2.1 North East India and its location

North Eastern States (NES hereafter) of India stands for the seven states Assam, Arunachal Pradesh, Mizoram, Manipur, Nagaland, Tripura, Meghalaya and Assam geographically situated in the far eastern part of India. These states are connected with the mainland India through a narrow chicken neck called Siliguri corridor of 20 km long. The region houses more than 200 major ethnic groups and subgroups, mainly Austro-Asiatic, Mongolian and Australoid although Caucasian strains were seen, speak approximately 400 languages and dialects.

Through the centuries, these hills and valleys have bridged South, South East, and Central Asia and on today's geo-political map, a large part of the original region constitutes the seven states of the Republic of India, but its political, economic and socio-cultural systems have always been linked with South East Asia. Historical evidences suggest that the NES "has remained as a distinct entity." The objective reality in the north eastern region of India is quite obvious for the last half a century. Firstly, the large chunk of the north eastern region has been acquired in post-British period or had been otherwise excluded areas, not governed by the metropolitan administration. Secondly, subsequently thereafter, militant peripheral secessionism had started the kick off in no time. Thirdly, brutal state repression or state terrorism had been let loose in the regional
civil society for neutralizing the insurgents, thereby militarizing the entire civil society.

2.2 Definition of Non-international (Internal) Armed Conflict

At present there are no clear-cut criteria for existence of an ‘armed conflict’. An armed conflict is understood to be any confrontation involving regular or irregular armed forces with objectives perceived as incompatible in which the continuous and organised use of violence: a) causes at least 100 deaths in a year and/or a serious impact on the area (destruction of infrastructures or nature) and human safety (e.g. people wounded or displaced, sexual violence, insecurity of food supplies, impact on mental health and on the social fabric or disruption of basic service); b) is intended to achieve objectives that can be differentiated from ordinary crime and are normally associated with: demands for self-determination and self-government or identity-related aspirations; opposition to the political, economic, social or ideological system of a State or the internal or international policy of a government, which in both cases provides motives for a struggle to achieve or erode power; or the control of resources or the territory.

The Geneva Conventions and its Additional Protocols used the term extensively; still it is not defined in either. The Geneva Conventions recognize two distinct categories of armed conflicts—international and non-international. The full complement of protections under IHL is applicable only to the first category. Under the Geneva Conventions, an international armed conflict arises between ‘two or more of the High Contracting Parties.’ Since only States can be High Contracting Parties, an international armed conflict has traditionally been viewed as a conflict between two States. A group of protections included under
Common Article 3 of the Geneva Conventions applies to a second category of armed conflicts, namely 'armed conflicts not of an international character.'\textsuperscript{10} Such conflicts 'occur in the territory of one of the High Contracting Parties,'\textsuperscript{11} which suggests that non-international armed conflicts typically occur within a single State.\textsuperscript{12}

Non-international armed conflicts are distinguished from 'internal disturbances and tensions or isolated and sporadic acts of violence.'\textsuperscript{13} One of the factors relevant to such a factual determination is the nature, intensity, and duration of the violence. Additionally, the protections applicable in non-international armed conflicts bind all parties to the conflict, including non-state actors. As a result, for a non-state actor to be deemed a party to a non-international armed conflict, it must have attained a certain level of organization and command structure such that it is capable of being identified as a party in the first place.

The decisions of international judicial bodies are of little help in clarifying the term 'armed conflict' in this context. The pronouncement of the Appeals Chamber of the ICTY in the \textit{Tadic} case is perhaps the most frequently cited decision on what constitutes an armed conflict. According to the Appeals Chamber, 'an armed conflict exists 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.'\textsuperscript{14} This puts a little more flesh on the skeletal definition provided in the Geneva Conventions, 1949.
In Tadic judgment, the Appeal Chamber of ICTY evaluated the existence of armed conflict through the application of a test. The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in common article 3 focuses on two aspects of a conflict, the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections or terrorist activities which are not subject to IHL. Whenever armed violence erupted in the international community, the traditional international law the legal response was based on a state dichotomy, belligerency or insurgency. The former category applied to armed conflicts between sovereign states, while the later applied to armed violence breaking out in the territory of a sovereign state. Corresponding international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating in armed violence.

The United States administration adopts a very broad concept of 'armed conflict'. It's Instructions to Military Commissions explains that armed conflict doesn't require 'mutual hostilities', a single hostile act or attempted act may provide sufficient basis if its magnitude or severity rises to the level of an 'armed attack' or 'an act of war', or the number, power, stated intent or organization of the force with which the actor is associated is such that 'the act or attempted act is tantamount to an attack by an armed force'. Similarly, 'conduct undertaken or
organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities satisfy the nexus requirement\(^{20}\).

Until now terrorist acts by private actors have not been customarily viewed as creating 'armed conflict'\(^{21}\). Upon ratifying Protocol 1, United Kingdom stated, 'it is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation\(^{22}\).

A Peace Journal defines that an armed conflict is 'a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths'.\(^{23}\) Any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 of Geneva Convention, 1949, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.

**2.3 Historical background on emergence of internal armed conflict in NES\(^{24}\)**

Having understood what constitutes a 'non-international armed conflict', it is relevant to have a historical perspective on the emergence of armed conflict in NES. In NES, the insurgent groups, regional parties and youth unions among others, had of late been claiming their right to self-determination in varying degrees and modalities on the ground that for historical reasons, the NES, 'remained outside the Indian fold till the signing of the Yandaboo Treaty\(^{25}\). The

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great Hindu and Muslim empires that reigned over the Indian sub-continent never extended east of the Brahmaputra River
down.

