Armed Forces Special Powers Act:

1. INTRODUCTION

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the more draconian legislations that the Indian Parliament has passed in its 45 years of Parliamentary history. Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to "maintain the public order".

The AFSPA gives the armed forces wide powers to shoot, arrest and search, all in the name of "aiding civil power." It was first applied to the North Eastern states of Assam and Manipur and was amended in 1972 to extend to all the seven states in the north- eastern region of India. They are Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland, also known as the "seven sisters". The enforcement of the AFSPA has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by security personnel. This legislation is sought to be justified by the Government of India, on the plea that it is required to stop the North East states from seceeding from the Indian Union. There is a strong movement for self-determination which precedes the formation of the Indian Union.

2. HISTORICAL BACKGROUND

As the great Himalayan range dividing South and Central Asia runs down the east, it takes a southward curve and splits into lower hill ranges. The hills are punctuated by valleys and the valleys are washed by the rivers that drain into to the Bay of Bengal. Waves of people settled in these blue hills and green valleys at various times in history. They brought with them cultures and traditions. The new interacted with the old and evolved into the unique cultural mosaic that characterizes the region.

Through the centuries, these hills and valleys have bridged South, South East, and Central Asia. On today's geo-political map, a large part of the original region constitutes the seven states of the Republic of India, but its political, economic and socio-cultural systems have always been linked with South East Asia. The great Hindu and Muslim empires that reigned over the Indian sub-continent never extended east of the Bhramaputra river.

India's British colonizers were the first to break this barrier. In the early 19th century, they moved in to check the Burmese expansion into today's Manipur and Assam. The British, with the help of the then Manipur King, Gambhir Singh, crushed the Burmese imperialist dream and the treaty of Yandabo was signed in 1828. Under this treaty, Assam became a part of British India and the British continued to influence the political affairs of the region.

This undue interference eventually led to the bloody Anglo- Manipuri conflict of 1891. The British reaffirmed their position but were cognizant of the ferocious spirit of independence

of these people and did not administer directly but only through the King.

It was during the Second World War, when the Japanese tried to enter the Indian sub-continent through this narrow corridor, that the strategic significance of the region to the Indian armed forces was realised. With the bombing of the Hiroshima and Nagasaki, a disenchanted Japanese had to retreat from Imphal and Kohima fronts, however the importance of control over the region subsequently remained a priority for the Government of India.

With the end of the war, the global political map was changed over night. As the British were preparing to leave Asia, the Political Department of the British Government planned to carve out a buffer state consisting of the Naga Hills, Mikir Hills, Sadiya Area, Balipara Tract, Manipur, Lushai Hills, Khasi and Hills in Assam, as well as the Chin Hills and the hills of northern Burma. The impending departure of the British created confusion and turmoil over how to fill the political vacuum they would leave behind. Ultimately, the various territories were parceled out to Nehru's India, Jinnah's Pakistan, Aung Sang's Burma and Mao's China according to strategic requirements. As expected, there were some rumblings between the new Asiatic powers on who should get how much - India and Burma over Kabow valley, India and East Pakistan over Chittagong Hill Tracts, and India and China over the North-East Frontier Agency (NEFA), present day Arunachal Pradesh.

Compromises were made, and issues were finally settled in distant capitals, to the satifaction of the new rulers. The people who had been dwelling in these hills and valleys for thousands of years were systematically excluded from the consultation process. The Indian share of the British colonial cake in this region constitutes the present "Seven Sisters" states of the North-East.

Over the years, thanks to the British, the advent of western education and contact with new ideas brought about the realization that the old ways had to give way to the new. Indigenous movements evolved as the people aspired to a new social and political order. For example, in the ancient Kingdom of Manipur, under the charismatic leadership of Hijam Irabot, a strong popular democratic movement against feudalism and colonialism was raging. After the departure of the British, the Kingdom of Manipur was reconstituted as a constitutional monarchy on modern lines by passing the Manipur Constitution Act, 1947.

Elections were held under the new constitution. A legislative assembly was formed. In 1949, Mr V P Menon, a senior representative of the Government of India, invited the King to a meeting on the pretext of discussing the deteriorating law and order situation in the state at Shillong. Upon his arrival, the King was allegedly forced to sign under duress the merger agreement. The agreement was never ratified in the Manipur Legislative Assembly. Rather, the Assembly was dissolved and Manipur was kept under the charge of a Chief Commissioner. There were protests, but the carrot-and-stick policy launched by the Indian Government successfully suppressed any opposition.

The Naga Movement

At the beginning of the century, the inhabitants of the Naga Hills, which extend across the Indo-Burmese border, came together under the single banner of Naga National Council (NNC), aspiring for a common homeland and self-governance. As early as 1929, the NNC

petitioned the Simon Commission, which was examining the feasibility of future of self-governance of India. The Naga leaders were adamantly against Indian rule over their people once the British pulled out of the region. Mahatma Gandhi publicly announced that the Nagas had every right to be independent. His assertion was based on his belief in non-violence, he did not believe in the use of force or an unwilling union.

Under the Hydari Agreement signed between NNC and British administration, Nagaland was granted protected status for ten years, after which the Nagas would decide whether they should stay in the Union or not. However, shortly after the British withdrew, independent India proclaimed the Naga Territory as part and parcel of the new Republic.

The NNC proclaimed Nagaland's independence. In retaliation, Indian authorities arrested the Naga leaders. An armed struggle ensued and there were large casualties on either side. The Armed Forces Special Powers Act is the product of this tension.

In 1975, some Naga leaders held talks with the Government of India which resulted in what is known as the Shillong Accord. The Naga leaders who did not agree with the Shillong accord formed the National Socialist Council of Nagaland (NSCN) and continue to fight for what they call," Naga sovereignty".

Problems of Integration

Much of this historical bloodshed could have been avoided if the new India had lived up to the democratic principles enshrined in its Constitution and respected the rights of the nationalities it had taken within its borders. But in the over-zealous efforts to integrate these people into the "national mainstream", based on the dominant brahminical Aryan culture, much destruction has been done to the indigenous populations.

Culturally, the highly caste ridden, feudal society is totally incompatible with the ethics of North-East cultures which are by and large egalitarian. To make matters even worse, the Indian leaders found it useful to club these ethnic groups with the adivasis (indigenous peoples) of the sub-continent, dubbing them "scheduled tribes". As a result, in the casteist Indian social milieu, indigenous peoples are stigmatized by higher castes.

The languages of the North-East are of the Tibeto- Chinese family rather than the Indo-Aryan or Dravidian. Until the recent Eighth Schedule of the Indian Constitution, none of the Tibeto- Chinese languages were recognized as Indian languages. The predominantly mongoloid features of the people of the North-East is another barrier to cultural assimilation.

