

ANALYZING THE ARMED CONFLICT SITUATIONS OF NE INDIA IN THE LIGHT OF IHL

Dr. Gautomi Dutta Borah¹

I. Introduction

The International Humanitarian Law (IHL) is that branch of International Law which intends to protect rights of the people when an armed conflict is going on in an area. They mandate firstly, for humanitarian treatment to the people affected by armed conflict and secondly, for imposing restrictions on the use of weapons indiscriminately to limit the sufferings of war. The Geneva Conventions, 1949 and their three Additional Protocols are at the core of IHL that regulate the conduct of armed conflict and seek to limit its effect. And for that purpose the armed conflicts are divided into two categories namely International Armed Conflict (IAC) and Non International Armed Conflict (NIAC). With the exception of one Article i.e. Article 3 common to all four Conventions, the provisions of all four Geneva Conventions are applied to the IAC. Article 3 which is common to all four Geneva Conventions applies to NIAC. This Article has been called mini Convention within the Conventions.

II. Nature and scope of NIAC

Common Article 3 to the four Geneva Conventions provides the basic rules to be followed by the parties in a NIAC. Prior to the adoption of these Conventions, the application of IHL in situations of NIAC largely dependent on the armed opposition group being recognized as belligerent. However, this Article itself does not provide any definition of NIAC. The opening paragraph of the article defines conditions for application of the Article by using the terms “in case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. Thus the Article provides no guidance to determine when a situation is a NIAC and who will determine the existence of such situation. The Commentary to the Geneva Conventions includes a non-exhaustive list of criteria to determine whether a situation is a non-international armed conflict². The Commentary does include the recognition of the insurgents by

¹ Principal, Dr. R. K. B. Law College, Dibrugarh

² Jean. S. Pietet (ed.), *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the*

the government as belligerents³. It is clear from the *travauxpreparatoires* that the scope of Common Article 3 was intended to include situations of civil war where insurgents had been recognized as belligerents⁴. Other criteria listed in the Commentary are strongly reminiscent of the traditional doctrine of recognition of belligerency, such as territorial possession and organizational aspects. This would suggest the intention was that Common Article 3 would apply in situations where the operation of international humanitarian law had been hindered by a State's refusal to recognize the insurgent group as belligerents despite objective criteria for such recognition being met.

The Additional Protocol II to the Geneva Conventions of 1949, adopted on 8th June 1977, marked a further step in the regulation of NIAC by providing a precise definition for the same and obligations of the parties involving in such conflict. Article 1(1) of the Protocol says that,-

“to apply this Protocol, the armed conflict must be conducted between the State and armed dissident group under responsible command, who have sufficient territorial control to mount sustained and concerted military operations and can implement the provisions of the protocol”.

Thus, main features of a conflict in which the protocol will apply are-

- (i) The confrontation must be between the government armed forces and armed dissident forces which may include a wide variety of actors such as guerrillas, rebel groups, militias, insurgents and their variants.
- (ii) The dissident armed forces must act under responsible command i.e. they are organized to some degree.
- (iii) The armed dissident force must have control on part of territory.
- (iv) Control on part of territory by the armed dissident force must be sufficient to carry out sustained and concerted military operations. The terms “sustained” and “concerted” imply an element of duration and intensity, but they correspond to an objective assessment.
- (v) Lastly, the capability of implementing the protocol is the fundamental criterion that justifies the other elements of the definition of situations to which Protocol II applies. When the

Field, (ICRC, Geneva, 1952), p. 49-50 derived from the deliberations and amendments presented during the conference with respect to that Article.

³ Criteria 3(a), Commentary GCI, *ibid*.

⁴ L. Moir, *The law of internal Armed Conflict*, Cambridge: Cambridge University Press, (2002), P.41

material criteria are fulfilled, it is reasonably be expected that the parties are in such a position that they could apply the provisions of the Protocol.