First people set their feet on the soil of Assam were people who were of Austric racial stock. Karbis, Bodos, Khasis, Jaitias, Kuki are said to be members of this racial sub-group. Two widely recognized historical kingdoms in the region – the Ahom and the Meitei ruled over these regions for years. Accounts of Ahom and Meitei kings are available in the official chronicles of the Ahom kings called Buranjis and ‘Cheitharol Kumbaba’, the royal chronicles of former kingdom of Manipur written in Meitei language describes the history of Meitei Kings. The Ahom kingdom established in upper Assam in the second quarter of the thirteenth century and annexed by the British in 1826 as per the Yandaboo Treaty. The Meitei kingdom, centered mostly in present day Imphal, was founded in the past by a people of Mangoloid origins mainly Tibeto-Burman or Sino-Tibetan speaking. The state of Manipur has been recognized as an independent country as early as 550 B.C in the Burmese royal chronicles and in 33 A.D as per Manipur’s royal chronicle, Cheitharol Kumbaba. Both the Ahom and the Meitei kingdoms became British protectorates, following the Yandaboo treaty signed in 1826 between the Burmese King and the British East India Company.

Both the Ahom and the Meitei kingdoms, having remained for long culturally indistinguishable within the heterogeneity of predominantly mongoloid epicanthic fold, came under the influence of Hindu devotional traditions in late 17th century. The advent of Hindu devotional cults, especially in the eastern districts led by Moran and the uprising against the Ahom kingdom staged by
them, known as Moamoria rebellion in the period between 1769 and 1806, not only weakened the Ahom kingdom, but also directly contributed king Gaurinath Singh petitioning Lord Cornwallis, then Governor General of India, in 1789 for the British intervention, which eventually annexed both the Ahom and Meitei kingdoms in 1826.30

In the beginning, the British called the area beyond Inner Line, ‘Backward Areas’, as laid down in the Government of India Act of 1919, conveying the sense that the modern institutions of administration had not taken root there. Under the Government of India Act 1919 the Governor General designated all the tribal areas of Assam as ‘backward tracts’31. The Backward Areas became ‘Excluded’ and ‘Partially Excluded’ areas under the Government of India Act, 1935, issued in fact on April 1, 1937 divided these tracts into ‘excluded areas’ and ‘partially excluded areas’.

With the enactment of Government of India Act, 1947, Indian Dominion was set up. Government of India Act 1935 became the constitution of the dominion till a new and permanent constitution was enacted. With the adoption of constitution of India in 1950, special provision for Sixth Schedule was made for administration of the tribal areas. In the constitution, tribal areas were no longer termed as excluded and partially excluded areas but were specified in two part appended to the Sixth Schedule32.

- **Emergence of Naga Movement for right to self-determination**

  In 1928, the Simon Commission had come into India to engage with the issues of constitutional progress towards self-rule, which was the main demand of
the Indian National Congress. The Naga Hill District was a part of Assam since 1874, with separate arrangements for its tribal administration\textsuperscript{33}.

The Naga Hill district could not take part in the contemplated political reforms and accordingly the members of the Naga Club\textsuperscript{34}, formed in 1918, to submit a memorandum asking for its exclusion. The Naga National Council (NNC afterwards) created in 1920s claimed that except for some seventy five years or so of British control from the 1880s onwards, the Nagas has never been subjugated or ruled by other people and that they had never formed part of what today constitutes the Indian union\textsuperscript{35}.

After submitting memorandum to Cabinet Mission plan in 1946, in May 1947, NNC sent another memorandum to Lord Mountbatten for setting up an interim government for the Nagas for a period of 10 years and after that they wished to form their own government. Phizo along with other top leaders of the Nagas, held a plebiscite for the Naga Hills on 16 May 1951 asking the people to vote for or against an independent, sovereign Nagaland. Over 6000 people from all corners of Naga Hills came to Kohima to give their verdict on 16 May 1951. More than 98 per cent of the participants opted for a sovereign Nagaland. The plebiscite covered only the Naga Hills district.

In 1955, an undeclared armed conflict began in Naga Hills, the then a part of Assam state. AFSPA was enacted at this point in 1958 to counter this insurgency. Nagaland was given full statehood status on December 1, 1963, as the 16\textsuperscript{th} State of the Indian Union. In 1975, some Naga leaders held talks with the Government of India which resulted in what is known as the Shillong Accord. The Naga leaders who did not agree with the Shillong Accord continue to fight for
what they call, ‘Naga sovereignty’ and swore to fight on. Isak Chisi Swu and Thuingaleng Muivah took the leadership and formed the National Socialist Council of Nagaland (NSCN) and on February 2, 1980 proclaimed a new Government of the People’s Republic of Nagaland with Isak Swu as chairman, Khaplang as vice-chairman and Muivah as general secretary.

In 1988, the government agreed for talks within the constitutional framework which was rejected by the NSCN. In the meantime internal conflict erupted in NSCN and two fractions come up as a result. These are NSCN-Khaplang and NSCN-Isak-Muivah group. Finally in 1997, Cease fire agreement was signed between NSCN (IM) and Government of India. The ceasefire has been extended without any time limitation in 2004 in ‘all Naga inhabited areas’. This ceasefire is continuing till date.