Politically dependent, the North East is being economically undermined; the traditional trade routes with South East Asia and Bangladesh have been closed. It was kept out of the Government of India's massive infrastructural development in the first few five-year-plans. Gradually, the region has become the Indian capitalist's hinterland, where local industries have been reduced to nothing and the people are now entirely dependent on goods and businesses owned predominantly by those from the Indo- Gangetic plains. The economic strings of this region are controlled by these, in many cases, unscrupulous traders.

All the states of the North-East are connected to India by the "chicken's neck", a narrow corridor between Bangladesh and Bhutan. At partition, the area was cut off from the nearest port of Chittagong, in what is now Bangladesh, reducing traffic to and from the region to a trickle. The states in the region are largely unconnected to India' vast rail system.

India freely exploits the natural resources of the North-East. Assam produces one-fourth of all the petroleum for India, yet it is processed outside of Assam so the state does not receive the revenues. Manipur is 22% behind the national average for infrastructural development, and the entire North-Eastern region is 30% behind the rest of India.

Observers have pointed out that "...it is clear that in the North East, insurgency and underdevelopment have been closely linked; in such a situation strong-arm tactics will only help to further alienate the people."

The shifting demographic balance due to large-scale immigration from within and outside the country is another source of tension. The indigenous people fear that they will be outnumbered by outsiders in their own land. Laborers from Bihar and Bengal who live under rigidly feudal, casteist socio-economic conditions in their states are ready to do all kinds of menial jobs at much lower wages. As they pour in, more and more local laborers are being edged out of their jobs. Illegal immigration from Bangladesh and Nepal is also percieved as a threat. In Tripura, the indigenous population has been reduced to a mere 28% of the total population of the state because of large scale immigration from then East Pakistan and now Bangladesh.

In Assam, a similar fear of " immigrant invasion" was at the root of a student movement in the early eighties. The student leaders formed a political party called the Assam Gana Parisad (AGP) and contested state elections and won. In 1984, the Assam Accord was signed with the Central Government. However, the provisions of the Accord were never implemented. The failure of the AGP to bring about change in the state of Assam fostered the growth of the armed and overtly seccessionist United Liberation Front of Assam (ULFA).

Mizoram

In the Lushai hills of Assam in the early sixties, a famine broke out. A relief team cried out for help from the Government of India. But there was little help. The relief team organized themselves into the Mizo National Front (MNF) and called for an armed struggle, " to liberate Mizoram from Indian colonialiasm." In February 1966, armed militant groups captured the town of Aizawl and took possession of all government offices. It took the Indian army one week to recapture the town. The army responded viciously with air raids. This is the only place in India where the Indian Security Forces actually aerially bombed its own civilian population. The armed forces compelled people to leave their homes and dumped them on the roadside to set up new villages, so that the armed forces would be able to better control them. This devastated the structure of Mizo society. In 1986, the Mizo Accord was signed between the MNF and the Government of India. This accord was identical to the Shilong Accord made with the Nagas earlier. The MNF agreed to work within the Indian Constitution and to renounce violence.

The Government of India's primary interest in the North East was strategic, and so was its response to the problems. A series of repressive laws were passed by the Government of India in order to deal with this uprising. In 1953, the Assam Maintenance of Public Order (Autonomous District) Regulation Act was passed. It was applicable to the then Naga Hills and Tuensang districts. It empowered the Governor to impose collective fines, prohibit public meetings and and detain anybody without a warrant.

On 22 May 1958, a mere 12 days after the Budget Session of Parliament was over, the Armed Forces (Assam-Manipur) Special Powers Ordinance was passed. A bill was introduced in the Monsoon session of Parliament that year. Amongst those who cautioned against giving such blanket powers to the Army included the then Deputy Chairman of the Rajya Sabha, (Upper House of the Indian Parliament), Mr P N Sapru. In a brief discussion that lasted for three hours in the Lok Sabha and for four hours in the Rajya Sabha, Parliament approved the Armed Forces (Assam- Manipur) Special Powers Act with retrospective from 22 May 1958.

3. THE ACT AND ITS PROVISIONS

Section 1: This section states the name of the Act and the areas to which it extends (Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram).

Section 2: This section sets out the definition of the Act, but leaves much un-defined. Under part (a) in the 1972 version, the armed forces were defined as "the military and Air Force of the Union so operating". In the 1958 version of the Act the definition was of the "military forces and the air forces operating as land forces". In the Lok Sabha Debates which led to the passing of the original Act, Mr Naushir Bharucha commented, "that probably means that the Government very mercifully has not permitted the air forces to shoot or strafe the area ... or to bomb." The Minister of Home Affairs did not confirm this interpretation, but certainly "acting as land forces" should rule out the power to resort to aerial bombardment. Nevertheless, in 1966, the Air Force in Mizoram did resort to aerial bombardment.

Section 2(b) defines a "disturbed area" as any area declared as such under Clause 3 (see discussion below). Section 2(c) states that all other words not defined in the AFSPA have the meanings assigned to them in the Army Act of 1950.

Section 3: This section defines "disturbed area" by stating how an area can be declared disturbed. It grants the power to declare an area disturbed to the Central Government and the Governor of the State, but does not describe the circumstances under which the authority would be justified in making such a declaration. Rather, the AFSPA only requires that such authority be "of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary." The vagueness of this definition was challenged in Indrajit Barua v. State of Assam case. The court decided that the lack of precision to the definition of a disturbed area was not an issue because the government and people of India understand its meaning. However, since the declaration depends on the satisfaction of the Government official, the declaration that an area is disturbed is not subject to judicial review. So in practice, it is only the government's understanding which classifies an area as disturbed.

There is no mechanism for the people to challenge this opinion. Strangely, there are acts which define the term more concretely. In the Disturbed Areas (Special Courts) Act, 1976, an area may be declared disturbed when "a State Government is satisfied that (i) there was, or (ii) there is, in any area within a State extensive disturbance of the public peace and tranquility, by reason of differences or disputes between members of different religions, racial, language, or regional groups or castes or communities, it may ... declare such area to be a disturbed area." The lack of precision in the definition of a disturbed area under the AFSPA demonstrates that the government is not interested in putting safeguards on its application of the AFSPA.

The 1972 amendments to the AFSPA extended the power to declare an area disturbed to the Central Government. In the 1958 version of the AFSPA only the state governments had this power. In the 1972 Lok Sabha debates it was argued that extending this power to the Central Government would take away the State's authority. In the 1958 debates the authority and power of the states in applying the AFSPA was a key issue. The Home Minister had argued that the AFSPA broadened states' power because they could call in the military whenever they chose. The 1972 amendment shows that the Central Government is no longer concerned with the state's power. Rather, the Central Government now has the ability to overrule the opinion of a state governor and declare an area disturbed. This happened in Tripura, when the Central Government declared Tripura a disturbed area, over the opposition of the State Government.