Under Article 1(2) of the Protocol, the internal disturbance and tensions have been formally excluded from the scope of Protocol II. Thus, riot and demonstrations without leadership or concerted aims; isolated and sporadic acts of violence by opponents or military operations carried out by armed forces or armed groups and other similar act can never be considered as NIAC situations. The concept of NIAC can further be clarified from the pronouncements of international tribunals that have been established from time to time in different parts of the world to prosecute the perpetrators of crime during armed conflicts of such areas. In the *Dusko Tadic*⁵ case, in 1995, the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that a NIAC exist when there is “protected armed violence between governmental authorities and organized armed groups or between such groups within a State”. The preliminary issue involved in this case is that, whether armed conflict- either internal or international exists or not in Bosnia and Herzegovina, from around 24 May until 30 August 1992, when alleged Tadic committed crime against humanity, grave breaches of Geneva Conventions and violations of customs of war under Articles 2, 3 and 5 of the ICTY statute. The Defence argument based on that ‘the conflict in the Prijed or region, where the alleged crimes are said to have taken place, was limited to political assumption of power by the Bosnian Serbs and did not involve armed combat’.

The Appeals Chamber rejected the argument of the appellant on the grounds the ‘the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. The Tribunal held that,-

“an armed conflict exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.

This definition is a very significant development of international humanitarian law. Here, ‘protected armed violence’ implies a certain level of intensity. It needs to be assessed against the yardstick of two fundamental criteria namely, the intensity of violence and the organization of the parities which must be evaluated on a case-by-case basis by weighing up a host of indicative data. Regarding the criterion of intensity, such data can be, for example, the collective nature of the fighting or the fact that the State is

⁵ *Prosecutor Vs. Delalic, Mucic, Delic and Landzo*, 16 November 1995, ICTY caseIt-9621-T, Judgement, para.183

obliged to resort to its army as its police forces are no longer able to deal with the situation on their own, the duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims as well as whether the conflict had attracted the attention of the UN Security Council and whether any resolutions on that matter had been passed. With regard to the criterion of organization, those involved in the armed violence must have minimum level of organization indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants and the existence of internal rules. This definition of NIAC given by ICTY is also confirmed by the International Criminal Tribunal for Rwanda (ICTR) and further suggested that armed conflict existing only for a few months also satisfies the ‘protected’ requirements. The Tribunal in the *Akayesu*⁶ judgement considering the intensity of violence in the Rwandan context, considered the conflict to constitute an “armed conflict” within the meaning of Common Article 3. The territorial control, ability to carry out prolonged military operations, controlling authority, structure and discipline of the troops also were factors in this decision⁷.

The Rome Statute of 1998 describes the non-international armed conflict in a slight variation on the definition provided by *Tadic* Appeal Jurisdiction in 1995 by saying that,-

“it applies to armed conflicts that take place in the territory of a state when there is protected armed conflict between governmental authorities and organized armed groups or between such groups”⁸.

This article has abandoned the requirement for the existence of responsible command by incorporating principle of individual criminal responsibility under Article 25⁹ of the Rome Statute. Moreover, a state of armed conflicts can exist between organized armed groups without any involvement of State authorities.

⁶ *Prosecutor Vs. Akayesu*, 2 September 1998, ICTR, para620

⁷ *ibid*, paras.627 and 639

⁸ Article 8(2)(f), Rome Statute 1998

⁹ Clause 2 of Article 25 of the Rome Statute says, “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute”.

III.I. Protection of victims and prosecution of perpetrator of crime in a NIAC

Common Article 3 to the Geneva Conventions says that each and every country of the contemporary world who are involving in a NIAC as well as the non state actors involve in the conflict have the obligation to provide for humane and non-discriminatory treatment to all those who are not, or who are no longer, taking an active part in hostilities such as civilians, members of armed forces of the parties to the conflict who have been captured, wounded or have surrendered. Parties should take steps to prohibit acts of violence to life and persons specially murder of all kinds, mutilation, cruel treatment and torture, taking of hostage, outrage upon personal dignity, in particular humiliating and degrading treatment. They can't pass sentences and carry out executions without previous judgement pronounced regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Finally, it imposes an obligation on the parties to collect the wounded and sick and cared for them. The parties to the conflict may enter into a special agreement to follow the norms laid down in this Article and such agreement does not confer any legal status to the parties¹⁰.

