Chapter – IV

Armed Rebellion, Insurgency Groups and Armed Conflict Situations in North-east India and Humanitarian Laws

Introduction

The north eastern 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 of British period 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 project. 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 reconciliation.

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. But, the Government of India has never ever been

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2 Ibid
accepted the situations of North-east India as armed conflict of non-international nature. Rather, she considered the situations of North-east India as merely a law and order situation and thereby denying the basic humanitarian protections to the innocent victims of such conflicts situation as well as any other type of obligations under the international humanitarian laws for more than sixty years. This chapter highlights the history of conflicts prevailing in the North-east India, its nature and international laws applicable in non-international armed conflict and government of India’s obligations to such rules.

4.2 History of the Conflicts in North-east India

Internal conflicts have been a permanent feature of the North-eastern part of India since India got independence from British 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. Other North-eastern States, Assam has 11, Meghalaya 4, Tripura 2, Nagaland 4 and Mizoram has 2 active terrorist groups. 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. To discuss the nature of the conflict, this discussion will cover history of some major outfits of three highly affected States of the area.

4.2.1 Nagaland

The first revolt against the Government of India was stared in the year of 1950 in the Naga Hills. Actually, the root of Naga separatism can be traced back to the

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founding of Naga Club, in Kohima in 1918 by a group of Western educated Nagas. They submitted a memorandum to the Simon Commission which was examining the feasibility of future self government of India to exclude the Nagas from any constitutional framework of India. Under the leadership Angami Zapu Phizo, Naga movement gained momentum in the late 1940s. Phizo along with some other prominent leaders fought on the side of Indian National Army of Netazi Subhash Chandra Bose for Japan against the Allied Force with the hope of getting freedom. The Naga Club transformed into Naga National Council in 1940. On 14th of August, 1947, the Naga National Council (NNC) unilaterally declared independence from the British and challenged the claims of the post-colonial Indian State to rule over the Naga Hills, which become part of the large province of Assam. The NNC entered into negotiations with the Indian government on the future status of the Naga Hills and when it appeared that Delhi will not entertain the Naga aspirations for self-rule, it formed an underground government called Naga Federal Government (NFG) and a Naga Federal Army (NFA) and started waging sustained guerrilla warfare against Indian forces. To curb this struggle, the Government of India invoked the Armed Forces (Special Power) Act, 1958 in the area.

In 1972, the Centre banned the NNC and NFG and NFA, as ‘unlawful association’ under the Unlawful Activities (Prevention) Act of 1967. The bulk of the NNC leadership gave up the path of armed insurgency and signed ‘Sillong Accord’ with the Centre. But the China trained Naga rebel leaders Issac Chisi Swu and Thuingaleng Muivah and S. S. Khaplang decried the Sillong Accord as a “sellout” and formed the National Socialist Council of Nagaland (NSCN) to establish greater Nagaland, comprising parts of Manipur, Nagaland and North Cachar Hills of Assam. The NSCN split in 1988 to form two groups namely NSCN (IM) and NSCN (K).
Now, both the NSCN factions observe ceasefire with Indian forces but fight freely amongst themselves. The Indian Security forces have made no attempt to stop the fighting even when the rebels used heavy weapons like mortars.

The main hurdle towards a settlement of Naga problem is the NSCN’s demand for a larger Naga State integrating of all Naga inhabited territories in North-east India with the present state of Nagaland which would never ever been accepted by the other States in the area. The NSCN has ruled out any compromise on this issue. On the other hand, any attempt on the part of the Government of India for such integration may sparks off massive unrest in Manipur and some tribal areas in Assam and Arunachal Pradesh. Manipur has already been erupted, in violence, in July 2001, after the NSCN- Delhi ceasefire was extended to the rest of North-east India. But the NSCN has indicated that it is prepared to settle for a “special federal relationship” with India-in which Nagaland will have its own flag and Constitution, but key subjects like defence and foreign affairs will be left to India\(^4\). Thus, no tangible result is yet to emerge to the Nagaland’s movement.