In the 1972 Lok Sabha debates, Mr S D Somasundaram pointed out that there was no need to extend this power to the Central Government, since the President had "the power to intervene in a disturbed State at any time" under the Constitution. This point went unheeded and the Central Government retains the power to apply the AFSPA to the areas it wishes in the Northeast.

Section 4: This section sets out the powers granted to the military stationed in a disturbed area. These powers are granted to the commissioned officer, warrant officer, or non-commissioned officer, only a jawan (private) does not have these powers. The Section allows the armed forces personnel to use force for a variety of reasons.

The army can shoot to kill, under the powers of section 4(a), for the commission or suspicion of the commission of the following offenses: acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons, carrying weapons, or carrying anything which is capable of being used as a fire-arm or ammunition. To justify the invocation of this provision, the officer need only be "of the opinion that it is necessary to do so for the maintenance of public order" and only give "such due warning as he may consider necessary".

The army can destroy property under section 4(b) if it is an arms dump, a fortified position or shelter from where armed attacks are made or are suspected of being made, if the structure is used as a training camp, or as a hide-out by armed gangs or absconders.

The army can arrest anyone without a warrant under section 4(c) who has committed, is suspected of having committed or of being about to commit, a cognisable offense and use any amount of force "necessary to effect the arrest".

Under section 4(d), the army can enter and search without a warrant to make an arrest or to recover any property, arms, ammunition or explosives which are believed to be unlawfully kept on the premises. This section also allows the use of force necessary for the search.

Section 5: This section states that after the military has arrested someone under the AFSPA, they must hand that person over to the nearest police station with the "least possible delay". There is no definition in the act of what constitutes the least possible delay. Some case-law has established that 4 to 5 days is too long. But since this provision has been interpreted as depending on the specifics circumstances of each case, there is no precise amount of time after which the section is violated. The holding of the arrested person, without review by a magistrate, constitutes arbitrary detention.

Section 6: This section establishes that no legal proceeding can be brought against any member of the armed forces acting under the AFSPA, without the permission of the Central Government. This section leaves the victims of the armed forces abuses without a remedy.

4. LEGAL ANALYSIS

The Armed Forces Special Powers Act contravenes both Indian and International law standards. This was exemplified when India presented its second periodic report to the United Nations Human Rights Committee in 1991. Members of the UNHRC asked numerous questions about the validity of the AFSPA, questioning how the AFSPA could be deemed constitutional under Indian law and how it could be justified in light of Article 4 of the ICCPR. The Attorney General of India relied on the sole argument that the AFSPA is a necessary measure to prevent the secession of the North Eastern states. He said that a response to this agitation for secession in the North East had to be done on a "war footing." He argued that the Indian Constitution, in Article 355, made it the duty of the Central Government to protect the states from internal disturbance, and that there is no duty under international law to allow secession.

This reasoning exemplifies the vicious cycle which has been instituted in the North East due to the AFSPA. The use of the AFSPA pushes the demand for more autonomy, giving the peoples of the North East more reason to want to secede from a state which enacts such powers and the agitation which ensues continues to justify the use of the AFSPA from the point of view of the Indian Government.

A) INDIAN LAW

There are several cases pending before the Indian Supreme Court which challenge the constitutionality of the AFSPA. Some of these cases have been pending for over nine years. Since the Delhi High Court found the AFSPA to be constitutional in the case of Indrajit Barua and the Gauhati High court found this decision to be binding in People's Union for Democratic Rights, the only judicial way to repeal the act is for the Supreme Court to declare the AFSPA unconstitutional.

It is extremely surprising that the Delhi High Court found the AFSPA constitutional given the wording and application of the AFSPA. The AFSPA is unconstitutional and should be repealed by the judiciary or the legislature to end army rule in the North East.

- Violation of Article 21 - Right to life

  Article 21 of the Indian Constitution guarantees the right to life to all people. It reads, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Judicial interpretation that "procedure established by law means a "fair, just and reasonable law" has been part of Indian jurisprudence since the 1978 case of Maneka Gandhi. This decision overrules the 1950 Gopalan case which had found that any law enacted by Parliament met the requirement of "procedure established by law".

  Under section 4(a) of the AFSPA, which grants armed forces personnel the power to shoot to kill, the constitutional right to life is violated. This law is not fair, just or reasonable because it allows the armed forces to use an excessive amount of force.

  The offenses under section 4(a) are: "acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or fire-arms, ammunition or explosive substances". None of these offences necessarily involve the use of force. The armed forces are thus allowed to retaliate with powers which are grossly out of proportion with the offence.

  Justice requires that the use of force be justified by a need for self-defense and a minimum level of proportionality. As pointed out by the UN Human Rights Commission, since "assembly" is not defined, it could well be a lawful assembly, such as a family gathering, and since "weapon" is not defined it could include a stone. This shows how wide the interpretation of the offences may be, illustrating that the use of force is disproportionate and irrational.

  Several incidents show how the Border Security Force (BSF) and army personnel abuse their powers in the North East. In April 1995, a villager in West Tripura was riding near a border outpost when a soldier asked him to stop. The villager did not stop and the soldier shot him dead. Even more grotesque were the killings in Kohima on 5 March 1995. The Rastriya Rifles (National Rifles) mistook the sound of a tyre burst from their own convoy as a bomb attack and began firing indiscriminately in the town. The Assam Rifles and the CRPF who were camped two kilometers away heard the gunshots and also began firing. The firing lasted for more than one hour, resulting in the death of seven innocent civilians, 22 were also seriously injured. Among those killed were two girls aged 3 1/2 and 8 years old. The injured also included 7 minors. Mortars were used even though using mortars in a civilian area is prohibited under army rules.

  This atrocity demonstrates the level of tension prevalent in the North East. For a tire burst to be mistaken for a bomb proves that the armed forces are perpetually under stress and live under a state of siege.

In the Indrajit Barua case, the Delhi High Court found that the state has the duty to assure the protection of rights under Article 21 to the largest number of people. Couched in the rhetoric of the need to protect the "greater good", it is clear that the Court did not feel that Article 21 is a fundamental right for the people of Assam. The Court stated, "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 a wholesome and beneficial law although it may infringe the liberty of some individuals."

This directly contradicts Article 14 of the Indian Constitution which guarantees equality before the law. This article guarantees that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" are denied the protection of the right to life, denied the protections of the Criminal Procedure Code and prohibited from seeking judicial redress, they are also denied equality before the law. Residents of non-disturbed areas enjoy the protections guaranteed under the Constitution, whereas the residents of the Northeast live under virtual army rule. Residents of the rest of the Union of India are not obliged to sacrifice their Constitutional rights in the name of the "greater good".