¹⁰ Common Article 3 of the Geneva Conventions says, "in case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict in the territory shall be bound to apply, at a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. Violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b. Taking of hostages;
- c. Outrages upon personal dignity, in particular humiliating and degrading treatment;
- d. The passing of sentences and the carrying out executions without previous judgement pronounced by a regularly constituted Court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body such as the International Committee of Red Cross may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or any part of the other provisions of the

Additional Protocol II to the Geneva Conventions provides three types of protections to the victims of non-international armed conflict, namely-

- (i) Protection from the effect of hostilities.
- (ii) Protection against abuse of powers.
- (iii) Norms concerning care and relief activities.

III.II. Protection from the effect of hostilities- The Additional Protocol II provides many provisions for providing protection from the effect of hostilities, such as bans attacks on the civilian population,¹¹ prohibits the starvation of the civilian populations¹² and attack on objects indispensable to its survival¹³, prohibition on displacement of the civilians populations unless the security of the civilians involved or imperative military reasons so demand¹⁴, prohibition to use of weapons causing superfluous injury or having indiscriminate effects, to lay mines indiscriminately¹⁵ etc.

III.III. Protection against abuse of powers- The protection covers the conditions of internment or detention of persons deprived of their freedom for reasons connected with the armed conflict¹⁶, the legal guarantee applicable to prosecution of offenders and repression of offences committed in connection with the armed conflict¹⁷ and the rules of conduct to be observed in all circumstances by civilian officials and members of the armed forces with regard to non-combatants or persons *hors de combat* under their authority¹⁸.

III.IV. Norms concerning care and relief activities- As concerns the sick and wounded, both civilians and military, the rules stipulate in particular that they must be collected and cared for¹⁹, that medical personnel²⁰ and

present Conventions and the applications of the preceding provisions shall not affect the legal status of the Parties to conflict”.

¹¹ Additional Protocol II, Article 13, para2

¹² Ibid, Article 14, first sentence

¹³ Ibid, second sentence

¹⁴ Rules of International humanitarian Law governing the conduct of hostilities in non-international armed conflict, International Review of Red Cross, No. 278, September-October 1990, pg. 388

¹⁵ Ibid, p.395

¹⁶ Additional Protocol II, Article 5

¹⁷ Ibid, Article 6

¹⁸ Ibid, Article 4

¹⁹ Ibid, Articles 7 & 8

²⁰ Ibid, Article 9

facilities²¹ are to be protected against military operations, and the military personnel and facilities regarded as such under the law are to be identified by means of the red cross and red crescent emblem²². Besides these provisions of the Common Article 3 and of the Additional Protocol II, Customary International Law also lays down different principles to be applicable in NIAC. In the *Tadic* case the Appeals Chambers of the ICTY confirmed the applicability of customary international law to NIAC by holding the customary rules had developed to govern “internal strife” covering “such areas as protection of civilians from hostilities, in particular from indiscriminate attack, protection of civilians objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare prescribed in IAC and ban of certain methods of conducting hostilities”²³. UN Code of conduct for the Law Enforcement Officials adopted by the UN General Assembly in resolution 34/169 of 17th December 1979 provides many principles to be followed by “law enforcement officials” has acquired the status of customary international law. The first Article requires that,-

“Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and protecting all persons against illegal act, consistent with high degree of responsibility required by their profession”

Article 2 of the Code says-

“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”

Under Article 3 of the Code-

“Law enforcement officials may use force only when strictly necessary and to the extent required for performance of their duty”

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

²¹ Ibid, Article 11

²² Ibid, Article 12

²³ ICTY, Prosecutor vs. Tadic, Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, caseIT-94_1, (October 2 1995) at para127

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”