- **Manipur’s merger with India**

  Manipur was a kingdom and legal personality, had already signed and transacted Jiri Boundary Treaty in 1835, Kubo Valley Treaty on January 9, 1834 and Kubo Valley Compensation Treaty on January 25, 1834 etc till it was invaded on March 24, 1891 and occupied the palace of Manipur on April 27, 1891. In 1907, the British decided to formally restore the Kingdom of Manipur, with the Maharaja. The people of the valley, mainly the Meitei, remained discontented with the British paramountcy. Sporadic protests are on record in 1904 and in 1932 when the agitation was led by Meitei women traders to protest against prohibition on open sale of rice, which had become an official monopoly. The government gave in and lifted the prohibition.
India became independent on August 15th, 1947, Manipur remained an independent state with constitutional monarchy. Instrument signed by the Maharajah of Manipur on August 11, 1947 with the dominion of India empowered the first democratic election of Manipur was held in August 1948 under the Manipur Constitution Act, 1947.

A communist group led by Hijam Irabot Singh insisted on keeping the independent political identity of Manipur intact. The Indian government decided to act tough and invited the Maharaja to Shillong to sign the merger agreement in 1949 and it is alleged that no consultation took place with the Council of Ministers or the elected Assembly. The State of Manipur became a ‘Part C’ state of the Indian Union under the administration of a Chief Commissioner. In 1963, Manipur was made a Union Territory and then in January 20, 1972 it became a State with its own Assembly and the elected government.

Hijam Irabot Singh went to Burma and set up the first underground outfit to fight for Manipur’s independence leading to the formations of the United National Liberation Front in 1964, the Revolutionary Government of Manipur (RGM), with its base in Sylhet, in 1968 and the People’s Liberation Army. Manipur valley was declared as a ‘disturbed area’ on September 9, 1979 and since then AFSPA is in force and remained a ‘disturbed area’ till today.

- **Uprising in Assam**

The ‘Maomoria rebellion’ organized by the peasantry in 1769 weakened the Ahom Kingdom temporarily, as mentioned earlier. Taking advantage of the weak Ahom leadership the Burmese army attacked Assam thrice in 1817, 1819 and 1821. The British who came to liberate Assam from the Burmese, entered
into an agreement to establish their business in Assam. A fierce encounter took place with the British and Burmese Army. The Burmese had to leave Assam eventually after signing the Treaty of Yandaboo on February 24, 1826. The British however did not hand over the right of ruling Assam to its authority, King Gaurinath Singha, the then Ahom king. Assam became a part of British India as a result of the Treaty of Yandaboo in 1826. This signified the end of Ahom rule in the state.

The British couldn't subdue the sentiment of the people and expressed their anger through intermittent outburst and minor revolts. Such revolts were Nagaon revolt on September 17, 1861, Pati Darrang, Nalbari, Lachima, Barama, Bajali, Khetri by 1892, by 1893 in Rangia and in 1894 at Pathurughat. The Bengal partition in 1905 resulted in movement of Muslim peasantry from East Bengal to Assam. The British was not happy with the revenue. Soon they discovered potentials of tea production and oil fields. Britishers required labourers and workers for producing tea and oil. The Assamese people were not willing to work in tea gardens.

Britishers brought groups of immigrants to Assam. First group was the Adivasi tribal of Chota Nagpur, Bihar and Madhya Pradesh and they were brought during the middle of nineteenth century, while East Bengali Muslim, the second group started migrating from the first decade of the 20th century mainly to cultivate the agricultural land and earn revenue for the Britishers. The third group of people was the Marwari traders and Bengali service holders formed the fourth groups. The migration continued during 1947 and 1971 from neighbouring East Pakistan and subsequently Bangladesh.
In 1972, various districts of Assam were given statehood. State of Manipur, Meghalaya, Tripura, Mizoram, came into existence. By the 1970s student's movement emerged in the state. All Assam Jatiyatabadi Yuba Chatra Parishad (AJYCP) and All Assam Students Union were formed. All Assam Gana Sangram Parishad was formed that started the Assam Agitation and took the shape of a movement against the foreigners or illegal migrants.

United Liberation Front of Assam (ULFA hereafter) was formed on April 7, 1979. There were demands of reforms in voter list. Elections were held in February, 1983 without amending the voter list. It is during this time, the massacres of Nellie and other similar killings took place all over Assam. In 1985, Assam Accord was signed between the Prime Minister Rajiv Gandhi and AASU leaders. After election, ULFA emerged as an armed response demanding sovereignty for Assam. An armed struggle for independent Assam began. ULFA was declared as a banned outfit in November 1990. On November 28, 1990, President's rule was imposed in the state and Operation Bajrang and later Operation Rhino was launched to control the armed insurgency. ULFA shifted its base to the neighbouring countries.

During 1995, several ULFA cadres surrendered. Surrendered ULFA activists popularly called SULFAs were used to locate ULFA cadres and to commit 'secret killings' from 1998-2002. Mainly family members of ULFA were the targets of secret killings to force the ULFA leaders to come to the mainstream and surrender. Operation All Clear was launched on December 15, 2003 by the Royal Bhutanese Army to flush out ULFA cadres from the soil of Bhutan. It is during this operation several ULFA top leaders were captured and was handed...
over to the Indian Army by the Royal Bhutanese Army. Many top leaders later on alleged to be involuntarily disappeared from the custody of Indian authorities. Habeas corpus writs were filed and are still pending before the GHC\textsuperscript{43}.