- Protection against arrest and detention - Article 22

Article 22 of the Indian Constitution states that "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate." The remaining sections of the Article deal with limits on these first two sections in the case of preventive detention laws. On its face, the AFSPA is not a preventive detention law therefore the safeguards of sections (1) and (2) must be guaranteed to people arrested under the AFSPA.

Section (2) of Article 22 was the subject of much debate during the framing of the Indian Constitution. There was argument over whether the time limit should be specified or whether the words "with the least possible delay" should be used. Dr Amedkar, one of the principal framers of the Indian Constitution argued that "with the least possible delay" would actually result in the person being held for a shorter period of time, whereas "twenty- four hours" would result in the person being held for the maximum time of twenty-four hours. The application of these terms has since shown that a specified time period constitutes a greater safeguard. Under the AFSPA, the use of "least possible delay" language has allowed the security forces to hold people for days and months at a time. A few habeas corpus cases in which the court did find the delay to be excessive are indicative of the abuses which are occurring in practice. It should be noted that habeas corpus cases are only filed for those who have access to lawyers and the court. In all the seven states of the North

East only the Guwhati High Court bench in Assam can hear habeas corpus cases. So although in the two following cases the time of delay in handing over the arrested person was found excessive, it can only be imagined what types of abuses occur in the states of Manipur and Nagaland where the people do not have access to the court. In Nungshitombi Devi v. Rishang Keishang, CM Manipur, (1982) 1 GLR 756, the petitioner's husband was arrested by CRPF on 10 January 1981, and was still missing on 22 February 1981. He had been arrested under AFSPA Section 4(c). The court found this delay to have been too long and unjustified, even under Section 5 of the AFSPA. In Civil Liberties Organisation (CLAHRO) v. PL Kukrety, (1988) 2 GLR 137, people arrested in Oinam were held for five days before being handed over to magistrates. The court found this to be an unjustified delay.

In its application, the AFSPA does lead to arbitrary detention. If the AFSPA were defended on the grounds that it is a preventive detention law, it would still violate Article 22 of the Constitution. Preventive detention laws can allow the detention of the arrested person for up to three months. Under 22(4) any detention longer than three months must be reviewed by an Advisory Board. Moreover, under 22(5) the person must be told the grounds of their arrest. Under section 4(c) of the AFSPA a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. The armed forces are not obliged to communicate the grounds for the arrest. There is also no advisory board in place to review arrests made under the AFSPA. Since the arrest is without a warrant it violates the preventive detention sections of article 22.

The case of Luithukla v. Rishang Keishing, (1988) 2 GLR 159, 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 (CrPC), but there are is no enforcement of these rulings.

Army officers have accused High Court judges of weakening military powers in the North East, exemplifying that the armed forces are not interested in complying with civil law standards. Any attempt by the courts to oblige compliance with police procedure is ignored. (see further section on the lack of independence of the judiciary)

In the habeas corpus case of Bacha Bora v. State of Assam, (1991) 2 GLR 119, the petition was denied because a later arrest by the civil police was found to be legal. However, in a discussion of the AFSPA, the court analyzed Section 5 (turn the arrested person over to the nearest magistrate "with least possible delay"). The court did not use Article 22 of the Constitution to find that this should be less than twenty-four hours, but rather said that "least possible delay" is defined by the particular circumstances of each case. In this case, the army had provided no justification for

the two week delay, when a police station was nearby, so section 5 was violated. Nevertheless, this leaves open the interpretation that circumstances could justify a delay of 5 days or more.

- The Indian Criminal Procedure Code ("CrPC")

  The CrPC establishes the procedure police officers are to follow for arrests, searches and seizures, a procedure which the army and other para- military are not trained to follow. Therefore when the armed forces personnel act in aid of civil power, it should be clarified that they may not act with broader power than the police and that these troops must receive specific training in criminal procedure.

  In explaining the AFSPA bill in the Lok Sabha in 1958, the Union Home Minister stated that the Act was subject to the provisions of the Constitution and the CrPC. He said "these persons [military personnel] have the authority to act only within the limits that have been prescribed generally in the CrPC or in the Constitution." If this is the case, then why was the AFSPA not drafted to say "use of minimum force" as done in the CrPC? If the government truly means to have the armed forces comply with criminal procedure, than the AFSPA should have a specific clause enunciating this compliance. Further it should also train the armed forces in this procedure.

  The CrPC has a section on the maintenance of public order, Chapter X, which provides more safeguards than the AFSPA. Section 129 in that chapter allows for the dispersal of an assembly by use of civil force. The section empowers an Executive Magistrate, officer-in-charge of a police station or any police officer not below the rank of sub-inspector to disperse such an assembly. It is interesting to compare this section with the powers the army has to disperse assemblies under section 4(a) of the Act. The CrPC clearly delineates the ranks which can disperse such an assembly, whereas the Act grants the power to use maximum force to even to non commissioned officers. Moreover, the CrPC does not state that force to the extent of causing death can be used to disperse an assembly.

  Sections 130 and 131 of the same chapter sets out the conditions under which the armed forces may be called in to disperse an assembly. These two sections have several safeguards which are lacking in the Act. Under section 130, the armed forces officers are to follow the directives of the Magistrate and use as little force as necessary in doing so. Under 131, when no Executive Magistrate can be contacted, the armed forces may disperse the assembly but if it becomes possible to contact an Executive Magistrate at any point, the armed forces must do so. Section 131 only gives the armed forces the power to arrest and confine. Moreover, it is only commissioned or gazetted officers who may give the command to disperse such an assembly, whereas in the AFSPA even non-commissioned officers are given this power. The AFSPA grants wider powers than the CrPC for dispersal of an assembly.

  Moreover, dispersal of assemblies under Chapter X of the CrPC is slightly more justifiable than dispersal under Section 4(a) of the AFSPA. Sections 129-131 refer to the unlawful assemblies as ones which "manifestly endanger" public security. Under

the AFSPA the assembly is only classified as "unlawful" leaving open the possibility that peaceful assemblies can be dispersed by use of force.

Chapter V of the CrPC sets out the arrest procedure the police are to follow. Section 46 establishes the way in which arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use "all means necessary to effect the arrest." However, sub-section (3) limits this use of force by stipulating that this does not give the officer the right to cause the death of the person, unless they are accused of an offence punishable by death or life imprisonment. This power is already too broad. It allows the police to use more force than stipulated in the UN Code of Conduct for Law Enforcement Officials (see section on International law below). Yet the AFSPA is even more excessive. Section 4(a) lets the armed forces kill a person who is not suspected of an offence punishable by death or life imprisonment.