4.2.2. Manipur

Another state Manipur was an independent Kingdoms in South-east Asia with her own civilization, tradition and cultural heritage from 33 AD to 1891 when the King of Manipur was defeated by British Imperial forces in Anglo Manipuri war whereby, Manipur lost her independence. Manipur became an independent State with the passing of Indian Independence Act, 1947 in the Parliament of United Kingdom, on 14\(^{th}\) August under the provision of clause 7(1)(b). Manipur was merged fully with the Indian Union on October 15, 1949. But, Heijam Irawat Singh, legendry

\(^4\)Supra note 1, P. 8
communist leader of Manipur opposed this merger and formed Manipur Red Guard Army to fight for independent Socialist Republic of Manipur. During 1949, the Red Guards were active and carried out few ambushes and killed a police personnel. They claimed that Manipur was an un-occupied territory of India and deploying security forces of India was named as ‘occupying forces’. They considered it as a hidden war of India against the Manipuries by snatching their sovereignty. So, they are compelled to launch armed resistance in order to restore the lost sovereignty of Manipur. However, the death of Irawat Singh in 1951 due to ill health put paid to the Red Army military.

In 1956, Manipur became a Union Territory. In 1972, ultimately, Manipur becomes a separate State after a long and frequent violent agitation. The circumstances of the merger and the delay in granting statehood caused emergence of insurgency in the State in 1964 by some Meiti Youth namely the “United National Liberation Front” (UNLF) under the leadership of Samarandra Singh demanding independence from India. It remains Manipur’s strongest separatist group. The Armed forces (Special Power) Act of 1958 was imposed on the area on September 1980. By that time, there was only four armed opposition group in Manipur- the United National Liberation Front (UNLF), People’s Revolutionary Party of Kangleipak (PRPK), People’s Liberation Army (PLA), and NSCN. However, today there are 34 militant organizations are operating in Manipur. The nature of the conflict is very much associated with the idea of armed conflict.

In the later part of 2011 the State of Manipur has undergone economic blocked for about 192 days announced by two associations. Initially, the Sadar Hills District Demand Committee (SHDDC) had launched blocked on two National highways
namely Imphal-Dimapur-Guwahati (NH 39) and Imphal–Jiribam-Silchar (NH-53) for a period of 92 days to press their demand for conservation Kuki majority Sadar Hills areas in Naga majority Senapati District. An agreement has been signed between the government of Manipur and SHDDC by which the Government agreed to grant Kuki majority Senapati District the status for full flagged revenue district. Against this decision of the State Government, the United Naga Council (UNC) had launched another blocked on the same national highways for a further period of 100 days started from August 21. The UNC said it want an “alternative arrangement” for Nagas in Manipur but did not clarify what this arrangement was. Such a blocked is a mockery on the government as the two warring tribes (Kukis and Nagas) can hold the government hostage anytime they wish.

4.2.3. Assam

Assam became a British Colony consequent to Yandaboo Treaty signed between Man and British on 24th February 1826. After that the people of Assam engaged in struggle against the British to restore the lost independence. At that time, the ‘liberation struggle of Assam’ was united with the Indian freedom struggle under the principle of ‘line of united struggle’ to establish an independent State. However, the British created leadership of independent India turned Assam into a colony of India.

In the subsequent period, in the independent India, Assam was forced to accept tens of thousands of refugees from East Pakistan. On strident opposition by the government of Assam, the Central Government threatened Government of Assam with denial of federal development funds unless Assam agreed to share India’s refugee burdens. When India decided to build a refinery at Barauni in Bihar, to
process crude oil from Assam transported through a long pipe line, considering geographical position of Assam, as a security risk to the refinery, the State erupted in agitation. This agitation raised the issue of Assam’s “exploitation” by the Indian State. This feeling of economic exploitation was further fuelled by powerful linguistic sentiments which have already been disturbed by the illegal migrants across the border of Bangladesh with the result of mass movement seeking the detection of foreigners, their deletion from voter’s list and their deportation to Bangladesh. The movement commenced in July 1979 under the leadership of the All Assam Student’s Union (ASSU) and All Assam Gana Sangram Parishad (AAGSP). Towards the end of 1979, the agitation took a violent turn despite the promulgation of President’s rule in December that year.

On April 7, 1979 United Liberation Front of Assam (ULFA) was established in Sibsagar under the leadership of Poresh Boruah with the goal of secession from India. Initially, ULFA operated in close co-operation with AASU-AAGSP’s agitation. The agitation ended in August 1985, with the signing of the “Assam Accord” with the Centre, and its leaders formed the Assam Gana Parishad (AGP) and engaged in electoral politics. From this point of time the political disturbance between the ULFA and AGP has grown continuously.