Several steps for peace negotiation were initiated. People’s Consultative Group was formed by ULFA to negotiate with the government of Assam and India. This peace negotiation is so far couldn’t bring any conclusion. Meanwhile with the arrest of several top ULFA members in 2008 to 2010, the government is undertaking peace talks with the groups.

Several other communities like Bodo, Karbi, Hmar, Dimasa, Koch, Rajbanshi etc also formed armed groups to advocate for their rights.

2.4 ‘Disturbed area’ in NES

In the light of the above discussion, the ‘disturbed’ situation of north eastern states can be compared to check if situation of internal armed conflict exist. Assam was declared as a ‘disturbed area’ in 1955. AFSPA was enacted in 1958 giving special power under section 4(a) to counter insurgency in the then Naga inhabited areas (now Nagaland). Counter insurgency operations are often launched in NES. The \textit{de facto} existence of armed conflict is evident from the fact that Government of India is constantly undertaking military operations and related activities under different operational code-names, such as, \textit{inter alia}, operations ‘Blue Bird’ (1988), ‘Sunny Vale’ (1993), ‘Loktak’ (2005), ‘Tornado’ (2005), ‘Dragnet’ (2006), ‘Somtal I’ (2006) and ‘Somtal II’ (2008), and ‘Summer Storm’ (2009)\textsuperscript{44}. In Assam, as pointed out earlier, operation ‘Rhino I’ (1991-1992) and operation ‘Bajrang’ (1990) was carried out in 1991-1992. Later on, anti-
insurgency operations by the army, paramilitary and police forces in the state of Assam since 1992 are termed as Operation Rhino II and are still in force.

Heavy deployment of armed forces in this region is carried out since insurgency erupted in 1950s. About 121 companies of Central para-military forces operate under the Armed Forces (Special Powers) Act of 1958 are deployed in Assam. After a series of bomb explosions by the armed opposition groups in October 2004, Assam decided to recruit additional 6,000 policemen, two battalions of Armed Police, 4,000 Home Guards and 5,000 Village Defense Party personnel. It is now estimated to be one member of the security forces for every 20 persons in Manipur, which has a population of 2.5 million. The Police-population ratio in Manipur is 554 per 100,000 (the national ratio is 126) and a Police density (policemen per 100 square km area) of 63.8 (the national average is 44.4).

Non-state armed groups are also organized and many of these groups are declared as 'unlawful' by the government of India, thus, recognizing them as groups having sort of command structure.

In Assam, approximately 30 thousand people were killed in the hands of armed forces since insurgency grew up in the state in 1990. According to records available with the police, more than 500 incidents of violence involving the militant outfits were reported from different parts of Assam in the year 2007 and as many as 286 civilians were killed and around 750 others received injuries. Altogether 24 security personnel including policemen were killed in attacks by the militants. In Assam in the year 2012, altogether 258 incidents of extremist violence were reported in 2012 and 53 insurgents were killed during the same
period. Moreover, the number of civilians killed in extremist violence stood at 33 while four security personnel also lost their lives.

On January 11, 2008, Army admits human rights violation in North Eastern India at a conference in Guwahati. It was revealed by the armed forces that in the North East and Jammu and Kashmir, a total of 1,318 cases of human right violation by the armed forces have been reported since 1994 out of which 384 cases are from the NES. Out of the total registered cases, the army has investigated 1269 cases – 903 from the J&K and 366 from the North East and found 54 cases to be true which is 4.26 per cent of the total registered cases. An unconfirmed source indicates that about 50 thousand people killed due to armed conflict since 1980. Chief Minister of Manipur, Okram Ibobi has said that around 8000 civilians and 12000 armed troops and insurgents have been killed since 1970s up to 2005.

Considering all the above statistics, it can be rightly concluded that the situation of north east India aptly qualifies to fit to be a situation of internal armed conflict and all international laws applicable in non-international armed conflict including common article 3 will be applicable.

2.5 Enactment and Enforcement of the AFSPA

AFSPA was enacted in 1958 to counter Naga insurgency. Insurgency movements in NES are ‘manifestations of local aspirations or discontents, some are secessionist’. Militancy in the region started with the Naga movement way back in the early 1950s and rose to serious levels in Manipur in the 1960s. Large scale immigration into Tripura gave birth to militancy there in the 1960s. Militancy in Assam on the ‘foreigner’s issue’ multiplied and spread in new areas.
during 1970s. NES emerged as conflict zone as internal armed conflict crystallized.

2.5.i Genesis of AFSPA

Pre-independence history of India has depicted several draconian pieces of security legislations enforced to suppress movement for independence. Legislations like Rawlat Act 1919 passed in March 1919 as an extension of ‘emergency measures’, was criticized by the leaders of Indian freedom fighters on the ground that it authorised the Government to arrest and imprison any person without trial in a court of law and to demand security from any person, impose restriction on residence, curb freedom of activities, to search house and arrest any person, at any place. Under this Act, the accused was denied the right to know the accusers and the evidence used in the trial and those convicted were required to deposit securities upon release and were prohibited from taking part in any political, educational, or religious activities. A protest against this Act resulted led to the infamous Jallianwala Bagh massacre of 1919. Later, acting upon the report of the Repressive Laws Committee, the Government of India repealed the Rowlatt Act, the Press Act and twenty-two other laws in March 1922.