Under the Indian Penal Code, at Section 302, only murder is punishable with death. Murder is not one of the offenses listed in section 4(a) of the AFSPA. Moreover the 4(a) offences are assembly of five or more persons, the carrying of weapons, ammunition or explosive substances, none of which are punishable with life imprisonment under the Indian Penal Code. Under section 143 of the Penal Code, being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Even if the person has joined such unlawful assembly armed with a deadly weapon, the maximum penalty is imprisonment for two years and a fine. Moreover, persisting or joining in an unlawful assembly of five or more persons is also punishable with six months imprisonment, or a fine, or both. The same offence committed by someone in a disturbed area under the AFSPA is punishable with death. This again violates the Constitutional right to equality before the law. Different standards of punishment are in place for the same act in different parts of the country, violating the equality standards set out in the Constitution.

Supposedly the military do have instructions on the procedures they are to follow when they act in aid of civil power. In People's Union for Democratic Rights v. Union of India, (1991) 2 GLR 1, when the court reviewed the army's powers it referred to two sets of instructions issued to the military when acting in aid of civil power. The first was a 1969 pamphlet issued by the Government of India as guidance for military but it was confidential and the court was not allowed to review it. A 1973 basic book instructions for army acting in aid of civil power was also referred to in the case. In a personal meeting with Justice Raghuvir, former Chief Justice of the Guwahati High Court, and the Justice who wrote the opinion in People's Union for Democratic Rights, SAHRDC asked for details on the nature of these instructions. Justice Raghuvir told us that he was only able to see a few pages and that the whole booklet was not available to non-military personnel. He believes that the military keeps these instruction manuals confidential so that it can not be shown that the armed forces fail to comply with their own standards. This is another example of the lack of judicial review and allows the armed forces to remain above the law.

- Military's Immunity / Lack of Remedies

The members of the Armed Forces in the whole of the Indian territory are protected from arrest for anything done within the line of official duty by Section 45 of the CrPC. Section 6 of the AFSPA provides them with absolute immunity for all atrocities committed under the AFSPA. A person wishing to file suit against a member of the armed forces for abuses under the AFSPA must first seek the permission of the Central Government.

In a report on the AFSPA to the UN Human Rights Committee in 1991, Nandita Haksar, a lawyer who has often petitioned the Guwahati High Court in cases related to the AFSPA, explains how in practice this leaves the military's victims without a remedy. Firstly, there has not been a single case of any one seeking such permission to file a case in the North East. Given that the armed forces personnel conduct themselves as being above the law and the people are alienated from the state government, it is hardly surprising that no one would approach Delhi for such permission. Secondly, when the armed forces are tried in army courts, the public is not informed of the proceedings and the court martial judgments are not published. In a meeting with the government National Human Rights Commission (NHRC), a representative of SAHRDC was able to discuss cases where BSF and armed forces in Jammu and Kashmir were punished for abuses. Yet, the results of these trials were not published and the NHRC representative stated that it would endanger the lives of the soldiers.

This section of the AFSPA was also reviewed in Indrajit Barua. The High Court justified this provision on the grounds that it prevents the filing of "frivolous claims". The court even said that this provision provides more safeguards, obviously confusing safeguards for the military with safeguards for the victims of the military's abuses.

Instances of human rights abuses by the army have shown that unless there is public accountability there is no incentive for the army to change its conduct. This was exemplified in Burundi when security forces killed 1,000 people in October 1991. Amnesty International reported, "The failure to identify those responsible for human rights violations and bring them to justice has meant that members of the security forces continue to believe that they are above the law and can violate human rights with impunity." Without the transparency of the public accounting, it is impossible to be sure that perpetrators are actually punished.

Habeas corpus cases have been the only remedy available for those arrested under the AFSPA. A habeas corpus case forces the military or police to hand the person over to the court. This gives the arrested person some protection and it is in these cases that legal counsel have been able to make arguments challenging the AFSPA. However, a habeas corpus case will not lead to the repeal of the act nor will it punish particular officers who committed the abuses. Also, only people who have access to lawyers will be able to file such a case.

Section 6 of the AFSPA thus suspends the Constitutional right to file suit. Mr Mahanty raised this crucial argument in the first Lok Sabha debate on the AFSPA in 1958. He said that Section 6 of the AFSPA "immediately takes away, abrogates, pinches,

frustrates the right to constitutional remedy which has been given in article 32(1) of the Constitution." This further shows that the AFSPA is more than an emergency provision because it is only in states of emergency that these rights can be constitutionally suspended.

Section 32(1) of the Constitution states that "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." In the Constitutional Assembly debates, Dr B R Ambedkar said, "If I was asked to name any particular article of the Constitution as the most important - an article without which this Constitution would be a nullity. I would not refer to any other article except this one (Article 32). It is the very soul of the Constitution and the very heart of it."

During the emergency in 1975 the right to file for writs of habeas corpus was suspended as ruled by the Supreme Court in A.D.M. v. Shivakant Shukla, (1976) 2 SCC 521. The Emergency had been declared under Section 359 of the Constitution. This section has now been amended, stating that the fundamental rights of section 20 and 21 cannot be suspended, even in a state of emergency. Therefore, should an emergency be declared today, the right to file habeas corpus on the grounds that the fundamental right to life has been denied should be allowed. Nevertheless, the 1975 case exemplifies the court's deference for the executive, even if it means a total suspension of individual liberty.

In the 1958 Lok Sabha, debate also occured about whether the right to file suit was a guaranteed right under the Constitution. The Speaker said, "Now who is to decide whether a right is one which has been guaranteed under this article? (article 32) The Supreme Court will decide it." Turning to this argument later, the Home Minister pointed out that under the Criminal Procedure Code and the Civil Procedure Code that the Government's consent was already required before a member of the armed forces could be sued in connection with their duties. This remains the case under both Codes today. Since, as seen above, the Supreme Court so readily defers to the executive and legislative branches, if the legislature does not pause to ask if a provision is constitutional, should the court review it once the legislature has passed it, it will most likely be deemed constitutional.

- The Army Act

The 1950 act was a revision of the 1911 Indian Army Act. One of the goals of this revision was "to bridge the gap between the Army and civil laws as far as possible in the matter of punishments of offenses." The High Courts of the country have a limited right to interfere with the court-martial system. Court-martial proceedings do not have to satisfy Article 21 of the Constitution. In chapter five of the Army Act, the members of the services are granted privileges, including immunity from attachments and arrest for debt. The only civil acts committed by members of the army which are not triable by court-martial are murder or rape of a civilian, unless this was done while on active service. This means that soldiers operating under the AFSPA will, if tried at all, be tried by court-martial, leaving no civil law remedy for the victims. Section 6 of the AFSPA only further reinforces the army's immunity.