The Government of India declared ULFA as unlawful organization on 27th November 1990 and launched “operation Bajrang” and “operation Raino” on September 1991. However, these army operations have not obtained any major success. Assam Chief Minister Hiteswar Saikia then went about splitting the rebel organization with a vengeance. The Assam police was using the surrendered militants (Popularly known as SULFA) to hunt down their colleague in the underground.
On December 5, 2009, Arabinda Rajkhowa, Chairman of ULFA and Raju Borua, Deputy Commander-in-Chief of ULFA were arrested from the Indo-Bangla border in Meghalaya. Earlier, other leaders were also arrested. On July 12, 2011, Rajkhowa group announces ceasefire. At present peace negotiations going on between this group of ULFA and the Governments, and on October 25, 2011, first round talks has been held among the Centre, Assam government and ULFA on the outfit’s charter of demands that it had submitted to the Government in August, 2011. However, insurgent activities still carried on by the ULFA under the leadership Poresh Borua, Commander –in- Chief of ULFA who decline any type of negotiations with the governments until and unless governments of India agrees to discuss on topic of “sovereignty of Assam”.

The insurgent groups of North-eastern region are very much responsible for the human rights violations of the people of the area. Though they are fighting against the government of India, in most of time they target innocent people to express their strength. Bombing upon innocent civilians is common phenomenon in the area. Every month, rebels collect “taxes” from people, governments and institutions for their “struggle”. In addition, various rebel groups also extort money from people at gun point. The money collected is used for various purposes, mainly the purchases of small arms, training of rebel groups etc.

Splitting among the armed opposition group who then start gunning for each other further deteriorated the situations. In fact, such splitting creates a big hurdle on any peace process with the Government of India. The two groups of NSCN namely NSCN (IM) and NSCM (K) who splitted in the year of 1988 has been violently opposed each other and there have been a number of clashes, the worst of which
occurred in April 1988, when NSCN-K activities attacked the ‘General Headquarters’ of the IM group faction and killed over a hundred cadres. Despite peace negotiations with the government of India, both the factions of NSCN continue to be actively involved in illegal activities including extortion, kidnapping, interfactional clashes, bootlegging and recruitment besides imposing various tax duties to all types of commercial enterprises and establishment.

4.3 Nature of conflicts in North-east India

The Government of India always considers the conflicts prevailing in the Northeast India as law and order situation and thereby denying applicability of humanitarian laws in the area. So, to determine the relevance of humanitarian laws in North-east India, one must first examine whether the conflict prevailing in the North-east India is non-international armed conflicts or not.

Common Article 3 to the four Geneva Conventions provides the basic rules to be followed by the parties in a non-international armed conflict. Prior to the adoption of these Conventions, the application of international humanitarian law in situations of non-international armed conflicts largely dependent on the armed opposition group being recognized as belligerent. The Common Article 3 codified this provision and provides laws that are applicable in non-international armed conflicts. However, the Article itself does not provide any definition of non-international armed conflict. 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”. The Article provides no guidance to determine when a situation is an “an armed conflict not of international
"character" and who will determine the existence of such situation. The International Committee of Red Cross in this regard says that

"the ascertainment whether there is non-international armed conflict does not depend on the subjective judgement of the parties to the conflict; it must be determined on the basis of objective criteria."\(^5\)

The ICRC has indicated that international humanitarian law applies within the meaning of Common Article 3

"if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organization."\(^6\)

However, the collective character and level of organization necessary for the situation to be recognized as an armed conflict is not further elaborated on.

The Commentary to the Geneva Conventions includes a non-exhaustive list of criteria to determine whether a situation is a non-international armed conflict\(^7\). The Commentary does include the recognition of the insurgents by the government as belligerents\(^8\). It is clear from the _travaux preparatoires_ that the scope of Common Article 3 was intended to include situations of civil war where insurgents had been recognized as belligerents\(^9\). When read together with Common Article 3(2) it becomes clear that in the absence of a special agreement decided between the belligerent parties, at a minimum Common Article 3 would apply. Other criteria listed in the

\(^5\) ICRC, Working Paper 929 June 1999), available at http://www/occmnpw/prg/documents/precon/papersonprepcomissues/ICRC WorkPaperArticle8Para2e.pdf. This was submitted as a reference document to assist the Preparatory commission in its work to establish the elements of crimes for the International criminal court


\(^7\) Jean. S. Pietet (ed.), _Commentary on the Geneva Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field_, (ICRC, Geneva, 1952).p. 49-50 derived from the deliberations and amendments presented during the conference with respect to that Article.

\(^8\)Criteria 3(a), Commentary GC I, ibid.