However, this legacy of imposing draconian legislations continued in 1942 with the proclamation of the Armed Forces (Special Powers) Ordinance (Ordinance XLI of 1942) by the then colonial government. In order to thwart the Quit India Movement, the then Viceroy Linlithgow declared emergency all over the British India and promulgated the Armed Forces (Special Powers) Ordinance, 1942 on 15 August 1942. This Ordinance never became legislation. This ordinance often termed as predecessor of the current AFSPA. The ordinance,
which remained operative only in a declared state of emergency and had no force after the conclusion of the war, did not use the expression 'use force to the extent of causing death' as section 4(a) of the present AFSPA. The power to use such discretion, the responsibility to conduct and supervise all operations, under the older colonial ordinance, had been delegated to an officer of the rank of Captain and above.60

Later in 1947, to meet the situation arising in certain parts of India on account of the partition of the country, the Government of India issued four Ordinances viz., the Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 11 of 1947); the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 14 of 1947); the East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 17 of 1947); and the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (Act 22 of 1947)61. These Ordinances were replaced by the Armed Forces (Special Powers) Act, 1948 being Act 3 of 1948 and it was a temporary statute enacted for a period of one year, though it continued till it was repealed by Act 195862.

Several security legislations have been enacted in India since independence to deal with insurgency, terrorism and secession movements. Security laws in India always remained in debate and are subjected to criticisms and debate by activists, academics, journalist and concerned people63. Apart from provisions in Indian Penal Codes special laws like the Seditious Meetings Act 1911, Nagaland Security Regulations, 1962; Unlawful Activities (Prevention) Act, 1967, amended in 2004; and, the National Security Act, 1980, Punjab Security of
the State Act 1953, Assam Preventive Detention Act 1980, Meghalaya Preventive Detention Act 1980, Code of Criminal Procedures (Manipur Amendment) Act 1983, and (ix) National Investigation Agency Act 2008 (NIA) etc were passed. The Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Prevention of Terrorism Act (POTA), 2000 have been repealed though the cases registered under the two laws continue to be prosecuted. The Orissa Preventive Detention Act, 1970 was also enforced in Manipur.\textsuperscript{64}

The present AFSPA was first promulgated in independent India as the Armed Forces (Special Powers) Regulation, 1958 No. 2 of 1958, in July, 1958 which changed into the Armed Forces (Assam and Manipur) Special Powers Act in September 11, 1958. The Act immediately came into force in Assam and Manipur as a counter-insurgency measure. Subsequently, the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 and the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, were brought on to the statute book. All three Acts are broadly similar, though there are differences of language and structure between the three Acts.\textsuperscript{65}

The AFSP Bill was introduced in the parliament for adoption by then Home Minister G. B. Pant and the Bill was vehemently criticized by the Manipur’s members of Parliament. R. Suisa and Laishram Achau Singh. Mr. Achou Singh opposed the Bill to enact the AFSPA, 1958 and during the parliamentary debate on 18th August 1958, he said ‘I rise to oppose this Bill... I failed to understand why the military authorities are to be invested with special powers... it is therefore, dangerous to invest the military authorities with extraordinary powers of killing an arrest without warrant.....This is black law.'
This is also an act of provocation on the part of the Government... how can we imagine that these military officers should not be allowed to shoot to kill and without warrant arrest and search? This is a lawless law.

MP Rungsung Suisa argued against the AFSPA and said 'sending armed forces will not solve problem'. MP Mohanty from Dhenkanal, Orissa opposed the Bill as he found that the Bill invokes a state of emergency without being open about it. He said that 'it has to be conceded that there are enough materials to show that there is an emergency. But emergency provisions of the constitution have been invoked without the president declaring an emergency'. He argued, '...we do not want a free India with barbed wires and concentration camps, where Havildars can shoot any man'.

In similar efforts MP Dr. Krishnaswami opposed the Bill, saying that this is a state of affairs that can be brought about only by a proclamation of emergency promulgated under article 352 of the constitution. He pointed out, 'The bill seeks to circumvent these provisions and attempts to usurp the powers of the state not warranted by the constitution.' He further argued 'I suggest, here, the unconstitutionality is so patent that we are justified in requesting the chair to rule that the measure is ultra vires'. Despite these oppositions, the Parliament passed the Bill with an overwhelming majority after seven hours of deliberations and AFSPA was brought into force on September 11, 1958.

AFSPA was enacted with an aim to counter the insurgency in the hill district of the then Assam or the present Nagaland. Earlier, the Assam Maintenance of Public Order Act, 1953, amended in 1968 and 1971; the Assam Disturbed Areas Act, 1955 was enacted and implemented to curb this problem and
these Acts were found inadequate. NES were reorganized in 1972 and accordingly the AFSPA was amendment to keep it in force in all the NES.

2.5.ii AFSPA and its interpretations by the Judiciary

As early as in 1970 abuse of power granted under AFSPA was reported before the Supreme Court and redressel for violations of right to life was sought. V.L.Rohluva vs. DY. Commissioner, Aizal, Distt. Mizo was probably the first case that reported abuse of AFSPA and raised question on the relation between section 4 and 5 of the Armed Forces (Assam & Manipur) Special Powers Act, 1958 and section 344 of Code of Criminal Procedure, 1898. In this judgment it was held that 15 days delay is justified considering the distance and travel and other logistic problems. Ever since petitions alleging violations of right to life and other fundamental rights are being reported before the GHC and the Supreme Court.