Since March 2003, the International Criminal Court, the first permanent international court established by Rome Statute has been prosecuting the perpetrators of genocide, crimes against humanity and war crimes both in international and non-international armed conflict. Articles 8(2)(c) to (f) of the statute identify several acts as war crimes when committed in internal armed conflict. Article 8(2)(c) specifically criminalizes the serious violations of common Article 3 as war crimes. Besides that Article 8(2)(e) the Statutes laid down a list criminal activities that are considered as war crimes while committed in a NIAC as they are serious violation of the laws and customs within the established framework of international law. The Court is designed as a complementary to the National Court that will interfere where a State with jurisdiction is ‘unable’ or ‘unwilling’ to act itself. The onus is, therefore, placed on the national courts to take responsibility. This principle of complementary is outlined in the Preamble and Articles 1, 17, 18 and 19 of the Rome Statute. Both the Preamble and Article 1 of the Rome Statute say that the jurisdiction of ICC “shall be complementary to national criminal jurisdiction”.

Thus, it refers to the duty of every state (not limited to State Parties) to exercise its criminal jurisdiction over those responsible for international crimes. The ICC will interfere only in case of lack of genuine national investigation and prosecution on the part of the State (Article 17). If the crime has been genuinely prosecuted and tried, the ICC has no jurisdiction on the same. Article 17(2) provides the text to determine the unwillingness of a state covers a State’s lack of positive attitude towards prosecution and trying perpetrators of international crimes.

Inability is defined under article 17(3) of the ICC statute. It says that, ‘in order to determine inability in a particular case, the Court shall consider whether, due to total substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’. Thus inability includes the non-functioning of a judicial system to such an extent that investigation, prosecution and trials of perpetrators are impossible.

Thus the international community by establishing the International Criminal Court has been trying to put an end to the impunity for committing crimes when the Government itself unwilling to prosecute the criminals or judicial system of the country is unable to prosecute the same.

IV. Nature of conflict in NE India and Domestic Law enforced in the area

Internal conflicts have been a permanent feature of the NE India since India got independence from Colonial Rule. This part of the territory of India is ethnically, linguistically and culturally very much different from the other parts of the country. For this, Colonial ruler took nearly a century to annex the entire region and administered the hills as a loose “frontier area”. As a result, large parts of the North-eastern hill areas never come in touch with the principle of a central administration before. Unlike the British, the independent India, has tried to integrate the largely Mongoloid region into its post-colonial nation building project²⁴. Unfortunately, the people of the area considered this effort of the government as an encroachment on their tribal way of life and freedom. And when such effort of assimilation resulted in discontent and armed revolt, the Government of India responded with a combination of force, monetary inducements, split and political reconciliation²⁵.

The Indian federal Government and those governing the States in the North-east have deployed large number of armed forces to mitigate the demands of the people of the area. Thus, the entire area, since 1950s, has witnessed, armed conflicts between the government armed forces and the insurgents groups that demand sovereignty directed against India. As per government report, in India, at present, 65 terror groups are active in the country, out of which a maximum of 34 are in Manipur. Among other North-eastern States, Assam has 11, Meghalaya 4, Tripura 2, Nagaland 4 and Mizoram has 2 active terrorist groups²⁶. Thus, currently, almost all of the States in the region are affected by some form of conflict, except Arunachal Pradesh and Sikkim in which the situation is at the moment relatively stable. One common feature of most of insurgent movement is that they are fighting against the Government of India for their sovereignty. They have been conducting their operations under responsible command. The insurgent groups are formed in rigid military hierarchy. They have control over part of the territory with sustained and concerned military operations. For example, NSCN-IM one of the fraction of National Socialist Council of Nagaland (NSCN) who has been fighting against the Government of India since 1950 (then by the Naga National Council) for their sovereignty has a military wing-the Naga Army, comprising one brigade and six battalions. There are also several “town command” and specialized mobile groups.