\(^9\) L. Moir, _The law of internal Armed Conflict_, Cambridge: Cambridge University Press, (2002),P.41
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 terms, “High Contracting Parties” in the Article mean sovereign entities. Thus, every sovereign entity who is a state party to Geneva Conventions is bound by the humanitarian norms mentioned in the Article. The scope of application has further extended by the International Court of Justice in the Nicaragua case\(^{10}\), whereby the Court laid down that the Common Article 3 has now acquired status of customary laws and thereby now the Article has universal application whether or not the conflict occurs on the territory of a High Contracting State. Thus, the Court, in this case, further, extends the duty of every state to ensure respect for humanitarian law under Article 1 common to the Geneva Conventions to non-international armed conflicts also.

The Additional Protocol II of the Geneva Conventions of 1949 marked a further step in the regulation of non-international armed conflicts 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

\(^{10}\) Nicaragua V. United States (Military and Paramilitary Activities in and against Nicaragua), 27 June 1986, ICJ Rep392,para 218
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-

a. The confrontation must be between the government armed forces and armed dissident forces. Here, the term armed dissident force includes a wide variety of actors including guerrillas, rebel groups, militias, insurgents and their variants. Private security or private military operations are not included in the remit of this definition\textsuperscript{11}. In general, such armed groups use force to achieve their objective and are not under State control\textsuperscript{12}.

When two or more factions within a country confront one another without the involvement of government armed forces, Protocol II does not apply.

b. To apply the Additional Protocol II, the dissident armed forces must act under responsible command. The existence of a responsible command implies that the insurgent armed groups or dissident armed forces must be organized to some degree. It has a \textit{de facto} authority, having sufficient power both to plan and carry out concerted and sustained military operations and to impose the discipline.

c. The insurgent or armed dissident force must have control on part of territory. Territorial control is not dependent on the duration or proportion


\textsuperscript{12} ibid
of control, but, is only dependent on whether the group can mount concerted and sustained military operations by using territory.

d. 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. At the beginning of conflict, a military operation would rarely display these characteristics; it is likely, therefore, that in the initial stages of hostilities only Common Article 3 will be applicable.

e. 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 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 non-international armed conflict situations.

This definition of non-international armed conflicts is not very clear and ambiguous in some aspects. These aspects ambiguity have been further clarified in the operation of international criminal law. The jurisprudence of International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone has clarified what constitutes
a “non-international armed conflicts” and the conditions of applicability of Common Article 3 and Additional Protocol II, both generally and as penal instruments\(^\text{13}\).

In the *Dusko Tadic*\(^\text{14}\) case, in 1995, the ICTY affirmed that a non-international armed conflict exist when there is “protected armed violence between governmental authorities and organized armed groups or between such groups within a State”. The context of this decision was the trial of Dusko Tadic, a Bosnian Serb charged with crime against humanity, grave breaches of Geneva Conventions and violations of the customs of war under Article 2, 3 and 5 of the ICTY Statute. The Defence argued that the Tribunal lacked subject-matter jurisdiction to try Tadic for war crimes. The preliminary issue concerned the status of the situation, 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 crimes as aforesaid. The argument was based on the fact that ‘the conflict in the Prijedor 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”.


\(^{14}\)Prosecutor Vs. Delalic, Mucic, Delic and Landzo, 16 November 1995, ICTY caseIt-9621-T, Judgement, para.183
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 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\textsuperscript{15} 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

\textsuperscript{15} Prosecutor Vs. Akayesu, 2 September 1998, ICTR, para620
military operations, controlling authority, structure and discipline of the troops also were factors in this decision\textsuperscript{16}.

Thus, in deciding the applicability of Common Article 3, both the ICTY and ICTR have focused on the organization of the forces and intensity of the conflict. From this applicability of Common Article 3, would therefore depend on organized, as opposed to unorganized, and prolonged as opposed to short-lived, internal hostilities\textsuperscript{17}.

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,-

\begin{quote}
“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”\textsuperscript{18}.
\end{quote}

This article has abandoned the requirement for the existence of responsible command by incorporating principle of individual criminal responsibility under Article 25\textsuperscript{19} of the Rome Statute. Thus, a state of armed conflicts can exist between organized armed groups without any involvement of State authorities.

Now, these requisites of non-international armed conflicts can be used to determine whether the conflicts in the North-east India qualify as non-international armed conflict or not. In the North-east India all the non-state actors are fighting against government armed forces opposing their authority and thereby fulfill the first

\begin{itemize}
\item Supra note 15, paras. 627 and 639
\item Article 8(2)(f), Rome Statute 1998
\item 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”.
\end{itemize}
requirement of non-international armed conflict as mentioned in the Additional Protocol II.

