 In India, a treaty may also be implemented by the exercise of executive power under article 53.34 In the absence of contrary legislation, Municipal courts in India would respect rules of International Law.35 The Constitution also acknowledges that there cannot be any such thing as absolute or uncontrolled liberty, for that would lead to anarchy and disorder. 36Liberty has to be limited in order to be affectively possessed. The question therefore arises and each case of adjusting the conflicting interests of the individual and the society.37In determining whether a restriction was necessary, the Court has to balance38 the need for the fundamental right and the social need to curb it in the circumstances of the particular case.39 In the United States The supreme Court in interpreting the constitution has, invented, the doctrine of 'police power' of the state[40], under which states the inherent power to impose such restrictions upon the Fundamental Rights as are necessary to protect the common good, e.g., public health, safety

[28] Lochner v. N.Y, (1950) 198 U.S. 45.
[29] European Convention on Human Rights, 1950, Art. 15; International Covenant on Civil and Political Rights, 1966, Article 4.
[30] European Convention on Human Rights, 1950, Art. 2, 3, 4(1), 7[art. 15(2)].; International Covenant on Civil and Political Rights 1966, Art. 6, 18,
[31] Lawless v. Ireland, 1961 1 EHRR 15.
[32] International Covenant on Civil and Political Rights, Article 4.
[33] Gramophone Co. v. Pandey, AIR 1984 SC 667.
[34] Magan Bhai v. Union of India, AIR 1969 SC 783.
[35] Gramophone Co. v. Pandey, AIR 1984 SC 667; P.U.C.L v. Union of India, (1997) 1 SCC 301.
[36] Gopalan v. state of Madras, (1950) SCR 88 (253-254).
[37] DURGA DAS BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW, 325(Dr. Ashish Kumar Massey et al.eds. Wadhwa and company, 2nd edition, 2005).
[38] Klass v. F.R.G, (1971) 2 EHRR 214.
[39] Lingens case, (1986) ECHR(A) 103.
[40] Lochner v. N.Y, (1950) 198 U.S. 45.

and morals. Further under the ICCPR, in times of "war or other public emergency", a state is free from the obligation imposed by Human rights.[41] This is called Derogation.[42] Derogation, in effect means that though a law violates a guaranteed human right, it will not be unconstitutional or invalid during a period of war, or proclamation of emergency.[43]. The exercise of the right of derogation again is subjected to two conditions by the International Instruments (i) the measures taken must be such as are strictly required by the exigencies of the situation; and (ii) such measures must not be inconsistent with the other obligations of the state under international law.[44]

To present a contrary view, it is the duty of the Government not only to protect the human rights of the victims of a criminal act such as terrorism, but also the rights of the criminal behind the act45. The duty of state at such instance is to initiate independent and impartial investigations into the allegations of human rights violations. The International Covenant on Civil and Political Rights guarantee 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."46 The ICCPR also entails that the rights mentioned in the covenant shall not be waived at any time even when there is a threat of public emergency in a nation.47 Article 3 of the Universal Declaration of Human Rights states that "Everyone has the right to life, liberty and security of person." Article 10 of the UDHR states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Jus cogens*, the literal meaning of which is "compelling law," is the technical term given to those norms of general international law that are argued as hierarchically superior.48 These are, in fact, a set of norms, which are peremptory in nature and from which no derogation is allowed under any circumstances.49 These *jus cogens* norms are binding on all nations can be modified only by a subsequent norm of general international

[41] European Convention on Human Rights, 1950, Art. 15; International Covenant on Civil and Political Rights, 1966, Article 4.
[42] European Convention on Human Rights, 1950, Art. 2, 3, 4(1), 7[art. 15(2)].; International Covenant on Civil and Political Rights 1966, Art. 6, 18,
[43] Lawless v. Ireland, 1961 1 EHRR 15.
[44] International Covenant on Civil and Political Rights, Article 4.
[45] State through Superintendent of Police, CBI/SIT v. Nalini and Ors, AIR 1999 SC 2640.
[46] Art. 6(1) of the ICCPR, 1976.
[47] Art. 4 of the ICCPR, 1976.
[48] Rebecca M.M. Wallace, International Law 33 (2d ed. 1994).
[49]Lauterpacht, ILC Ybk 1953/II 90, 154-5.

law having the same character.50 Jus cogens norms are *erga omnes* in nature.51 *Jus cogens* are rules, which correspond to the fundamental norm of international public policy and in which cannot be altered unless a subsequent norm of the same standard is established. 52 The Vienna Convention on the Law of Treaties has given recognition to these norms and it reads thus"A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."53 This means that the position of the rules of *jus cogens* is hierarchically superior compared to other ordinary rules of international law. Hence *jus cogens* is an accepted doctrine in international law.54 Article 6 of the International Covenant on Civil and Political Rights states 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." This is necessarily considered to be a jus cogens norm in the international arena.55 In the International legal system states that practice, encourage, or condone genocide, slavery or the slave trade, extra judicial killings, torture or systematic racial discrimination violate international law, which acts violate peremptory norms, or jus cogens and violations of which constitute violations of obligations owned to all ("ergaomnes").56 Extrajudicial killings clearly contravene the right to life and a number of national courts have concluded that the prohibition of extrajudicial executions is a jus cogens norm.57 The Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated58 that articles 6 and 14 of ICCPR, apply extraterritorially to the conduct of the State agents. He further emphasizes that while the targeting of a combatant directly participating in hostilities is permitted under the laws of war, there are no circumstances in