²⁴ Subir Bhumik, “Insurgency in India’s North-east: Conflict, Co-option and Change”, *East-West Washington Working Papers*, No. 10, July 2007, p. 1-42, available at www.eastwestcentrewashington.org/publications.

²⁵ Ibid

²⁶ The Hindu, ‘65 terror groups active in India: Government’, New Delhi, 27 August, 2013.

NSCN-IM has divided its area of influence into 11 regions, which are organized primarily on tribal considerations. In many areas, it runs a parallel government. There are four major 'Ministries'-defence, home, finance, and foreign. Besides, there are five other Ministries including education, information and publicity, forest and minerals, law and justice and religious affairs. The most prominent 'Home Ministry' seeks to replace the State government machinery. The outfit has also established a government-in-exile called the Government of People's Republic of Nagaland (GPRN) which interacts with formal and non-formal world bodies and media. The GPRN sends emissaries abroad to garner support and raise funds for Naga cause. This group is able to carry out attacks from or using the held territory. The NSCN-IM outfit aims to establish a 'Greater Nagalim' ('Nagalim' or the People's Republic of Nagaland) based on Mao Tse Tung's ideology. Its manifesto is based on the principle of Socialism for economic development and a spiritual outlook.

Similarly, People's Liberation Army (PLA) of Manipur consists of four divisions that which follow a military hierarchy, with commanders maintaining authority over lieutenants, sergeants and lance corporals. In 1979, the PLA formed a political wing, the Revolutionary People's Front (RPF). Despite being declared unlawful in 1981, the RPF still runs a government-in-exile out of Bangladesh. The RPF has several departments that resemble a legitimate government, including finance, foreign affairs, publicity and communications, health and education and social welfare. RPF maintains relationship with other groups of North-east India, and in 1991, it joined an umbrella organization of other separatist groups of Manipur namely, Revolutionary Joint Committee (RJC) and thereby increase their overall revolutionary capabilities for an independent Manipur nation. The conflicts between the government of India and non-state actors of north-east India also fulfils standard laid down by the ICTY and ICTR in the *Tadic* and *Akayesu* case respectively. The intensity aspect as mentioned in these judgements is signified from the deployment of government armed forces in the area for more than 50 years by enacting the Armed Forces Special Power Act (AFSPA) which confers wide powers to the forces to curb insurgency. This act of Government of India implies that she herself consider the intensity of conflict very seriously. As regard to the number of victims, according to the Uppsala Conflict Data Programme (UCDP)²⁷, if a conflict results in 25 battle related deaths in one year it constitutes an armed conflict (in which one of the parties to the conflict is the state)²⁸. In the North-east

²⁷ UCDP is a data collection project on organized violence which has recorded ongoing violent conflict since 1970, housed at Uppsala University in Sweden.

²⁸ Department of Peace and Conflict Research, *Uppsala Conflict Data Programme (UCDP)*, Uppsala University, Sweden, available at www.pcr.uu.se/research/ucdp/definitions, last visited 24 december,2013

India during the period of 1992 to 2001 total fatalities in insurgencies and terrorist conflicts were 12,181 among which 6,717 were civilians, 1,892 were security forces and 3,572 were militants²⁹. In 2013, 61 fatalities recorded in Nagaland, despite the fact that ceasefire is going on that area, out of which 55 were insurgent cadres of various formations and other six were civilians. No Security Force (SF) fatalities have been recorded in Nagaland since 2008. In Manipur, there were 55 insurgency related killing during the year of 2013 of which 21 were civilians, 6 security force personnel and 28 terrorists. In Assam, there were 101 insurgency related killing in 2013 out of which 35 were civilians, 6 were security force personnel and 60 were terrorist.³⁰