Secondly, the insurgent armed groups have always been conducting their operations under responsible command. The insurgent groups are formed in rigid military hierarchy. For example, NSCN-IM one of the major insurgent group of the area has a military wing—the Naga Army, comprising one brigade and six battalions. There are also several “town command” and specialized mobile groups. S. Hungshi is the Commander-in-Chief of Naga Army.

Thirdly, to apply the provisions of Protocol II, the armed opposition group must control a part of the territory with sustained and concerned military operations. 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 fourth requirement to establish a conflict situation as non-international armed conflict is that there must be sustained and concerted military operations by the insurgent group and they are enabling to implement the Protocol II. 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. NSCN was formed on January 1980 and split into NSCM-K and NSCM-IM in 1988. However this demands of Naga people dates back to 1918 when it was demanded by Naga Club and then by Naga National Council.

Just like NSCN-IM, People’s Liberation Army (PLA) of Manipur since it’s formation in 1978, has engaged in a guerrilla insurgent campaign against the government of India. PLA militants have constantly targeted Indian army and security forces in districts and along border regions within Manipur. The PLA consists of four divisions that are mostly prevalent in and around Imphal. Divisions 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, headed by President Irengban Chaoren. 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 United National Liberation Front (UNLF) another insurgent group of Manipur established in 1964 with the goal to establish an independent Manipur nation with a socialist government. The group evolved out of an older secessionist group, the Manipur Red Guards, whose revolt against federal rule was suppressed in the early
1950s. Throughout the 1970s and 1980s the group remained mostly peaceful. Since 1990 the group openly started to take up arms in order to achieve their goal of an independent Manipur. The group formed the Manipur People’s Army (MPA) as an armed wing, and since that time, the UNLF has launched numerous attacks against Indian army and security personnel. It also began a ‘social reformation campaign’ under which it took vigilant action against alcoholism, drug abuse, gambling and other crime. Taking the law into its own hands, the UNLF even executed many rapists.

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 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)\(^20\), 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)\(^21\). In the North-east 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 militants\(^22\). In 2013, 61 fatalities recorded in Nagaland, despite the fact that ceasefire is going on that area, out

\(^{20}\) UCDP is a data collection project on organized violence which has recorded ongoing violent conflict since 1970, housed at Uppsala University in Sweden.

\(^{21}\) Department of Peace and Conflict Research, *Uppsala Conflict Data Programme (UCDP)*, Uppsala University, Sweden, available at [www.pcr.uu.se/research/ucdp/definitions](http://www.pcr.uu.se/research/ucdp/definitions), last visited 24 December, 2013

\(^{22}\) Ajay Sahni, *Survey of conflicts and Resolutions in India’s Northeast*, available at [www.satp.org/satporgtp/publication/faultlines/vol12/Article3](http://www.satp.org/satporgtp/publication/faultlines/vol12/Article3)
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.  

The second requirement as per the observation made in the Tadic case relates
to the organizational structure of the groups taking part in an armed conflict. As
discussed above almost all of the armed group of North-east India fulfilled this
condition. The NSCN-IM of Nagaland has a 3,000-strong armed cadre as 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-IM.  

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

23 South Asia Terrorism Portal, India Assessment 2013, available at
www.satp.org/satporgtp/countries/india/index.html last visited 09-01-14
24 Sashinungla, Nagaland: Insurgency and Fractional intransigence available at
www.satp.org/staporgtp/publication/faultines/volume16/article4.htm, last visited on 09-01-14
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, the PLA, 2500 cadres for the 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.

All these facts and figures establish the nature of armed conflict of North-east India as non-international armed conflict as per Additional Protocol II and judicial pronouncement as mentioned above.

4.4 Domestic Laws enforcing in Conflicts in North-east India

Government of India has so long been trying to face the problems of North-east India by imposing some draconian laws in 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. Initially, it was promulgated by then President Dr. Rajendra Prasad, in May 1958 in response to the continued unrest in the North-eastern territories of Union, including self determination activities by Naga tribes that spilled over into the State of Manipur. The Ordinance entitled the Government Assam and Chief Commissioner of Manipur to declare the whole or any part of Assam or Manipur, respectively as a “disturbed area”. The Ordinance was replaced by the Armed Forces (Special Power) Act later that year.

