



SANCTIONING REPRESSION IN VIOLATION OF INDIA'S HUMAN RIGHTS OBLIGATIONS

The Armed Forces (Special Powers) Act, 1958
in Manipur and other States of the Northeast of India

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I. INTRODUCTION

The Armed Forces (Special Powers) Act (hereinafter “*the Act*” or “*AFSP Act*”) has been in force in several parts of India, including the State of Manipur in the northeast of the country, for more than fifty years.¹ The vaguely formulated provisions of the Act grant extraordinary powers to the Indian armed forces in the so-called “disturbed areas” where it is applicable. The Act has been at the heart of concerns about human rights violations in the region, such as arbitrary killings, torture, cruel, inhuman and degrading treatment and enforced disappearances. Its continued application has led to numerous protests, notably the longstanding hunger strike by Ms. Irom Chanu Sharmila in Manipur.

This Report aims to provide local, national and international human rights defenders and decision makers with a comprehensive analysis of the Act’s compatibility with India’s domestic and international human rights obligations. It focuses on Manipur since this is one of the states of north-eastern India with the longest history of the military abusing its powers under the Act and with a vibrant civil society indefatigably denouncing those violations.

The human rights obligations analysed in the present Report concern, first of all, those flowing from the Constitutional mandates of India,² and international law sources, with particular emphasis on the International Covenant on Civil and Political Rights (hereinafter “*the Covenant*” or “*ICCPR*”). The Covenant, to which India acceded in 1979, recognises a number of fundamental human rights, including the right to life, the right not to be tortured or ill-treated, the right to liberty and security, fair-trial rights, the right to privacy, and the right to freedom of assembly.

This Report examines the legality of the Act, with reference to its practical application, with a view to providing lawmakers with the information needed to consider the future of the Act, including its repeal. It also provides a tool for victims of violations and their lawyers who litigate cases relating to the Act, and to national or international human rights bodies or courts considering its lawfulness.

The history of the Act is marked by longstanding concerns over its compatibility with, and its impact on human rights. Yet, no comprehensive up to date analysis of its conformity with applicable international human rights standards is available. The guardian of the Covenant – the ICCPR’s Human Rights Committee (hereinafter “*the Committee*”) – examined India’s last periodic report in 1997.³ It expressed a number of concerns but abstained from pronouncing itself on the overall compatibility of the Act with the ICCPR as the Act’s provisions were at that time subject

¹ The Act, introduced originally as an Ordinance, The Armed Forces (Assam & Manipur) Special Powers Ordinance 1958, was first made applicable in respect of the north-eastern state of Assam, and Manipur - then a Union Territory. In May 1958 the Ordinance was brought to the Parliament as a Bill. Both houses of the Parliament, after a short discussion enacted the Armed Forces (Assam & Manipur) Special Powers Act, 1958 on 18 August of that year. It received presidential assent on 11 September 1958. By amendments introduced in 1972 and 1986 the scope of the application of the Act was expanded. Today the Act is applicable to the north-eastern territory of India, comprising of seven states, namely, Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland. In 1990, a similar Act was enacted to cover the State of Jammu and Kashmir.

² Constitution of the Republic of India. Promulgated by the Constituent Assembly on 26 November 1949.

³ Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add. 81 (8 April 1997).

to a challenge before the Supreme Court of India.⁴ However, in its judgement of 1997, the Supreme Court did not address the Act's compatibility with international human rights law,⁵ ignoring a specific request of the Committee.⁶ Since then, India has not submitted any further periodic reports, thereby effectively depriving the Committee of the opportunity to reconsider the matter.⁷

Meanwhile, in November 2004, following unprecedented public protest in Manipur, the Government of India set up a special committee chaired by a retired Justice of the Supreme Court with the mandate to review the Act. The Committee filed its report in 2005. Although it has never been officially published, this report was leaked informally, and its text is now in the public domain.⁸ Having carefully considered the various views, opinions and suggestions put forward by the representatives of organisations and individuals who appeared before it as well as the representations made by the concerned governmental departments, including the security agencies, the Committee was of the firm and unanimous view that the Act "should be repealed".⁹ The Committee emphasised that it found it impossible to recommend that the Act remains in force, with or without amendments. It did not, however, examine whether and to what degree the Act is compatible with India's obligations under international human rights law. The recommendations contained in the Committee's report were never carried out or even publicly commented upon by the Indian Government.

The present Report finds that the AFSP Act is, both on its face and in its practical application, incompatible with India's obligations under international human rights law, in particular, the ICCPR. REDRESS, AHRC and HRA call on India to consider these findings urgently and to give effect to the rights recognised in the Covenant, as required by the ICCPR and India's Constitution. This would require a repeal of the Act, which has been discredited as a symbol of arbitrary law-enforcement, and has significantly contributed to the perpetuation of a state of exceptionalism that fosters human rights violations.