The armed descendent groups of North-east India have also fulfill the observation made in the *Tadic* case relating to the organizational structure. The NSCN-IM of Nagaland has a 3,000-strong armed cadre and also a political and military wing. The military wing – the Naga Army – consists of ‘one brigade and six battalions’ with a ‘General Headquarters’ (GHQ), called the ‘Oking’, at Niuland in the Dimapur district of Nagaland. There are also several ‘town commands’ and specialized mobile groups. The political wing also has a GHQ and the 11 ‘regions’ are organized primarily on tribal considerations. The NSCN-K has an estimated strength of about 2,000 cadres. The group runs a ‘government-in-exile’ called the Government of the People’s Republic of Nagaland (GPRN) and is organized on similar lines as the NSCN-IM³¹. Manipur is one of the worst affected states in the North-east where at least 9 insurgent outfits are active at present. A report of the State Home department in May 2005 indicated that ‘as many as 12,650 cadres of different insurgent outfits with 8,830 weapons are actively operating in the State’. According to government sources, the strength of those concentrated in the valley districts, is assessed at around 1500 cadres for the Revolutionary People’s Front (RPF) and its army wing People’s Liberation Army (PLA); 2500 cadres for the United National Liberation Front (UNLF) and its army wing Manipur People’s Army (MPA); 500 cadres for the PREPAK and its army wing Red Army, while Kanglei Yawol Kanna Lup (KYKL) and its Yawol Lanmi army is assessed as having a strength of 600 cadres. The Kangleipak Communist Party (KCP)’s strength is assessed at 100 cadres. Government of India has so long been trying to face the problems of North-east India by imposing some draconian laws in

²⁹ Ajay Sahni, *Survey of conflicts and Resolutions in India’s Northeast*, available at www.satp.org/satporgtp/publication/faultlines/vol12/Article3

³⁰ South Asia Terrorism Portal, *India Assessment 2013*, available at www.satp.org/satporgtp/countries/india/index.html last visited 09-01-14

³¹ Sashinungla, *Nagaland: Insurgency and Factional intransigence* available at www.satp.org/staporgtp/publication/faultines/volume16/article4htm, last visited on 09-01-14

the area. The first and most draconian law enacted by the Union Government to face problems of Northeast India and which is still in force in various parts of the area is the Armed Forces Special Power Act (AFSPA). The Act grants extraordinary powers to the military personnel to do anything and even to shoot a person on mere suspicion. Section 4³² of the Act provides a military personnel license to kill 4(a), destroy property without verification 4(b), arrest without warrant 4(c) and search without warrant 4(d). Section 5 of the Act states that after the military has arrested someone under the AFSPA, they must hand over that person to the nearest police station with the “least possible delay”. There is no definition in the Act of what constitute the least possible delay.

Further, Section 6 of the Act provides immunity to military personnel from prosecution in any court of law, for anything done in a disturbed area by laying down that-

“no prosecution, suit or other legal proceedings shall be instituted, except with previous sanction of the Central Government against any person in respect of anything done

³² Section 4- any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may, in a disturbed area, (a) if he is of opinion that it is necessary so to for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death against any person who is acting in contravention of any law and 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 of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide out by armed gangs or absconders wanted for any offence;

(c) Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may, in a disturbed area, arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

(d) Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the Armed Forces may, in disturbed area, enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongly restrained or confined or any property or any arms, ammunition or explosive substance believed to be unlawfully kept in such premises: and may for that purpose use such force as may be necessary.

or purported to be done in exercise of powers conferred by this Act”.

Thus, this provision virtually eliminated any prosecution of armed forces personnel. This despite the government of India already provides immunity under section 197³³ of the Criminal Procedure Code. These provisions of AFSPA violate the basic human rights of people mentioned in the Universal Declaration of Human Rights (UDHR) such as, free and equal dignity³⁴, non-discrimination³⁵, life, liberty, security of persons³⁶, non-torture³⁷, equality before the law³⁸, effective remedy³⁹, no arbitrary arrest⁴⁰ and right of property⁴¹. They also violate the provisions of International Covenant on Civil and Political Rights (ICCPR) to which India has been a member since 1978. Section 6 of the Act is a direct violation India’s treaty obligation under Article 2(3) of the ICCPR according to which,

“Each State Party to the present Covenant undertakes:

³³ Section 197(2) of the CrPC says,- “No court can take cognizance of any offence alleged to have been committed by any member of the armed forces of the Union while acting or purporting to act in the discharge of his official duty except with previous sanction of the Central Government”. Section 197(3) says, “The State Government may by notification extend this provision to the members of the forces maintaining public order. In such cases, previous sanction of the State Government will be necessary”.