Indrajit Barua vs. State of Assam and another is another landmark litigation before the Delhi High Court that challenged the Assam Disturbed Areas Act (Act 19 of 1955) and sections 2 and 3 of AFSPA 1958 (as amended in 1972, Act 28 of 1958). It was held in this case that width of the power conferred by sections 4 and 5 of the two Acts do not make the sections suffer from the vice of being arbitrary.

Section 6 of the AFSPA too was reviewed in Indrajit Barua’s case. The Delhi High Court justified this provision on the grounds that it prevents the filing of ‘frivolous claims’. The court even said that this provision provides more safeguards, obviously confusing safeguards for the military with safeguards for the victims of the military's abuses.
Sebastian M. Hongray vs. Union of India⁷⁴, a case of disappearance of person from the custody of armed forces, is one of the earlier cases that raised certain legal issues on AFSPA and reported abuse of power. It is a ‘rare case that a complaint was scrutinised by the Supreme Court, it deliberately decided not to impose, even, a fine upon the Army though it concluded that everyone, from senior army officers to Defense Ministry bureaucrats, had lied on oath to protect themselves from the consequences of their illegal actions⁷⁵.

AFSPA came into public debate during 1980s and this debate gained momentum when Amnesty International released its first report on ‘Operation Blue Bird’ in 1993 as well as its ‘application in Jammu and Kashmir, the hotbed of South Asia’s politics⁷⁶. The Report was on disappearance, summary and extrajudicial Executions in Manipur during Operation Blue Bird in 1983. Some students of Jawaharlal Nehru University, New Delhi filed a PIL challenging the constitutionality of the Act in 1980. Several writ petitions challenging the AFSPA and Assam Disturbed Areas Act 1955 was challenged before the Supreme Court and GHC from 1980 to 1991⁷⁷. All these petitions later were clubbed together and named a Naga People’s Movement for Human Rights vs. Union of India⁷⁸ and judgment was delivered in 1997 withholding the hearing for long 17 years.

In November 1997, the Supreme Court of India in this case limited the powers granted to the military under AFSPA, in particular by ruling that a declaration under Section 3 of the AFSPA, which relates to the determination of ‘disturbed areas’, is to be reviewed every six months, by strengthening the safeguards for the rights of arrested persons and by determining that a list of pre-
existing 'Do's and Don’ts' were legally binding. However, Supreme Court upheld the constitutional validity of the Act.

For the sake of further discussion it is relevant to quote the list of ‘Do’s and Don’ts’ here.

Do's 1. Action before Operation

(a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.

(b) Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.

(c) Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.

(d) As far as possible co-operate representative of local civil administration during the raid.

2. Action during Operation

(a) In case of necessity of opening fire and using any force against the suspect or any person acting in contravention to law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.

(b) Arrest only those who have committed cognizable offence or who are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.

(c) Ensure that troop under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.
(d) Ensure that women are not searched/arrested without the presence of female police. In fact women should be searched by female police only.

3. Action after operation
   (a) After arrest, prepare a list of the persons so arrested.
   (b) Handover the arrested persons to the nearest Police Station with least possible delay.
   (c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.
   (d) Every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon particular case.
   (e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.
   (f) All such arms, ammunition, stores, etc. should be handed over to the police State along with the seizure memo.
   (g) Obtain receipt of persons arms/ammunition, stores etc. so handed over to the police.
   (h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.
   (i) Make a record of the commander and other officers/JCOs/NCOs forming part of such force.
   (k) Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police along with the details leading to such death.
4. Dealing with Civil Court (a) Directions of the High Court/Supreme Court should be promptly attended to.
(b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.
(c) Answer questions of the court politely and with dignity.
(d) Maintain detailed record of the entire operation correctly and explicitly.

Don'ts

1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest Police Station.
2. Do not use any force after having arrested a person except when he is trying to escape.
3. Do not use third degree methods to extract information or to extract confession or other involvement in unlawful activities.
4. After arrest of a person by the member of the Armed forces, he shall not be interrogated by the member of the Armed force.
5. Don not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.
6. Do not temper with official records.
7. The Armed Forces shall not take back person after he is handed over to civil police.'

The instructions in the List of ‘Do's and Don'ts’ which must be followed while providing aid to the civil authority are as under:-

‘List of Do's and Don'ts While Providing Aid to Civil Authority

Do's
1. Act in closest possible communication with civil authorities throughout.

2. Maintain inter-communication if possible by telephone/radio.

3. Get the permission/requisition from the Magistrate when present.

4. Use the little force and do as little injury to person and property as may be consistent with attainment of objective in view.

5. In case you decide to open fire:
   
   (a) Give warning in local language that fire will be effective.
   
   (b) Attract attention before firing by bugle or other means.
   
   (c) Distribute your men in fire units with specified Commanders.
   
   (d) Control fire by issuing personal orders.
   
   (e) Note number of rounds fired.
   
   (f) Aim at the front of crowd actually rioting or inciting to riot or at conspicuous ring leaders, i.e, do not fire into the thick of the crowd at the back.
   
   (g) Aim low and shoot for effect.
   
   (h) Keep Light Machine Gun and medium Gun in reserve.
   
   (i) Cease firing immediately once the object has been attained.
   
   (j) Take immediate steps to secure wounded.