II. THE AFSP ACT IN CONTEXT

1. Historical background on enforcing the Act in Manipur¹⁰

Manipur is one of the constituent states of the Republic of India which is among the "seven sisters", i.e. the States situated in the north-eastern part of the country connected with the rest of it by the "chicken's neck", a narrow corridor of land between Bangladesh and Bhutan. It is a hilly

⁴ *Ibid.*, at para. 18.

⁵ *Naga People's Movement of Human Rights et al. v. Union of India*, 1998 AIR 431.

⁶ *Supra* note 3, at para. 18.

⁷ However other treaty bodies have urged India to repeal the Act. See Committee on the Elimination of Racial Discrimination, Concluding Observations on India's Fifteenth to Nineteenth Periodic Reports, UN Doc. CERD/C/IND/CO/19 (5 May 2007), at para. 12, Committee on Economic, Social and Cultural Rights, Concluding Observations on India's Second to Fifth Periodic Reports, UN Doc. E/C.12/IND/CO/5 (16 May 2008), at para. 50, and Committee on the Elimination of Discrimination against Women, Concluding Comments on the Combined Second and Third Periodic Reports of India, UN Doc. CEDAW/C/IND/CO/3 (2 February 2007), at para. 9.

⁸ See: <http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf>.

⁹ *Ibid.*, at 74.

¹⁰ The report is mainly based on examples of human rights violations documented and reported in the state of Manipur, a place where some of the worst forms of violations of the Act have been and are being perpetrated under the cover of the statutory impunity provided by the Act.

region, with almost no rail network, and significantly behind the national average in terms of its infrastructural development.¹¹ Manipur's population is ethnically and linguistically peculiar.¹²

The Kingdom of Manipur came under British rule in 1891 as a self-governed state. After a short-lived period in 1947-1949, in which Manipur state had the status of a constitutional monarchy, the Assembly of Manipur was dissolved and the state became part of India. In 1956 Manipur became a Union territory. Since 1972 it is a full-fledged state within the Republic of India.

In May 1958, Dr. Rajendra Prasad, the then President of India, in response to the continued unrest in the north-eastern territories of the Union, including self determination activities by Naga tribes that spilled over into the state of Manipur, promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance. The ordinance entitled the Governor of Assam and the Chief Commissioner of Manipur to declare the whole or any part of Assam or Manipur, respectively, as a "disturbed area".¹³ The ordinance was replaced by the AFSP Act later that year. The Act was passed by both Houses of Parliament on 18 August 1958 and received presidential assent on 11 September 1958.¹⁴ Subsequent amendments to the Act, which mainly dealt with the territorial scope of its application, were enacted in 1960, 1970, 1972 and 1986.¹⁵ Even though there was some resistance within the parliament against the passing of the Act, the majority prevailed and the law was passed.

The Act is now applicable in several States of India including Manipur.

2. Substance of the AFSP Act

The Act grants extraordinary powers to the military, including the powers to detain persons, use lethal force, and enter and search premises without warrant. These powers are formulated very broadly and framed in vague language. For example, the Act allows the military officers involved to "use such force as may be necessary"¹⁶ to effect arrests and to enter and search any premises. Despite the inherent risk of abuse in such broad powers, the Act contains no effective safeguards to protect rights.

The Act grants the following powers¹⁷ to any military officer, including any commissioned officer, warrant officer, non-commissioned officer and any other person of equivalent rank in the military forces, air forces operating as land forces, and other operating armed forces of the Union:

¹¹ Infrastructural Development in Manipur, Planning Commission of India, Report on Manipur, 2001-2002: http://planningmanipur.gov.in/pdf/MSDR/Chapter%209_Infra.pdf

¹² See for details the information available at the official website of the Planning Department of the Government of Manipur: http://planningmanipur.gov.in/pdf/MSDR/Chapter%203_Demography.pdf.

¹³ Other "disturbed areas" include, in particular, Kashmir and neighbouring states in the north-east.

¹⁴ The Armed Forces (Special Powers) Act, 1958

¹⁵ The Repealing and Amending Act, 58 of 1960; The Armed Forces Special Powers (Extension to Union Territory of Tripura) Act, 1970; The Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 7 of 1972; The State of Mizoram Act, 34 of 1986; The State of Arunachal Pradesh Act, 69 of 1986.

¹⁶ Section 4 (c) and (d) of the Act.

¹⁷ Section 4 of the Act.

- Use of lethal force:¹⁸

If a military officer is of the opinion that it is necessary to do so for the maintenance of public order, he or she can, after giving warning, fire upon or otherwise use force, including lethal force, against any person who is acting in contravention of any law or order. This applies in particular if five or more persons assemble together or if the targeted person carries weapons or any other objects that can be used as weapons.