[50] US v. Matta-Ballesteros, 71 F.3d 754.
[51] Malcolm Shaw, International Law, Cambridge University Press, 6th Ed., 2008, pp. 125.
[52] Gennady M. Danilenko, International Jus Cogens: Issues of Law-Making, 2 EUR. J. INT'L L. 42, 44 (1991); [1963] 2 Y.B. International Law Commission 52, U.N. Doc
[53]Article 53 of the Vienna Convention on the Law of Treaties (1969).
[54] ICJ Reports (1986) 100.
[55] F.F. Martin, et.al, International Human Rights and Humanitarian Law, Cambridge University Press, New York, 2006. pp. 34-35.
[56]Timothy McCormack and Avril McDonald, Yearbook of International Humanitarian Law, 2003, Volume 6, Cambridge University Press, pp. 665.
[57] Rapporteur Mr Louis Maria de Puig, Report of the Parliamentary Assembly, Democratic oversight of the Security Sector in member states, Armed force and security services: what democratic controls, Council of Europe Publishing, 2009, pp. 29,
[58] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Philip Alston, U.N. Doc. HRC/4/20/Add. 1, 12 March 2007.

which the targeting of any other person can be justified.59 It is also well established that states may be responsible for *ultra vires* acts of their officials committed within their apparent authority or general scope of authority.60 It is a general principle of International law that a breach of an international obligation entails the responsibility of the state concerned.[61] In the *Spanish Zone of Morocco*[62] case it was held that responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.[63] Pursuant to ARSIWA Article 4, 'the conduct of any State organ shall be considered an act of that State under international law', regardless of the character of that organ and whatever function it exercises.[64] It was held by the International Court in *Armed Activities on the Territory of the Congo*[65] that 'according to a well-established rule of international law i.e. jus cogens, which is of customary character, the conduct of any organ of a State must be regarded as an act of that State'.[66] States are, of course, under a general obligation to act in conformity with the rules of international law and will bear responsibility for breaches of it, whether committed by the legislative, executive or judicial organs and irrespective of domestic law.[67]

CONCLUSION

Article 3[68] of the Universal Declaration of Human Rights says that "Everyone has the right to life, liberty and security of person". Further, article 9[69] provides that "No one shall be subjected to arbitrary arrest, detention or exile". Clause 10 of the same says that "Everyone is entitled in full equality to a fair and public hearing by an impartial tribunal"[70] The same principles are enshrined in the Covenant on Civil and political Rights.[71] Universal Declaration and International Covenant extends fundamental rights to aliens. Art. 6[72] of the universal declaration and Art. 16 of ICCPR says "Everyone shall have the right to recognition

[59] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 22 November 2007, pp. 20, Para. 42.
[60]James Crawford, Brownlie's Principles of Public International Law, Oxford University Press, 8th Ed. Pp. 549.
[61] James Crawford, Brownlie's Principles of Public International Law, Oxford University Press, 8th Ed. Pp. 540.
[62]Great Britain v. Spain, (1924) 2 R.I.A.A. 615, 641.
[63]Coenco Bros v. Germany, (1924) 4 ILR 570; James Crawford, Brownlie's Principles of Public International Law, Oxford University Press, 8th Ed. Pp. 542.
[64]Salvador Commercial Company (1902) 15 RIAA 455,477.
[65]Democratic Republic of the Congo v Uganda, [2005] ICJ Rep 168.
[66] ICJ Reports 2005 pp. 168,242.
[67] The Exchange of Greek and Turkish Populations case, PCIJ, Series B, No. 10, p. 20,
[68] The Universal Declaration of Human Rights 1948, Art. 3.
[69] The Universal Declaration of Human Rights 1948, Art. 3
[70] M. v. Organisation Belge, (1972) 45 Inter, LR 446.
[71] International Covenant on Civil and Political Rights 1966, Art. 6-7, 10-11.
[72] The Universal Declaration of Human Rights 1948, Art. 6.

everywhere as a person before the law." The Fifth Amendment to the Constitution of U.S.A. (1791) declares- "No person shall be deprived of his life, liberty or property, without due to process of law. [73] Due process is conveniently understood means procedural regularity and fairness.[74] In India we follow the 'procedure established by law'. Article 21 simply means you cannot deprive a man of his personal liberty, unless you follow an act according to the law which provides for the deprivation of such liberty.[75] Law means state made or enacted laws and not general principles of natural justice. A procedure established by law thus means procedure prescribed by the legislature.[76] However, this has been expanded by the Supreme Court to mean that in order for ant state action or law to be valid the procedure prescribed must not be arbitrary, unfair or unreasonable.[77] Thus, in conclusion we can see that the state has a plethora of justifications for committing an extrajudicial action, but in the interests of satisfying the grounds of natural justice, it is necessary to bring such extrajudicial actions within the purview of our national courts.

[73] The ' due process' clause was adopted in s, 1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by 'the principles of fundamental justice' [s.7]
[74] Brook v. N Carolina, (1951) 344 US 424 (427)
[75] Gopalan v. State of Madras ,(1950) SCR 88:AIR 1950 SC 27.
[76] Gopalan v. State of Madras ,(1950) SCR 88:AIR 1950 SC 27.
[77] Maneka Gandhi v. Union of India,AIR 1978 SC 597.