6. Maintain cordial relations with civilian authorities and Para Military Forces.

7. Ensure high standard of discipline.

Don'ts

8. Do not use excessive force.

9. Do not get involved in hand to hand struggle with the mob.

10. Do not ill treat any one, in particular, women and children.

11. No harassment of civilians.
12. No torture.
13. No meddling in civilian administration affairs
14. No meddling in civilian administration affairs
15. No military disgrace by loss/surrender of weapons.
16. Do not accept presents, donations and rewards
17. Avoid indiscriminate firing.' The learned Attorney General has submitted that these instructions provide an effective check against any misuse or abuse of the powers conferred under the Central Act on an officer in the armed forces inasmuch as contravention of these instructions is punishable under Sections 41, 42(e), 63 and 64(f) of the Army Act, 1950.

The Act again came before the Supreme Court purview through Masooda Parveen vs. Union of India (Masooda Parveen onwards). An analysis of the judgment by SAHRDC reveals that in 'in May 2007 Masooda decision, the Supreme Court undermined its earlier NPMHR 1997 ruling by accepting very weak arguments from the Central Government excusing the army's lack of cooperation with local police forces'. Such observation leaves scope to check for effectiveness of the guidelines.

2.4.iii Review of AFSPA in India

In July 2004, due to massive public protest against the AFSPA following the extrajudicial execution of a female combatant, the Government of India formed 'Committee to Review AFSPA' headed by Justice Jeevan Reddy to review the Act. The report of the Committee is not made public officially but was leaked to a newspaper, the Hindu in October 2006. The report recommended the repeal of the Act along with a suggestion of insertion of similar provision in the
Unlawful Activities Prevention Act, 1967 (UAPA, hereafter) as amended in 2004. In 2007, the Administrative Reforms Commission recommended the repeal of the Act as well as making amendment in the UAPA, similar that of the previous Committee.

2.4.iv Review of AFSPA by international human rights bodies and experts

The international human rights treaty bodies also reviewed the AFSPA where Government of India is a party and expressed their concern over the dependence of this legislation for decades. These bodies are CERD Committee (May 2007), CEDAW Committee (February 2007 and February 2004), Human Rights Committee recommendations (August 1997).83

The United Nations Human Rights Committee in 1997 had observed the following on its 3rd periodic report84: Para 18: the Committee... hopes its [AFSPA] provisions will also be examined for their compatibility with the Covenant. Para 19: the Committee regrets that some parts of India have remained subject to declaration as ‘disturbed areas’ for many years – for example the Armed Forces Special Powers Act has been applied throughout Manipur since 1980 and in some areas of that state for much longer and that in these areas the state party is in effect using emergency powers without resorting to article 4, para 3 of the Covenant.

UN Special Rapporteurs also constantly raised concern on the continuous dependence on Armed Forces Special Powers Act. The Special Rapporteur on Extrajudicial, summary or arbitrary execution, Philip Alston, in his report to Human Rights Council, dated January 29, 200785 observed the ‘redress (under the AFSPA) is slow and resource intensive for the complainant. Remedy and redress
are reportedly further limited by section 19 of the Protection of Human Rights Act (PHRA) which prohibits the National Human Rights Commission and state human rights commissions from investigating allegations of human rights violations by members of the armed or paramilitary forces'. This provides virtual immunity to the armed forces for atrocities done on civilians. He observed ‘this impunity provision (section 6 of AFSPA) is found to be expressly incompatible with the obligations of the Government under Article 2 (3) of the ICCPR to ensure the provision of an effective remedy in cases involving violations of human rights’.

2.5 To Sum up

The above discussion tried to analyse the historical background of internal armed conflict in North East India and how the situation fits to be called a situation of ‘internal armed conflict’ as per IHL. The history, context and purpose of enactment as well as enforcement, reviews and debates over the application of the AFSPA was also highlighted. It is found that ‘Do’s and Don’ts’ guidelines became an integral part of AFSPA after NPMHR 1997. Thus violation of these guidelines will constitute extrajudicial execution. In relevant chapters later, provisions and enforcement of section 4(a) of AFSPA in ‘disturbed areas’ is discussed to have a clear understanding of extrajudicial executions under section 4 (a) of this Act.
Notes and References:

1 Here North Eastern States or NES is used to refer to the post independence geographical region of north eastern part of India. For the purpose of this study on section 4 (a) of AFSPA, primarily, three states - Assam, Nagaland and Manipur will be focused.


3 Nepram, Binalakshmi Mentschel, Armed Conflict, Small Arms Proliferation and Women's Responses to Armed Violence in India's Northeast, Heidelberg: South Asia Institute, Department of Political Science, University of Heidelberg, 2007, pg. 2

4 SAHRDC, A Study in National Security Tyranny, supra

5 Sanajaoba, Naorem, Current Legal Essays, op.cit, p. 81. The Khasi, Jaintia hills remained independent so as the Naga Hills and Tuensang areas. North Eastern Frontier Agency (NEFA or the present Arunachal Pradesh) had been an excluded area.

6 ibid, p. 93

7 ibid, p. 94

9 Additional Protocol I, which supplements the protections available in international armed conflict, applies also to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination.' See Additional Protocol I, article 1(4).

10 Under Additional Protocol II, further protections apply in cases of conflict between a State and armed forces that are 'under responsible command [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' See Additional Protocol II, article 1(1).