- Arrest:¹⁹

A military officer can arrest, without warrant, any person who committed a cognisable offence²⁰ or against whom a reasonable suspicion exists that he or she has committed such an offence or is about to commit it. When effecting arrest, the military officer can use such force as may be necessary. Any person who is arrested pursuant to the AFSP Act shall be handed over by the military officer to the officer-in-charge of the nearest police station as soon as possible.

- Enter and Search:²¹

A military officer can enter and search, without warrant, any premises in order to carry out an arrest, or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen or any arms or explosives. When entering and searching, the military officer can use such force as may be necessary.

- Immunity:²²

The risk of abuse inherent in these provisions is further heightened by the all-embracing immunity covering all military officers involved. In particular, the Act provides: “No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of *anything done or purported to be done* in exercise of the powers conferred by this Act”.²³

3. Application of the AFSP Act in practice and responses

The provisions of the Act have been, and reportedly continue to be routinely applied in practice. The overall practical effect of the Act has been the *de facto* militarisation of Manipur and other north-eastern States of India. Even the proponents of the Act have acknowledged that the general administration in Manipur is wholly dependent on the security forces.²⁴

Action taken pursuant to the Act reportedly led to 260 killings in 2009 alone.²⁵ The military has also widely used its powers to detain persons. As held in a number of judgments, those arrested

¹⁸ Section 4 (a) of the Act.

¹⁹ Section 4 (c) of the Act.

²⁰ Cognisable offences are those in which police is empowered to register a first information report, i.e. most serious offences.

²¹ Section 4 (d) of the Act.

²² Section 6 of the Act.

²³ Section 6 of the Act (emphasis added).

²⁴ A. Kamboj, Manipur and Armed Forces (Special Powers) Act 1958, in 28 *Strategic Analysis* (2004), at 618.

²⁵ Interview with Mr K.S. Subramanian, a retired Indian Police Service officer, in *The Times of India* (21 December 2009), http://articles.timesofindia.indiatimes.com/2009-12-21/interviews/28096458_1_afspa-battalions-manipur-rifles.

pursuant to the Act remained in military custody without being brought before a judge for prolonged periods of time, such as five days²⁶ or even two weeks.²⁷ In several cases, courts found that persons who had been arrested by the military under the Act disappeared subsequently,²⁸ which suggests that they have become victims of enforced disappearances.²⁹

The application of the Act has over the years led to numerous violations. The following examples are the most illustrative ones which were widely covered by the media and triggered investigations which, however, were not capable of leading to the establishment of the truth of what had happened.

The widely reported events that took place on 5 March 1995 in Kohima, Nagaland, still stand out as one of the most glaring examples.³⁰ The military, while driving along the streets of the town, mistook the sound of a burst tyre from their own convoy for a bomb explosion and opened fire indiscriminately. Individuals who were considered to be terrorists' accomplices were dragged from their houses and arbitrarily killed. As a result, seven civilians lost their lives. In addition, twenty-two passers-by, including seven minors, were injured. A commission of inquiry set up by the Government of Nagaland found that there had been no reasonable ground for the use of any force in the circumstances.³¹

Another well publicised case is the arrest and death of Ms Thangjam Manorama Devi. On 11 July 2004 the 32-year-old was arrested under the Act at her house in Manipur by the Assam Rifles (part of the Indian armed forces). Three hours later her badly mutilated and bullet-ridden body was found by the roadside nearby.³² No investigation followed, and the Indian Army Vice Chief of Staff explained that what happened to Manorama had been "unfortunate".³³ Her death, as well as the authorities' failure to investigate it, led to large-scale protests throughout Manipur prompting the Prime Minister of India to visit the State. The Government of Manipur established a commission of inquiry headed by Justice C. Upendra, a former sessions judge, but the Assam Rifles challenged that decision before the courts claiming that the state government had no competence to investigate their actions. The ensuing prolonged litigation came to an end only in 2010 when the challenge was rejected.³⁴ However, at no point during this period and thereafter have the authorities taken any measures to establish the circumstances of Manorama's abduction, possible torture and death and to identify those responsible. The enquiry report itself has not been made available to the public. Manorama's family approached the High Court to

²⁶ *CLAHRO v. PL Kukrety*, (1988) 2 GLR 137.

²⁷ *Bacha Bora v. State of Assam*, (1991) 2 GLR 119.

²⁸ *Nungshitombi Devi v. Rishang Keishang, CM Manipur*, (1982) 1 GLR 756, and *Luitbukla v. Rishang Keishang*, (1988) 2 GLR 159.