In the original version of the Armed Forces Special Power Act of 1958 (AFSPA), only the State Government had the power to declare an area as disturbed as per Article 246 read with 7th Schedule of the Constitution of India which places
“Public Order” under Entry 1 of the State’s list. But in 1972 the Act was amended and the Union Government took away this power from the State Government and its legislative assembly to its own hand despite the fact that the President of India can proclaim emergency under Article 356 of the Constitution of India.

The Act grants extraordinary powers to the military personnel to do anything and even to shoot a person on mere suspicion. Sections 4 and 6 are the most controversial one which has violated the all basic standards of human rights and humanitarian norms. Section 4 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 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.

25 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.
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. The section lays 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 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 197 of the Criminal Procedure Code.

These provisions of AFSPA violate the basic rights mentioned in the UDHR such as, free and equal dignity, non-discrimination, life, liberty, security of persons, non-torture, equality before the law, effective remedy, no arbitrary arrest and right of property. They also violate the provisions of ICCPR to which

26 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”.

27 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”.

28 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”.

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

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

31 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”.

32 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”.

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

34 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”.

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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:

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 proclaims, ICCPR foresees that some rights may have to be suspended. However, ICCPR remains operative even under such circumstances since certain rights are non-derogable rights. 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

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35 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.
nor detracts from the due process of law or suspended any rights or their enforceability\textsuperscript{36}

Moreover, the AFSPA 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 justice system i.e. \textit{nullum crimen, nulla poena 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 frivolous\textsuperscript{37}.

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.

\textsuperscript{36} United Nations (1997), Human Rights Committee, Summary Record of the 1603\textsuperscript{rd} Meeting, CCPR/C/SR.1603, 24 July, Geneva.

4.5 Magnitude of Human Rights violations under the AFSP Act

In 1990, the Government of India classified ULFA, the main insurgent outfit in Assam, as a terrorist organization and had banned it under the Unlawful Activities (Prevention) Act. Concurrently, the Indian Army started military offences, in different parts of Assam, against ULFA in the name of Operation Bajrang November 1990, Operation Rhino September 1991, Operation All Clear December 2003 and Operation Rhino 2. The scholar visited one of the highly affected area by such operations in east Assam, namely, Maz-Mamoroni Gaon under the Makum Mouza of Tinsukia District. The survey was conducted among 120 persons of 40 households of the gaon, comprising of approximately 65 households by providing some questionnaires, copy of which is enclosed with this thesis as Annexure I.

The scholar finds that all the operations of Indian Army were conducted at night and generally started with extensive search and arrest operation. Villagers were required to line in the nearby field and questioned. Persons those were arrested kept in the camp for different times without producing before Magistrates, and torture inflicted on them by adopting different method. Some of the methods used for inflicting torture are electric shocks to genitals, cigarette burns, pulling out of fingernails, pushing pins on all fingers, dunking the head under water/urine repeatedly; hanging upside-down for prolonged period etc. Sometimes when the conditions of tortured victims deteriorate the victims were killed and the kill passed of as due to an encounter. The villagers reveal that the armed forces were never successful in capturing any terrorist by such operations.
Women were generally molestated by the armed personnel and many times rapes took place during search-and-arrest operations which went unreported. Even if report was made, there were no fair hearings.

In, certain cases, persons picked up by the security forces were simply disappeared. They reported the nearest police station about the torture inflicted upon them, but no steps were taken by the authority against such complaint. The villagers were not aware, even a few has the knowledge about human rights. They completely dissatisfied with the existing legal system of India. They are willing to approach to international authority, if any, for prosecution of the persons inflicted torture on them and for better protection of their rights.

The survey conducted by scholar reveals that 8% people are physically deformed, 72% people were detained in the army camps and where they suffered both physical and mental torture, sexual offences committed against 45% and only 25% people are aware of human right. 100% people are not satisfied with the existing legal system of the country and they are willing to approach to an international organization for protection of their rights.

**Human Rights Violation at Maj-Mamoroni gaon of Tinsukia District of Assam**
4.6 Jeevan Reddy Committee Report

In 2005 the Government of India appointed a committee headed by former Chief Justice B. P. Jeevan Reddy J. to review the AFSPA following the very controversial gang rape and extrajudicial execution of Manorama Devi by Assam Rifles in 2004. The Committee in its report confirmed that insurgency situation in North-east has worsened since the AFSPA has been applied in 1958s. The no. of insurgent groups have greatly increased. Their cadres, weapons, tactical capabilities have expanded and improved immediately\(^{38}\). The report further says that,-

“there have been a large number of cases where those taken away without warrants have “disappeared” and ended up dead or badly injured. Suspicion and bitterness have grown as a result”\(^{39}\).