³⁴ Article 1 of UDHR says- “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

³⁵ Article 2 of UDHR says-“Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

³⁶ Article 3 of UDHR says- “Everyone has the right to life, liberty and security of person”.

³⁷ Article 5 of UDHR says- “No one shall be subjected to torture or to cruel, in human or degrading treatment or punishment”.

³⁸ Article 7 of UDHR says- “All are equal before the law and are entitled without any discrimination to equal protection of the law. all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

³⁹ Article 8 of UDHR says- “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

⁴⁰ Article 9 of UDHR says- “No one shall be subjected to arbitrary arrest, detention or exile”.

⁴¹ Article 17 of UDHR says- “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property”.

To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity;

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

To ensure that the competent authorities shall enforce such remedies”.

In times of public emergency, which threatens the life of the nation and the existence of which is officially proclaimed, ICCPR foresees that some rights may have to be suspended. However, ICCPR remains operative even under such circumstances since certain rights are non-derogable rights⁴². But India’s official stand has been that AFSPA is not an emergency law and that powers granted under the law do not amount to a state of emergency. In its report submitted to the Human Rights Committee, 1997, government stated that since no emergency exist in India, it does not come under the jurisdiction of Article 4 of the ICCPR. AFSPA was defended as an enabling legislation applied in designated areas and which neither confers extraordinary powers nor detracts from the due process of law or suspended any rights or their enforceability⁴³

The AFSPA also violates basic tenets of criminal justice system in any civilized society. Firstly, it provided special powers which tantamount to awarding heavier penalty to the suspects than convicted persons would get under normal court, a clear violation of the cardinal principle of criminal

⁴² Article 4 of the ICCPR says- “1. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligation under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from Articles 6, 7, 8 (paragraph 1 and 2) 11, 15, 16, and 18 may be made under this provision. (3) Any State Party to the present availing itself of the right of derogation shall immediately inform the other State parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminate such derogation.

⁴³ United Nations (1997), Human Rights Committee, Summary Record of the 1603rd Meeting, CCPR/C/SR.1603, 24 July, Geneva.

justice system i.e. *nullumcrimen, nullapoena sine lege*. Secondly, non application of due process law makes the armed forces to be their own judge and jury. Most importantly, by giving virtual impunity to the armed forces under section 6 of the AFSPA which makes it mandatory to seek prior permission of the Central Government to initiate any legal proceedings, the Executive has expressed its lack of faith in the judiciary. Otherwise, it would have been left to the judiciary to decide whether the charges are vexatious, abusive or frivolous⁴⁴. While introducing the AFSPA on August 1958, the Government of India accepted it as an emergency measure and it was supposed to have remained in operation only for one year. But even after 54 years the Act has been in force in some of the areas of North east India. To contain the insurgents and to diminish the support they enjoyed, especially in the rural areas, security forces have indulged in extra-judicial executions, custodial deaths, torture and rape. On the one hand, common villagers intimidated and terrorized to divulge information about insurgents and on the other hand, insurgents are physically eliminated. The Government of India as a signatory to the Geneva Conventions, 1949 is bound to follow the norms prescribed under the Common Article 3. But the Government, while enacting the Geneva Convention Act, 1960 to implement the provisions of Geneva Conventions to India, under section 17 of the Act incorporated such provision that no prosecution against a government official can be initiated for violation of human rights without previous sanction of the Central Government. The Government of India so long has not been a party to the Additional Protocol II to the Geneva Conventions 1949. The Indian delegate present in the 39th Plenary Meeting, with regard to Draft Protocol II, expressed that notwithstanding its desire for full development of humanitarian law applicable in armed conflicts, the Government of India could not approve any international document which impinged upon national sovereignty and permitted outside interference, directed or in directed, financial, military or otherwise, in the internal affairs of states especially of the younger nations of the developing world⁴⁵. India was against internationalization of any purely internal situation through an international instrument.⁴⁶