²⁹ An "enforced disappearance" is "the arrest, detention, abduction or any form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (International Convention for the Protection of All Persons from Enforced Disappearance, Article 2).

³⁰ South Asia Human Rights Documentation Centre, *Armed Forces Special Powers Act: A Study in National Security tyranny*, undated, http://www.hrdc.net/sahrdc/resources/armed_forces.htm; Rakesh Shukla, Why Temperance Will Not Work With AFSPA, in *ManipurOnline* (6 November 2010), <http://manipuronline.com/edop/opinions-commentary/why-temperance-will-not-work-with-afspa/2010/11/06>.

³¹ R. Shukla, Why Temperance Will Not Work With AFSPA, in *ManipurOnline* (6 November 2010), <http://manipuronline.com/edop/opinions-commentary/why-temperance-will-not-work-with-afspa/2010/11/06>.

³² G. Pandey, Woman at the Centre of the Manipur Storm, in *BBC World* (27 August 2004), http://news.bbc.co.uk/1/hi/world/south_asia/3604986.stm.

³³ Manorama Devi had links with terrorists: Army, in *Times of India* (11 December 2004), http://articles.timesofindia.indiatimes.com/2004-12-11/india/27149487_1_media-hype-terrorists-manorama-devi.

³⁴ Manorama Devi rape and murder: Assam Rifles indicted, in *NDTV* (11 September 2010), <http://www.ndtv.com/article/india/manorama-devi-rape-and-murder-assam-rifles-indicted-51249>.

obtain a copy of the report. The Court agreed. However, the Union government at the time filed a special leave petition against the order and the case is still pending before the court.

Another reported case of arbitrary killing by the military acting under the Act concerned Mr. Rengtuiwan, a 75 year old retired school teacher, and his disabled wife who were killed and injured, respectively, on 16 November 2004 when they were fired at by the Assam Rifles in Bungte Chiru village, Manipur. Twenty or thirty Assam Rifles were searching for rebels in the village and reportedly considered the elderly couple as being part of them. The *post mortem* report revealed the following: “[T]he bullet which killed Mr Rengtuiwan went in through his chest and exited through his bottom. The pathway of the shot implies firing at a close range and [that] the person must have been in a kneel down position as the shot must have been fired from above his head at a sharp angle or more than 60 degrees”.³⁵ In other words, the evidence points to a cold-blooded execution rather than firing at a suspicious target.

The more recent examples of the activities of the military in Manipur include indiscriminate use of firearms during the night of 2-3 April 2011³⁶ which led to the killing of Ms Waikhom Mani in the village of Nongangkhang, and assault against the Justice of the Guwahati High Court in Imphal on 20 April 2011.³⁷

Private and confidential admissions of military officers reportedly characterise civilian casualties as “errors in judgment” in the application of the Act.³⁸ They attest to an apparent practice in which priority is given to the use of lethal force over the arrest of suspects and subsequent prosecution, where warranted.³⁹

The frequent violations and culture of impunity led to protests by civil society activists in Manipur who have been campaigning and litigating for the repeal of the Act since the 1980s.⁴⁰ An exceptional mode of protest against the Act is that of Ms. Irom Chanu Sharmila, also known as the “Iron Lady of Manipur”, a civil rights activist and writer. She has been on hunger strike since 2000 demanding the repeal of the Act which she blames for violence in Manipur and other localities in the north-eastern part of India. Sharmila has been repeatedly arrested on charges of attempt to commit suicide⁴¹ and forcibly fed by her prison wardens. Her protest is probably the world's longest hunger strike.⁴²

³⁵ Amnesty International, Briefing on the Armed Forces (Special Powers) Act (8 May 2005), <http://www.amnesty.org/en/library/asset/ASA20/025/2005/en/41fc59d2-d4e1-11dd-8a23-d58a49c0d652/asa200252005en.html>.

³⁶ Reported in *Imphal Free Press* (4 April 2011), at 1.

³⁷ Reported in *The Sangai Express* (22 April 2011), at 1 and 4.

³⁸ Human Rights Watch, “These Fellows Must Be Eliminated”: Relentless Violence and Impunity in Manipur (2008), at 44-45.

³⁹ *Ibid.*

⁴⁰ The first Writ Application challenging the constitutional *vires* of the Act was filed in the Supreme Court on 10 October 1980.

⁴¹ Under section 309 of the Indian Penal Code which makes an attempt to commit suicide a punishable offense. However the Supreme Court of India in a judgment delivered on 7 March 2011 stated: “... the time has come when it should be deleted by Parliament as it has become anachronistic.” (*Aruna Ramachandra Shanbaug vs. Union of India et al.*, Criminal Writ Petition 115/2009).