- States of Emergency

  The declaration that an area is disturbed essentially amounts to declaring a state of emergency but by-passes the Constitutional safeguards. The point that this bill invokes a state of emergency was raised immediately by Mr Mahanty (Dhenkanal) in the 1958 Lok Sabha debates. He said the Assembly could not proceed if Section 352(1) of the Constitution was not fulfilled. In response, Mr K C Pant, then Home Minister, attempted to argue that the powers granted under the AFSPA do not resemble a state of emergency. He said that in an emergency fundamental rights can be abrogated and that the AFSPA does not abrogate those rights. But under Section 4(a) the right to life is clearly violated. An officer shooting to kill, because he is of the opinion that it is necessary, does not conform, even prima facie, with the Article 21 Constitutional requirement that the right to life cannot be abridged except according to procedure established by law. The Home Minister said the AFSPA powers stem rather from Article 355 of the Constitution, which gives the Central Government authority to protect the States against external aggression.

  Dr Krishnaswanmi (Chingleput) also made the argument that the AFSPA was outside the powers granted in the Constitution, since it was declaring a state of emergency without following the Constitutional provisions for such a declaration. He argued that this Bill would take away the State's power by bringing in the military. The Speaker responded that this did not take away the State's power, rather it granted the States more power because it allowed them to decide to "hand over thoroughly, entirely and completely to the Armed Forces". This argument is circular - the Speaker was saying that the States are given more power because they are now able to freely hand over their power. And because this was explained as granting power to the States, no Presidential proclamation was necessary (the proclamation is only made when the State powers are restricted). So the emergency provisions in the Constitution were cleverly by-passed.

  In a state of emergency, fundamental rights may be suspended under Article 359, since the 1978 amendment to this article, rights under Articles 20 and 21 may not be suspended. As shown above, the AFSPA results in the suspension of Article 21 right to life, therefore AFSPA is more draconian than emergency rule. Emergency rule can only be declared for a specified period of time, and the President's proclamation of emergency must be reviewed by Parliament. The AFSPA is in place for an indefinite period of time and there is no legislative review.

  The UN Working Group on Arbitrary Detention noted in its report of 17 December 1993, that states of emergency tend to be a "fruitful source of arbitrary arrests." In its report of 21 December 1994, the Working Group concluded that preventive detention is "facilitated and aggravated by several factors such as ... exercise of the powers specific to states of emergency without a formal declaration, non-observance of the principle of proportionality between the gravity of the measures taken and the situation concerned, too vague a definition of offenses against State security, and the existence of special or emergency jurisdictions." This describes exactly the situation under the AFSPA. The AFSPA grants state of emergency powers without declaring an emergency as prescribed in the Constitution. The measures taken by the military

outweigh the situation in the North East, notably the power to shoot to kill. The offences are not clearly defined, since all of the Section 4 offences are judged subjectively by the military personnel. And the AFSPA is a "special jurisdiction" provision.

B) INTERNATIONAL LAW

Under relevant international human rights and humanitarian law standards there is no justification for such an act as the AFSPA. The AFSPA, by its form and in its application, violates the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Civil and Political Rights (the "ICCPR"), the Convention Against Torture, the UN Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under any form of Detention, and the UN Principles on Effective Prevention and Investigation of Extra- legal and summary executions.

A UDHR argument would just be repetitive with ICCPR so SAHRDC has not done it but the UDHR articles which the AFSPA violates are the following: 1 - Free and Equal Dignity and rights, 2 - Non- discrimination, 3 - Life, liberty, security of person, 5 - no torture, 7 - equality before the law, 8 - effective remedy, 9 - no arbitrary arrest, 17 - property.

- International Covenant on Civil and Political Rights ("ICCPR")

  India signed the ICCPR in 1978, taking on the responsibility of securing the rights guaranteed by the Covenant to all its citizens. The rights enunciated by the ICCPR are those which must be guaranteed during times of peace by the member states. In times of public emergency, the ICCPR foresees that some rights may have to be suspended. However, the ICCPR remains operative even under such circumstances since certain rights are non- derogable. The AFSPA violates both derogable and non-derogable rights.

  This first article of the ICCPR states that all people have the right to self-determination. As discussed previously, the AFSPA is a tool in stifling the self-determination aspirations of the indigenous peoples of the North East.

  Article 2 imposes an obligation on the states to ensure that all individuals enjoy the rights guaranteed by the Covenant. This includes an obligation to provide a remedy for those whose rights are violated. When India gave its second periodic report to the UN Human Rights Committee in March 1991, members of the Committee pointed out that the AFSPA violates this right because article 2 foresees more than just a legal system which provides such remedies, but requires that such a system work on the practical level.

  Article 4 of the Covenant governs the suspension of some of the Covenant's rights. Derogation of the ICCPR has three conditions. Firstly, it is only "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" that states may derogate from their obligations under the ICCPR. Also, such derogation must be "strictly required by the exigencies of the situation" and cannot be inconsistent with other international law obligations nor "involve discrimination solely on the ground of race, colour, sex, language, religion or

social origin." The AFSPA has been enacted without such an official proclamation of emergency and goes beyond the requirements of the situation. Moreover, the fact that the AFSPA targets the population of the North East shows that it does discriminate on the basis of social origin. Secondly, there can be no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. As discussed below, the AFSPA violates three of these, article 6 guaranteeing the right to life, article 7 prohibiting torture and article 8 prohibiting forced labour. Thirdly, any state which derogates from the ICCPR obligations must inform the other states party to the Covenant. India has not met this obligation as regards the AFSPA.

The AFSPA comes within the purview of article 4 as understood by the Human Rights Committee. The members found that since it "enables the army to supplement ... [the] civil authorities [in] powers of arrest, powers of search" the AFSPA is the equivalent of emergency legislation. Moreover, a committee member stated that the AFSPA had actually created a "continuous state of emergency" since it has been in application since 1958.

The greatest outrage of the AFSPA under both Indian and international law is the violation of the right to life. This comes under Article 6 of the ICCPR, and it is a non-derogable right. This means no situation, or state of emergency, or internal disturbance, can justify the suspension of this right. Committee members insisted on this particular point in regards to the AFSPA. They found that the powers to kill under the Act are simply too broad. As pointed out by a member of the committee, the offences under Section 4(a) for which the soldier may shoot do not threaten the soldier. The Code of Conduct for Law Enforcement Officials only foresees the use of deadly force when the officer is threatened with force. Under Section 4(a) of the AFSPA, the officer can shoot when there is an unlawful assembly, not defined as threatening, or when the person has or is suspected of having a weapon. Since "weapon" is defined as anything "capable of being used as a weapon", a committee member pointed out that this could even include a stone, further bringing out the lack of proportionality between the offence and the use of force by the army.

The armed forces in the North East have systematically tortured the people they arrested under the AFSPA. Article 7 of the ICCPR prohibits torture and this also is a non-derogable right. Moreover, the prohibition against torture is a "norm of customary law". Under the UDHR, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other person."