11 Geneva Conventions, article 3.


13 Additional Protocol II, article 1(2).


16 *ibid*
17 ibid
18 ibid
20 ibid
22 Reservation by the United Kingdom to Article 1 (4) and Article 96 (3) of Protocol 1, available at www.icrc.org/ihl.nsf as on January 8, 2008

26 SAHRDC, *A Study in National Security Tyranny*, supra

27 Manab Adhikar Sangram Samiti (MASS), *A draft on Right to Self-determination and Referendum in Assam*, MASS publication, August 2002


29 The Treaty of Yandaboo between the British East India Company and the Burmese King of Ava, signed on February 24, 1826 marked the end of the First Burmese War. By the terms of the treaty, the British took possession of the former independent kingdom of Arakan and the former Siamese (then Burmese) territories of Ye, Tavoy and Mergui typically known as Tennasserim, http://www.123exp-history.com/t/03764296253/, December 13, 2008. Article 2 of the treaty reads as, 'His Majesty the King of Ava renounces all claims upon, and will abstain from all future interference with, the principality of Assam and its dependencies, and also with the contiguous petty States of Cachar and Jyntia. With regard to Munnipoor it is stipulated, that should Ghumbheer Sing desire to return to that country, he shall be recognized by the King of Ava as Rajah thereof', available at http://projectsouthasia.sdstate.edu/Docs/history/primarydocs/Treaties/Burma/002.htm, as on December 12, 2008.

31 These included i) the Garo hills district, ii) the British portion of the Khasi and Jainatia hills district other than the Shillong municipality and Cantonment, iii) the Mikir hills (in Nowgong and Sibsagar), iv) the North Cachar hills (in Cachar District), v) the Naga hill district, vi) the Lushai hills district, vii) the Sadiya Frontier Tract, viii) the Balipaura Frontier tract, ix) the Lakhimpur Frontier tract.

32 Agnihotri, Sk, *supra*


34 Naga Club formed in 1918 was followed by Lotha Council in 1923 and Ao council in 1928. All these formed Naga Hills District Tribal Council in 1945 but did not last long. Finally the bodies reorganized and formed Naga National Council in February 1946. Every Naga is supposed to be a member of NNC.

35 Mishra, Udayan, *Periphery Strikes Back*, *op cit*

36 Varghese, BG, *India’s Northeast Resurgent*, Konark publication, 1996, pp.95

37 Sanajaoba, Naorem, *Right of Oppressed Nation*, *supra*


39 *ibid*

40 *ibid*

41 *ibid*

42 *ibid*

Stakeholders report to India-UPR, 2012 by Civil Society Coalition on Human Rights in Manipur and UN, published by the Coalition on November 28, 2011 in Imphal, Manipur


Laishramcha Jinine, ‘*Militarisation of Manipur*’ special issue of Article 2 available at www.article2.org as on January 28, 2008


Sadim, (Assamese weekly), May 14, 2009

Assam Tribune January 3, 2008

Staff reporter, ‘53 insurgents, 33 civilians killed during 2012’ The Assam Tribune, January 25, 2013

The Assam Tribune, January 12, 2008

Laishramcha Jinine, ‘*Militarisation of Manipur*, op. cit


A contradictory view is given by the East Army. According to website of East Army, the emergence of insurgency in NES is due to the reorganization of the states. It is of the opinion that after Independence in 1947, re-organisation of
the States was a semblance of real Government authority and administration brought into these far-flung areas (NES). This was strongly resented by the newly educated elite of the tribal societies, who construed the efforts of the Government as an encroachment on their tribal way of life and freedom. Thus, on the basis of racial, cultural and religious differences from the majority stock of the plains, insurgency in the north east India came into being. Issues of ideology are by and large irrelevant to the insurgency movements of the north eastern region. Available on http://www.eastarmy.nic.in/combating-militancy/index.html, as on December 10, 2008.


57 ibid


60 Combat Law, The Armed Forces (Special Powers) Act – Repressive Law, Volume 2, Issue 1, April-May 2003 –


62 ibid


65 Section 3 of AFSPA 1958 and the AFSPA (Punjab) are, virtually, identical, while the equivalent section in the AFSPA (Jammu and Kashmir) is structured
somewhat differently. In substance, however, all three Acts are similar, as quoted in Agarwal, Ashok, 'Law's Autonomy' in Autonomy, Beyond Kant and Hermenutics, in Paula Banerjee and Samir Kumar Das. (ed.), Delhi: Anthem Press, 2007. 148-185


67 ibid


69 Lok Sabha Debates, second series, op. cit

70 Naorem, Sanajaoba, Revisiting Justice Reddy Report on AFSPA, 1958, op.cit,

71 ibid


74 AIR 1984 SC 571, decided on November 24, 1983
75 Agarwal Ashok, *Law's Autonomy*, supra

76 SAHRDC, *A Study of National Security Tyranny*, supra

77 WPs. (C) Nos. 5328/80, 9229-30/82 Civil Appeals Nos. 721/85, 722/85, 723/85, 724/85, 2173-76/91, 2551/91 and WPs (C) Nos. 13644-45/84 S.C.

78 AIR 1998 SC 431

79 AIR 2007 SC 1840

80 SAHRDC, Masooda Parveen: *Judicial Review of India’s Special Security Laws Goes from Bad to Worse*, www.hrde.net, December 2007


82 The report is available at http://www.hindu.com/nic/afa/ as on May 30, 2009. Henceforth the report will be quoted as Reddy Committee report. Also see The Hindu, ‘*Repeal Armed Forces Act: Official Panel*,’ October 08, 2006 available at

83 See the Concluding Comments of these bodies available at www.ohchr.org

84 Concluding Observations of the Human Rights Committee on India August 04, 1997, document number CCPR/C/79/Add.81, para. 18 and 19.


86 ibid