The committee in its report mentioned two main recommendations-

1. To amend the provisions of the Act to bring them in consonance with the obligations of the government towards protection of human rights or
2. To replace the Act by a more humane Act.
3. To recommend insertion of appropriate provisions in the Unlawful Activities (Prevention) Act, 1967 (as amended in the year 2004)- which is a cognate enactment as pointed out in Chapter III Part II of this Report instead of suggesting a new piece of legislation.\(^{40}\)

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\(^{39}\) Reddy report, p. 79

\(^{40}\) Jeevan Reddy Committee Report, *Ministry of Home Affairs 2005*, Pg 73
The Committee further pointed out that the deployment of armed forces for the said purposes should be undertaken with great care and circumspection. The report clearly expressed that the Act “has become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness,” and should be withdrawn. The Central Government has ignored the report of its own committee, with AFSPA still in continuance in the North East India and Jammu and Kashmir too.

4.7 Laws applicable in non-international armed conflicts- under International Law

Common Article 3 to the Four Geneva Conventions of 1949 provides the fundamental rules that are applicable in a non-international armed conflict. Under this Article each and every country of the contemporary world who are involving in an armed conflict of non-international nature 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 indispensible 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 parties\textsuperscript{41}.

Protocol II additional to the Geneva Conventions adopted on 8\textsuperscript{th} June 1977
which develops and supplements Article 3 common to the Geneva Conventions

\textsuperscript{41}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 \textit{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 cured for. An impartial humanitarian body
such as the International Committee of Red Cross may offer it 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 present Conventions and the
applications of the preceding provisions shall not affect the legal status of the Parties to
conflict”.

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provides three types of protections to the victims of non-international armed conflict, namely-

a. Protection from the effect of hostilities.

b. Protection against abuse of powers.

c. Norms concerning care and relief activities.

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,\textsuperscript{42} prohibits the starvation of the civilian populations\textsuperscript{43} and attack on objects indispensible to its survival\textsuperscript{44}, prohibition on displacement of the civilians populations unless the security of the civilians involved or imperative military reasons so demand\textsuperscript{45}, prohibition to use of weapons causing superfluous injury or having indiscriminate effects, to lay mines indiscriminately\textsuperscript{46} etc.

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 conflict\textsuperscript{47}, the legal guarantee applicable to prosecution of offenders and repression of offences committed in connection with the armed conflict\textsuperscript{48} and the rules of conduct to be observed in all circumstances by civilian officials and members

\textsuperscript{42} Additional Protocol II, Article 13, para2
\textsuperscript{43} Ibid, Article 14, first sentence
\textsuperscript{44} Ibid, second sentence
\textsuperscript{45} 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
\textsuperscript{46} Ibid pg.395
\textsuperscript{47} Additional Protocol II Article 5
\textsuperscript{48} Ibid Article 6
of the armed forces with regard to non-combatants or persons *hors de combat* under their authority\(^{49}\).

**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 for\(^{50}\), that medical personnel\(^{51}\) and facilities\(^{52}\) 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 emblem\(^{53}\).

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 non-international armed conflict. In the *Tadic* case the Appeals Chambers of the ICTY confirmed the applicability of customary rules to non-international armed conflict 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 international armed conflicts and ban of certain methods of conducting hostilities”\(^{54}\).

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\(^{49}\) Additional Protocol II Article 4  
\(^{50}\) Ibid, Articles 7 & 8  
\(^{51}\) Ibid, Article 9  
\(^{52}\) Ibid, Article 11  
\(^{53}\) Ibid, Article 12  
\(^{54}\) ICTY, Prosecutor vs. Tadic, Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, caseIT-94_1, (October 2 1995) at para 127
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”

These Codes 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. But a high degree of responsibility is sadly lacking in the troops stationed in the North-east India. They are not concerning about respect for human dignity and maintenance of human rights, as the AFSPA encourages them to violate human rights by permitting arrests, searches and seizures on their subjective suspicion. The armed forces know their action will not be reviewed and that they will not be held accountable for their action.

Under the Code, the armed forces have no ground 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”

This provision of the Code sweeps aside any justification of the Government of India to impose AFSPA upon North-east India. Even if the North-east India is a “Disturbed area” there is no justification for the human rights abuses being carried out by the military in the region. Further, the Act far behind the norms laid down in the Common Article 3 to the Geneva Conventions and the Additional Protocol II to the Geneva Conventions.