During Operation Bluebird, the Assam Rifles committed gross abuses of this right. The Operation was launched in the wake of an attack on an Assam Rifles outpost in Oinam, a village in Manipur. The attack is believed to have been carried out by the NSCN. The armed forces retaliated by perpetuating atrocities on the village people of Oinam. The Amnesty International report found that more than 300 villagers claimed they were beaten, "some torture victims were left for dead ... others were reportedly subjected to other forms of torture including inserting chili powder into sensitive parts

of the body, being given electric shocks by means of a hand operated dynamo ... or being buried up to the neck in apparent mock executions." The headman of the village was also tortured and reported, "I was called out and repeatedly interrogated throughout the day ... I was beaten by the officers an jawans ... they also indiscriminately attack[ed] the villagers - ... chili powder dissolved in water [was] rubbed into the nostrils, eyes and soft parts of the body and [officers and jawans] took sadistic pleasure from the cries of pain by the victims."

Under similar circumstances in "Operation Rhino", Rajputana Rifles surrounded the village of Bodhakors on October 4, 1991. An extensive house to house searched was conducted during which women were sexually harassed and men were taken to interrogation camps. They were beaten up and kept without food or water. During this combing operation not a single insurgent was found. The People's Union for Civil Liberties (PUCL) noted, "It is very difficult to understand the logic such useless raids, mass torture and interrogations, unless the purpose is taken to be the creation of pure terror for some sinister and ulterior motives."

During Operation Bluebird, the military also forced the villagers of Oinam to work for them and provided them with no compensation. This violates article 8(3) of the ICCPR which prohibits forced labour. The Assam Rifles "rounded up villagers for forced labour for such tasks as porter service, building new army camps, washing clothes and carrying firewood."

Article 9 of the ICCPR guarantees liberty and security of person, and the AFSPA violates all five sub-parts of this right. Sub- part (1) guarantees that "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his Liberty except on such ground and in accordance with such procedure as are established by law." All the residents of a disturbed area are subject to arbitrary arrest. The military can arrest them on mere suspicion and detain them for unspecified amounts of time before handing them over to the nearest magistrate. Sub-part (2) states "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." The AFSPA does not require the arresting army officer to inform the person of the reason for their arrest. This is a requirement under Indian criminal procedure, but the military are not trained in this procedure. Sub-part (3) requires that "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other official authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time of release." The AFSPA requires less than this since it states that the person should be brought to the nearest police station "with the least possible delay". Moreover, requiring the person to be handed over to the police station does not assure that they will be brought promptly before a judge.

Article 26 of the ICCPR, like article 14 of the Indian Constitution guarantees equal protection for all persons before the law. The AFSPA violates this right because the inhabitants of the North East do not have equal protection before the law. They live under a virtual but undeclared state of emergency and are given no remedy for the injustices they suffer at the hands of the military. Inhabitants of the rest of India, with

the exception of Punjab and Kashmir are not subject to this law.

In response the UN Human Rights Committee in 1991, the Attorney General from India did not address the specific points of these various ICCPR articles. He justified the AFSPA under Section 355 of the Indian Constitution which makes it the duty of the Union to protect each state from external aggression. He said the AFSPA was necessary given the context of the North East where there is "infiltration of aliens into the territories mingling with the local public, and encouraging them towards this [secession]." He stated that the ICCPR does not encourage secession and governments are not encouraged to promote it. He said the AFSPA is a "temporary measure", not addressing the concern of committee members that the AFSPA has proven to be a longterm provision as it has been in force for over thirty years.

- International Customary Law

  The UN Code of Conduct for Law Enforcement Officials, the UN Body of Principles for Protection of All Persons Under any form of Detention, and the UN Principles on Effective Prevention and Investigation of Extra-legal and summary executions all form part of international customary law because they were passed by UN General Assembly resolutions. They lend further strength to the conclusion that the AFSPA violates basic human rights standards.

  a. The UN Code of Conduct for Law Enforcement Officials was adopted by the UN General Assembly in resolution 34/169 of 17 December 1979. This code applies to all security forces stationed in the North East since "law enforcement officials" are defined as all those who exercise police powers, and it can include military officers. The first article requires that, "Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal act, consistent with the high degree of responsibility required by their profession." A high degree of responsibility is sadly lacking in the troops stationed in the North East. As exemplified by the atrocities noted above, the BSF, CRPF and Assam Rifles are not concerned with the requirements of the law enforcement profession, rather they are operating on a "war footing".

     The second article of the code requires that, "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." As demonstrated above, multiple provisions of the basic human rights standards in the ICCPR are violated under the AFSPA. The AFSPA encourages the military officers to violate human rights because it allows the armed forces to base arrests, searches and seizures on their subjective suspicion. The armed forces know their actions will not be reviewed and that they will not be held accountable for their actions. They have neither the training nor the incentive to comply with this article of the Code.

Under Article 3 of the Code, "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." The Attorney General of India tried to convince the UN Human Rights Committee that the use of force under the AFSPA is strictly necessary and is "squarely within the requirements of Article 3 [of the Code]." However, this argument ignores the sub-sections of Article 3 which stipulate that "(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used." This provision aims at establishing proportionality between the use of force by an officer and the use of force by an offender. Under 4(a) of the AFSPA, the military personnel can use force against people who are not presenting any force. Under 4(c) they can use any amount of force necessary to arrest someone who is suspected of having committed, or being about to commit, an offence. Under 4(d), this same excessive use of force can be justified in entering and searching premises without a warrant.

Sub-section (c) of the code further clarifies that "in general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender." When armed forces fire upon an unlawful assembly under Section 4(a) they are violating this basic provision. Moreover, the fact that the armed forces have begun firing into crowds and lob mortar shells in the middle of a town in the North East proves they are not interested in "less extreme measures".

Under the Code, the armed forces have no grounds on which to justify their broad powers in the North East. Article 5 of the code reads, "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment." (emphasis added) This sweeps aside all the arguments made in the Lok Sabha to justify the original passage of the AFSPA, as well as the Attorney General's arguments before the UN Committee. Even if the North East is a "disturbed area" there is no justification for the human rights abuses being carried out by the military in the region.

b. The Body of Principles on Detention or Imprisonment was passed by UN General Assembly resolution no. 43/173, on 9 December 1988. This body of principles applies to all persons under any form of detention. It further strengthens several of the points raised under both Indian and international law.

Principle 10 states that "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of the charges against him." The armed forces are not obliged to provide this information under the AFSPA. Moreover, under principle 14, "A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive [information] promptly in a language which he understands". Since the armed forces stationed in the North East are foreign to the region they are unable to comply with this principle. Under principle 32 the right to habeas corpus must be absolutely guaranteed.

c. The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions adopted by Economic and Social Council also offer guidance for the use of force. Principle 3 says, "Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other person to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions." The armed forces operating in the North East should therefore not follow the excessive power to shoot to kill granted in the AFSPA.