⁴² Interview conducted on 3 March 2011 in London with Babloo Loitongbam, Executive Director of Human Rights Alert. The continuing detention of Sharmila poses a serious question of its compatibility with her internationally recognised human rights, such as the right to freedom of expression.

4. India's obligations under the ICCPR, other human rights treaties and customary international law

India has a series of obligations under international law, both under international human rights treaties and customary international law.

The ICCPR⁴³ to which India has been a party since 1979 outlines a series of rights and corresponding obligations that are relevant when interpreting the Act and its application. These include the right to life (article 6), the prohibition of torture, cruel, inhuman and degrading treatment (article 7), the right to liberty and security of the person (article 9), the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence (article 17), the right to freedom of assembly (article 21), as well as article 2 (3), which provides for the right to an effective remedy to anyone whose rights protected by the Covenant have been violated.

Since 1968 India is also a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁴ ("ICERD"). Article 1 (1) of the ICERD defines "racial discrimination" widely as including "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms". The ICERD further mandates States Parties "to amend, rescind or nullify all laws and regulations which have the effect of creating or perpetuating racial discrimination".⁴⁵

India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997.⁴⁶ Although it has not yet ratified it, the very act of signing entails an international obligation not to defeat the treaty's object and purpose.⁴⁷ This includes, pursuant to the Convention's preamble, the effective struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of racial discrimination, the right to life, the right to liberty and security and the right to an effective remedy have also been recognised as customary international law. These are rules binding on states as a matter of State practice and *opinio juris*⁴⁸ irrespective of whether or not a State is a party to a particular treaty. Unlike for States parties to a treaty, adherence to customary international law is not monitored by a treaty body but subject to monitoring by UN charter bodies, such as the UN Human Rights Council and its special procedures.⁴⁹

⁴³ 999 UNTS 171.

⁴⁴ 660 UNTS 195.

⁴⁵ Article 2 (1)(c) ICERD.

⁴⁶ 1465 UNTS 85.

⁴⁷ Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 18 (a).

⁴⁸ *Opinio juris* denotes the sense of a certain practice being followed as a matter of legal obligation. See *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark and Netherlands), International Court of Justice, Judgment of 20 February 1969, I.C.J. Reports, 1969, at para. 77.

⁴⁹ UN General Assembly Resolution 60/251 of 3 April 2006, at paras. 2-3.

5. Review of the AFSP Act

a. National review

Supreme Court

On 27 November 1997 the Supreme Court of India rendered its judgment in *Naga People's Movement for Human Rights v. Union of India*.⁵⁰ In this case the validity of the Act was challenged by means of a writ petition before the Supreme Court of India. The petitioner alleged that the Act had violated constitutional provisions that govern the procedure for issuing proclamations of emergency, and upset the balance between the military and civilian and the Union and State authorities. The Court rejected those contentions. It found that the Parliament had been competent to enact the Act and ruled that its various sections were compatible with the pertinent provisions of the Indian Constitution. In particular, the Court held that the application of the Act should not be equated with the proclamation of a state of emergency, which led to it finding that the constitutional provisions governing such proclamations had not been breached. The Court further emphasised that the military forces had been deployed in the disturbed areas to assist the civilian authorities. As these authorities continued to function even after the military's deployment, the Court held that the constitutional balance between the competencies of the military and the civilian authorities had not been upset. Equally, the Court found no violation of the constitutional balance of competencies of the Union and State authorities. What the Court did not address was the compatibility of the Act with India's obligations under the ICCPR or other international obligations. This is notwithstanding the general rule of Indian constitutional law, confirmed by the Supreme Court in another case decided in 1997,⁵¹ that the courts must have regard to international conventions and norms when interpreting domestic statutes.

The position of the Supreme Court of India carries immense persuasive weight while interpreting the constitutional *vires* of the Act. One could argue that the main points of discussion concerning the constitutionality of the Act in *Naga People's Movement for Human Rights* revolved around the procedures followed during the enactment and the implication of the Act in the centre-state relations. However, the Supreme Court of India has been liberal in reading in international human rights jurisprudence to be applied at the domestic level. For instance in 1996⁵² the Supreme Court extensively drew inspiration from the General Comment adopted by the Human Rights Committee to decide upon the question of reservations, a process the Court refrained to engage in while deciding the case on the AFSP Act. The Court has held on various occasions that although ratified international treaties do not automatically become part of domestic law they are nevertheless relevant to constitutional interpretation, with reference to article 51 (c) of the Constitution which directs the state "to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another". This provision does not confer a justiciable right. It, however, encourages the government to strive to achieve in good faith the objectives of the ratified international treaty through executive or legislative actions. It is this provision that the Indian courts have liberally interpreted to read

⁵⁰ *Supra* note 5.