India further stated the impossibility of discrimination between its own citizens under the national Constitution and the proposed draft protocol II. What Government were being asked to do was to treat some perpetrators of grave crimes leniently, while the full regour of the law would be

⁴⁴ An analysis of AFSPA, 1958- By the Asian Centra for Human Rights, www.google.com. January 5 2005, p.3, last visited 15 May 2009.

⁴⁵ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1974-77), vol. V pgs 345-346

⁴⁶ Supra note 44 pg 63

applicable to other citizens who dared to commit similar crimes. In the case of some again, it was proposed that sentences would not be carried out immediately, whereas others would be punishable forthwith according to law. It was not possible under the Indian Constitution to discriminate between one citizen and another in that fashion⁴⁷. The government of India is also obliged to follow the UN Code of conduct for Law Enforcement Officials which has now acquired the status of customary international law. These codes are applicable to all security forces stationed in the NE India. But a high degree of responsibility is sadly lacking in the troops stationed in the NE region. They are not concerned about respect for human dignity and maintenance of human rights, as AFSPA encourages them to violate human rights by permitting arrests, searches and seizures on their subjective suspicion. India is not a party to the Rome Statute, 1998 by which the international Criminal Court has been established. The principal objection of India to ICC is that it impinges on the sovereignty of India. The argument is that the ICC's inherent jurisdiction to decide whether a state has acted in a manner that is consistent with justice, impinges on the sovereignty of the state. India's stand is that it has its own efficient law enforcement machinery and an active judiciary and so its action should not be open to scrutiny by an international institution. The ICC's jurisdiction over NIAC, was another main objection raised by India along with other countries such as China, Turkey, Sudan, and Russian Federation while negotiation leading up to the adoption of the Rome Statute. Her contention is that the ICC's jurisdiction ought to be restricted to exceptional circumstances- only in situations of a total breakdown of the legal machinery and not when there is political unwillingness to prosecute the offenders.

V. Concluding Remarks and Suggestion

The strength of any country claiming itself as “democratic” lies in upholding the supremacy of the judiciary and primacy of the rule of law. It requires putting in place effective criminal law provisions to deter the commission of offences against the innocents and punishments for breaches of such provisions while exercising executive powers. On the contrary, India despite being the largest democracy of the world has so long been failed to perform this obligation of a democratic country. National security laws are indispensable in a country facing conflict of different nature. But such laws must fulfill the basic norms of due process. In India, the Supreme Court which is considered to be the guardian of the Constitution has failed to declare Acts like AFSPA as unconstitutional though it does not fulfill the norms of due process. Government of India's denial to accept the situations of North-east India as NIAC mostly affects the innocent civilians of the area.

⁴⁷ Supra note 44

So comprehensive law should be enacted in India incorporating three key issues namely- protection of victims and witness, victims participations in the proceedings and right to reparation. The Government of India should amend criminal law of the land in order to fix individual criminal responsibility of person-be he an ordinary citizen or the Prime Minister or, the chief of the army staff for commission of heinous crime.

Peace cannot exist without justice. Failure to bring the perpetrators to justice facilitates perpetuations of these abuses. To this end the government of India should adopt steps to make the national security laws more human with minimum judicial guarantee. Further, the Government of India should stop viewing the ICC as a judicial institution that would threaten its sovereignty, and perceive it as a preventive institution for perpetrators of heinous crimes of the largest order. Such a preventive institution could ensure that the armed forces as well as the terrorist of North-east India adhere to a minimum, internationally recognized standard of human rights and humanitarian law.

Last but not the least, the Government of India should adopt necessary and proper steps for all round development of the entire NE India, which scholar believes to contain increasing tendency of taking arms and creating any kind of armed conflict situation.