- International Humanitarian Law

The four Geneva Conventions of 1949 along with the two optional protocols, constitute the body of international humanitarian law. These provisions are suited to human rights protection in times of armed conflict. Under these conventions the International Committee of the Red Cross (ICRC) is given access to all international conflicts. In non-international armed conflicts, the ICRC can only offer its services.

The ICRC's mandate in the context of non-international armed struggle is based on Protocol II to the Geneva Conventions. However, India has not signed either protocol to the Geneva Conventions. Nevertheless, the ICRC can offer its services in such a conflict based on Article 3, paragraph 2, common to the four Geneva Conventions of 1949 ("an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict"). When the ICRC offers its services in such a situation, a state does not have to accept them, or consider it an interference in its internal affairs. However, "in situations of internal disturbance, the rules of international humanitarian law can only be invoked by analogy."

C) COMPARATIVE LAW STANDARDS

The British armed forces presence in Northern Ireland is an apt comparison to the Indian military presence in the North East. The British carry out arrests under the Northern Ireland (Emergency Provisions) Act or the Prevention of Terrorism (Temporary Provisions) Act. When detainees were held for seven days without charge the European Court of Human Rights found this to be in violation of the European Human Rights Covenant.

5. CONCLUSIONS

The Supreme Court of India reached a low for its lack of enforcement of fundamental rights in the Jabalpur case of 1975. The country was in a state of emergency and the high courts had concluded that although the executive could restrict certain rights, people could still file habeas corpus claims. The Supreme Court rejected this conclusion and said the high court judges had substituted their suspicion of the executive for "frank and unreserved acception of the proclamation of emergency." Noted Legal luminary, H M Seervai notes that this shows the lack of judicial detachment. Indeed, it exemplifies a deference to the executive which leaves the people with no enforcement of their constitutional rights. Jabalpur has since been deemed an incorrect decision, but it remains an apt example of the judiciary's submission to the executive.

The Supreme Court has avoided a Constitutional review for over 9 years, the amount of time the principal case has been pending. The Court is not displaying any judicial activism on this Act. The Lok Sabha in the 1958 debate acknowledged that if the AFSPA were unconstitutional, it would be for the Supreme Court to determine. The deference of the Delhi High Court to the legislature in the Indrajit case also demonstrates a lack of judicial independence.

The Basic Principles on the Independence of the Judiciary was adopted by the seventh UN Congress on the Prevention of Crime and the Treatment of Offenders and was also adopted by the UN General Assembly. Principle 2 of this document says, "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressure, threats or interferences, direct or indirect, from any quarter or for any reason." The Indian judicial system is not subject to direct interference. It seems to function independently, but under the surface it is possible to discern indirect pressure. For example, the practice of appointing retired judges to commissions may well influence judges while they are on the bench. There may not be direct pressure to render decisions favorable to the executive, but certainly a judge who has "towed the government line" is more likely to be appointed by that same government to a position of prominence upon retirement.

Moreover, there is an absence of creative legal thinking. When the Guwahati High Court was presented with international law argument in People's Union for Democratic Rights, the court ignored it. Justice Raghuvir said in a personal interview that the court could not use international law. If the government has signed an international convention like the ICCPR which requires the government to guarantee rights to its citizens, how can these be enforced if the judiciary does not turn to the text of the convention in its rendering of decisions? The courts are not turning to the spirit of the law which guarantees the fundamental right to life to all people and as a result violations of human rights go unchecked.

The UN Special Rapporteur on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, Mr Param Cumaraswamy, stated in the 51st Session of the Commission on Human Rights on 10 February 1995, at the United Nations in Geneva that," The power of judicial review is vital for the protection of the rule of

law." He also quoted from Mr L M Singhvi's 1985 report that "the strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice."

6. RECOMMENDATIONS

The only way to guarantee that the human rights abuses perpetrated by the armed forces in the North East cease is to both repeal the AFSPA and remove the military from playing a civil role in the area. Indeed with 50% of the military forces in India acting in a domestic role, through internal security duties, there is a serious question as to whether the civil authority's role is being usurped. As long as the local police are not relied on they will not be able to assume their proper role in law enforcement. The continued presence of the military forces prevents the police force from carrying out its functions. This also perpetuates the justification for the AFSPA.

Among the recommendations made by the Working Group on Arbitrary Detention, from 1994 was the statement that "Governments which have been maintaining states of emergency in force for many years should lift them, limit their effects or review the custodial measures that affect many persons, and in particular should apply the principle of proportionality rigorously."

The National Human Rights Commission is now reviewing the AFSPA. Hopefully, the NHRC will find that the AFSPA is unconstitutional and will submit this finding to the Supreme Court to influence its review of the pending cases. However, the NHRC has a very limited role. In past cases, the Supreme Court has not welcomed such intervention by the NHRC. This was evident when the NHRC attempted to intervene in the hearing against the Terrorist and Disruptive Activities (Prevention) Act (TADA).

If the AFSPA is not repealed, it must at a bare minimum comply with international law and Indian law standards. This means the powers to shoot to kill under section 4(a) must be unequivocally revoked. Arrests must be made with warrants and no force should be allowed in the search and seizure procedures. Section 5 should clearly state that persons arrested under the Act are to be handed over to the police within twenty-four hours. Section 6 should be completely repealed so that individuals who suffer abuses at the hands of the security forces may prosecute their abusers.

Moreover, the definition of key phrases, especially "disturbed area" must be clarified. The declaration that an area is disturbed should not be left to the subjective opinion of the Central or State Government. It should have an objective standard which is judicially reviewable. Moreover, the declaration that an area is disturbed should be for a specified amount of time, no longer than six months. Such a declaration should not persist without legislative review.

Armed forces should not be allowed to arrest or carry out any procedure on suspicion alone. All their actions should have an objective basis so that they are judicially reviewable. This will also assist those who file suit against the security forces.

All personnel acting in a law enforcement capacity should be trained according to the UN Code of Conduct for law enforcement personnel. The instructions and training given to the armed forces should be available to the public. Complete transparency should be established so that a public accountability is rendered possible.

Having the armed forces comply with the Indian CrPC would also be a bare minimum. The CrPC itself does not fully comply with international human rights standards, so making the AFSPA comply on its face with the CrPC provisions for the use of minimal force, arrest, search and seizure would only be a rudimentary step in reducing the abuses committed under the AFSPA.

If the Indian Government truly believes that the only way to handle the governance of the North Eastern states is through force, then it must allow the ICRC to intervene. This can only have a calming influence. Acceptance of ICRC services would demonstrate that the fighting parties want to bring an end to the violence. The ICRC's involvement could help protect the residents of the North East who are currently trapped in the middle between insurgents and the military.