⁵¹ *Vishaka et al. v. State of Rajasthan et al.*, 1997 AIR 3011. It is interesting to note that this judgment, known as a watershed event in Indian jurisprudence was delivered in August, whereas the Naga People's Movement case was decided by the same court in November, both in 1997.

⁵² *T.M.A. Pai Foundation et al. v. State Of Karnataka et al.*, 1996 AIR 2652.

in within the domestic framework the country's obligation under international human rights law. A fitting case to the point would be the *Kesavananda Bharati* case.⁵³ The then Chief Justice of India, Justice Sikri, while deciding the case said: "... [i]t seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to by India".

The principle was developed further and applied without hesitation in the *Vishaka* case where the Court said: "... [i]n the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee".⁵⁴

It follows that under Indian domestic law, wherever possible, a statutory provision must be interpreted consistently with India's international obligations, whether under customary international law or an international treaty. If the terms of the legislation are not clear and are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that the Parliament does not intend to act in breach of international law, including therein, a specific treaty obligation; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.⁵⁵

Considering the question of domestic applicability of the principles of customary international law the Court did not have any hesitation in holding that: "...once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the [c]ourts of [l]aw."⁵⁶

Despite all these affirmative and progressive steps in its pertinent jurisprudence, when it came to interpreting the Act, the Court fell short of its own established practice and failed to interpret the Act in compliance with India's international human rights obligations and the treaty obligation under the ICCPR in particular.

Yet, there is hope since the Court did not merely say that the AFSP Act is constitutional and leave it at that. By way of caution, probably reading in the arbitrary nature of the powers conferred by the Act to the persons working under the Act, the Court set out some precautions for the implementation of the Act as follows:

⁵³ *Kesavananda Bharathi vs. State of Kerala*, (1973) Supp. SCR 1.

⁵⁴ *Supra* note 51.

⁵⁵ See D. D. Basu, *Introduction to the Constitution of India*, 20th Edition (New Delhi, 2002).

⁵⁶ *Vellore Citizens Welfare Forum v. Union of India et al.*, 1996 AIR 2715.

“While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of Do's and Don'ts issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950. The instructions contained in the list of Do's and Don'ts shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the Central Act as construed and also the direction contained in the order of this Court dated July 4, 1991 in Civil Appeal No. 2551 of 1991. A complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central Act”.

There has been no effective review of these directions so far. For instance, the Central Bureau of Investigation of India only lists 118 applications that sought prior sanction for prosecution, of which only 5 are from Manipur. This is contrary to the statistics available as to the number of civil cases in which Indian courts have awarded monetary compensation to victims. If the number of writ petitions - from Manipur itself there have been more than two dozen cases - is an indicator of the extent of violations of the Supreme Court's directives, it is time for an effective review of the AFSP Act. It is also important to note that a remedy under the writ jurisdiction is not punitive in nature. A prosecution by means of the "procedure established by law" has never happened.⁵⁷ The authors of this report are not aware of a single case prosecuted so far.

Committee to review the Act set by the Government

The Union Ministry of Home Affairs set up a Committee chaired by a retired justice of the Supreme Court B. P. Jeevan Reddy⁵⁸ with the remit to review the provisions of the Act and report to the Government on whether amendment or replacement of the Act would be advisable. Having conducted extensive studies and consultations, the Committee reported in 2005 that it had formed “the firm view”⁵⁹ that the Act should be repealed as “too sketchy, too bald and quite inadequate in several particulars”.⁶⁰ It went on to emphasise that “recommending the continuation of [this] Act, with or without amendments, [did] not arise”.⁶¹

The Committee felt it necessary to further specify the following: “We must also mention the impression gathered by it during the course of its work that the Act, for whatever reason, has

⁵⁷ A case that could be considered to have come close enough is *Sebastain M. Hongray v. Union of India et al.*, 1984 AIR 571, where a writ of habeas corpus was filed before the Supreme Court of India concerning the disappearance of two persons Mr. C. Daniel and C. Paul since their arrest from Huining village in Manipur on 10 March 1982. The Court by its order dated 24 November 1983 allowed the writ petition thereby directing the respondents 1, 2 and 4 in the case, to produce the corpus of the two missing persons on 12 December 1983 before the Court. The outcome of the case since then is not known.

⁵⁸ The Committee had as its members (1) Dr. S. B. Nakade an academic and jurist; (2) Mr. P. Shrivastav (IAS) Former Special Secretary, Ministry of Home Affairs; (3) Lt. Gen. V. R. Raghavan; and (4) Mr. Sanjoy Hazarika, Journalist

⁵⁹ Government of India, Ministry of Home Affairs, Report of the Committee to review the Armed Forces (Special Powers) Act, 1958 (2005), at 74.

⁶⁰ Ibid.