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 non-international armed conflict 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. It lays down that in order to determine unwillingness on the part of the State in a particular case, the Court shall consider having regard to the principles of the due process recognized by international law, whether one or more of the following exist as applicable.

a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court referred to in article 5

b. There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with intent to bring the person concerned to justice.

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

55 Article 5 of the Rome Statute provides crimes within the jurisdiction of the Court as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.
Thus, unwillingness shows a State’s lack of positive attitude towards prosecution and trying perpetrators of international crimes.

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

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.

4.8 Humanitarian Laws and non-state actors

The provisions of the Common Article 3 and Protocol II are binding not only on the established government, but also on the insurgent party. Although only States may formally ratify or become party to the various international treaties, non-state actors of a non-international armed conflict must also comply with Common Article 3, customary IHL, and where applicable Additional Protocol II. Common Article 3 in its language by using the terms “each party to the conflict” makes it very clear that the provisions of the article are applicable on both the State as well non-actors involved in the armed conflict. The Commentaries of both the Geneva Conventions 1949 and Additional Protocols further clarified this intention by stating that,
“the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested”\textsuperscript{56}.

This practice is also confirmed by decisions of international court and tribunal and other international body. In 2004, the Appeal Chamber of Special Court for Sierra Leone held that, “it is well settled that all parties to an armed conflict, whether States or non-state actors, are bound by international humanitarian law, even though only States may become parties to international treaties”\textsuperscript{57}.

The UN Security council has also passed a number of resolutions calling all parties to hostilities, namely government armed forces and armed opposition groups, to respect fully the applicable provisions of international humanitarian law, including Common Article 3\textsuperscript{58}. For example, in 1998 with regard to Afghanistan, the Security Council reaffirmed that “all parties to the conflict are bound to comply with their obligations under international law and in particular under the Geneva Conventions of 1949\textsuperscript{59}.

\textsuperscript{56} Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Geneva, 1987) para4444
\textsuperscript{57} Prosecutor vs. Sam Hinga Norman, Decision of 31 May 2004, SCSL, Case No.SCSL-2004-14-AR72(E), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para 22.
\textsuperscript{59} SC Res.1214(1998),UN Doc. S/RES/1214, adopted in 3952\textsuperscript{nd} meeting, 8 December 1998, preamble para12
4.9 India and the International Humanitarian Documents

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. Similar provision has also been incorporated in the section 6 of the AFSPA. Under section 45(1) of the Code of Criminal Procedure, members of the armed forces are also expressly protected from arrest for anything done or purported to be done in the discharge of official duties except after obtaining the consent 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 main objection of India with regard to this document is that once the national liberation movements had been included in the paragraph 2 of part I of the protocol I to the Geneva Conventions, giving them the status of international conflict, then Protocol II would not be necessary since any other conflict taking place within the territory of a sovereign state would be an internal conflict, and international instrument designed to regulate non-international conflict might in actual application impede the settlement of the conflict and lead to external interference\(^{60}\). The Indian delegate present in the 39th Plenary Meeting, with regard to Draft Protocol II, expressed that notwithstanding its desire to see the full

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development of humanitarian law applicable in armed conflicts, the Government of India could not approved of 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 world. India was against internationalization of any purely internal situation through an international instrument.

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 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 fashion.

India is not a party to the Rome Statute, 1998 by which the international Criminal Court has been established to investigate and bring to justice the most heinous crimes under international law. In fact, India along with 20 other countries were abstained from voting at the Rome Conference in 1998 where the Rome Statute was formally adopted by 120 countries. Subsequently, there has been no apparent move towards ratifying the Statute. 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

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62 Supra note 60 p 63
63 Ibid
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 non-international armed conflict, 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. 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.

4.10 Concluding Remarks

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.

The Government of India’s view while denying the signing of the Additional Protocol II that it cannot discriminate between citizen’s by treating some criminals leniently under the Protocol II while the full regour of law to be applicable to the
other law abiding citizens is in complete contradiction with the immunity provisions granted to armed personnel from prosecution for anything done even to kill a person on mere suspension. Is it not discrimination on the people of North-east India?

Government of India’s denial to accept the situations of North-east India as armed conflict of non-international nature mostly affects the innocent civilians of the area. Their rights are violated on the hands of both in the government armed forces and armed opposition groups. They even no right to move to the court for seeking justice without prior permission of the Central Government. This inevitably creates a situation to approach to the international organization for protection of rights of the people of North-east India.

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.