⁶¹ Ibid.

become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness”.⁶²

These recommendations were never carried out and the report itself was not officially made public.

In addition to the Jeevan Reddy Committee, the Second Administrative Reforms Commission in its 5th Report of 2007 has also recommended the repeal of the AFSP Act. The Commission stated that “after considering the views of various stakeholders came to the conclusion that AFSP [Act] should be repealed”.⁶³

b. International review

Human Rights Committee

The Act was scrutinised on two occasions by the Human Rights Committee, a body composed of independent experts that is established specifically to monitor the implementation of the ICCPR by its States Parties.

The Committee first raised questions about various provisions of the Act, such as the scope of the authorisation to use lethal force, in 1991, during the consideration of India’s second state party report on its compliance with the ICCPR. In particular, the Committee “inquired to what extent [the Act was] consistent with provisions of the Covenant relating to the physical integrity of the person and the obligation to bring a person to trial with the least possible delay and, more generally, to provisions relating to preventive detention and article 4 of the Covenant; whether the authorization of the use of force even to the causing of death in accordance with [the Act] was compatible with article 4, paragraph 2, and article 6 of the Covenant”.⁶⁴

In 1997 the Committee, while considering India’s third periodic report, emphasised that all measures taken by India in order to protect its population against terrorist activities must be in full conformity with its obligations under the ICCPR.⁶⁵ It further expressed its hope, in vain as it turned out, that the Supreme Court would examine the provisions of the AFSP Act for their compatibility with the ICCPR in the context of the then pending proceedings in *Naga People’s Movement for Human Rights v. Union of India*.⁶⁶

The Committee specifically underscored its concern about the fact that the Act had remained in force in certain areas of India – such as Manipur – for decades, thus effectively making emergency powers permanent without formally derogating from the ICCPR.⁶⁷ It further stressed that decisions on continued detention must be taken by an independent and impartial tribunal⁶⁸

⁶² Ibid., at 75.

⁶³ Second Administrative Reforms Commission Report, Report 5 - Public Order (June 2007), at 239.

⁶⁴ Human Rights Committee, Report to the General Assembly, UN Doc. CCPR/46/40 (10 October 1991), at para. 268.

⁶⁵ Human Rights Committee, Concluding Observations on the Third Periodic Report of India, UN Doc. CCPR/C/79/Add.81 (4 August 1997), at paras. 4 and 18

⁶⁶ Ibid., at para. 18.

⁶⁷ Ibid., at para. 19.

⁶⁸ Ibid., at para. 24.

and that a central register of detainees be maintained and shared with the International Committee of the Red Cross.⁶⁹

The Committee noted with concern the “allegations that... security forces do not always respect the rule of law and that, in particular, court orders for *habeas corpus* are not always complied with, in particular, in disturbed areas”.⁷⁰

On a more general level the Committee reminded India that immunity provisions, such as those found in the AFSP Act, are incompatible with the right to an effective remedy under international human rights law and the concomitant duty to investigate and prosecute gross human rights violations, such as torture. It expressed, in particular, its concern “that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant”.⁷¹

Several views expressed by individual Committee members during the discussion prior to the adoption of these concluding observations are particularly instructive. When questioning the members of the Indian delegation, Mr Klein noted the extraordinary powers that the Act granted to the military, in particular, the provision which authorises the use of lethal force. He remarked that “[h]uman beings were very easily tempted to use whatever power they were given” and that he thought that “the Indian authorities gave individuals too much power without adequate safeguards”.⁷² Mrs Evatt likewise posed a question concerning the Act, referring to the fact that in certain “disturbed areas” – such as Manipur – it had been in force quasi-permanently.⁷³ Mr Lallah noted that the Act which had been in force for decades and granted extraordinary powers to the military officers had in fact amounted to a derogation within the meaning of article 4 of the ICCPR.⁷⁴ Mr Prado Vallejo expressed the view that the reservations entered by India to various provisions of the ICCPR, including its article 9 (right to freedom and personal security), were incompatible with its object and purpose and should be withdrawn.⁷⁵

The fourth periodic report of India to the Committee pursuant to article 40 of the ICCPR was due in 2001. It has not yet been submitted, which means that it is overdue by ten years at the time of writing. The Government of India should ensure that the report is prepared and submitted to the Committee at the earliest possible date.

Notwithstanding the failure of the Government of India to submit a report, it is recognised practice that the Committee can proceed with the examination of a State party’s compliance with the ICCPR on the basis of otherwise available information even in the absence of a State party report.⁷⁶ It appears that the Committee still hesitates to use this power in the case of India. If the report is not submitted in the nearest future, the Committee should be prepared to re-consider its position and assess India’s performance in terms of compliance of its law and practice with

⁶⁹ Ibid.

⁷⁰ Ibid., at para. 23.

⁷¹ Ibid., at para. 21.

⁷² Summary Record of the 1604th meeting of the Human Rights Committee, UN Doc. CCPR/C/SR.1604 (24 July 1997), at paras. 15-16.

⁷³ Ibid., at para. 18.

⁷⁴ Ibid., at para. 46.

⁷⁵ Ibid., at para. 34.

⁷⁶ Revised Rules of Procedure of the Committee, UN Doc. CCPR/C/3/Rev.9 (13 January 2011), Rule 70 (1).

the ICCPR in the absence of the State report. The existence and application of the AFSP Act should in this case be among the primary concerns of the Committee, and international and domestic non-governmental actors should take a lead in providing it with examples that illustrate how different provisions of the Act have been applied on the ground.

Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination is a body responsible for monitoring States Parties' compliance with the ICERD. The ICERD makes provision for regular State reports to this Committee which considered India's combined fifteenth to nineteenth periodic reports in 2007. It recommended to the Government of India to repeal the Act and replace it by "a more humane" piece of legislation.⁷⁷ It specifically underlined its concern about the provisions of the Act under which "members of the armed forces may not be prosecuted" without authorisation of the Central Government and "have wide powers to search and arrest suspects without a warrant or to use force against persons... in Manipur and other north-eastern States which are inhabited by tribal peoples".⁷⁸

Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women is a body responsible for monitoring States parties' compliance with the Convention on the Elimination of All Forms of Discrimination against Women.

When the Committee on the Elimination of Discrimination against Women considered India's second and third periodic reports in 2007, it noted the gender aspect of the abuses created or tolerated by the continued application of the Act in the disturbed areas of India and urged the Indian authorities to take steps "to abolish or reform" the Act and "to ensure that investigation and prosecution of acts of violence against women by the military in disturbed areas [including Manipur] and during detention and arrest is not impeded".⁷⁹

This gender aspect which should be properly considered and addressed includes the fact that women are disproportionately affected by violence; gross patterns of violence facilitated by the Act involve women being routinely raped, sexually assaulted, beaten or killed in their homes and in public during military operations. Human rights violations of a sexual nature lead to a climate of fear heightened by the lack of victims' institutional protection coupled with the social stigma attached to such violations. The immunity that the Act provides to the military officers involved in the operation within the disturbed areas likewise affects women disproportionately. It constitutes yet another obstacle adding to many factors which already impede women from accessing justice, among them limited education and the burden of economic dependence and heavy domestic responsibilities.

⁷⁷ Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined fifteenth to nineteenth periodic reports of India, UN Doc. CERD/C/IND/CO/19 (5 May 2007), at para. 12.

⁷⁸ *Ibid.*

⁷⁹ Committee on the Elimination of Discrimination against Women, Concluding Comments on the combined second and third periodic reports of India, UN Doc. CEDAW/C/IND/CO/3 (2 February 2007), at para. 9.

III. COMPATIBILITY OF THE AFSP ACT WITH INTERNATIONAL HUMAN RIGHTS LAW

1. Applicability of the ICCPR in Manipur

It is a matter of debate whether the situation in Manipur constitutes an armed conflict. However, possible simultaneous application of international humanitarian law does not affect India's obligations under international human rights law including the ICCPR.

Non-international armed conflict is characterised under international law by the twin criteria of “the protracted extent of the armed violence [intensity criterion] and the extent of organisation of the parties involved [organisation criterion]”.⁸⁰

Most armed groups, with the exception of the more marginal ones, have now ceased hostilities in Manipur.⁸¹ The remaining ones are reportedly mostly involved in extracting money from the local population rather than in fighting governmental forces.⁸² It follows that both the intensity and organisation criteria relating to the existence of the armed conflict are not fulfilled, and the prevailing situation is better characterised as “lawlessness”⁸³ rather than an active armed conflict.

If the armed conflict exists, international humanitarian law would be applicable. However, even assuming that such armed conflict exists or will erupt in Manipur and other “disturbed areas”, it does not exclude the applicability of the ICCPR. Indeed, as confirmed by the International Court of Justice (ICJ) “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [ICCPR].”⁸⁴ The ICJ's pronouncement was echoed by the Human Rights Committee which found that international human rights law and international humanitarian law “are complementary, not mutually exclusive”.⁸⁵ In relation to the issues of deprivation of liberty and associated judicial guarantees, which are of major concern in the application of the Act in Manipur, the UN Working Group on Arbitrary Detention stated that “the norms of the international human rights law protecting individuals against arbitrary detention shall be complied with by the Governments in situations of armed conflict.”⁸⁶

In any case, international humanitarian law reflects most of the provisions of customary international human rights law. The right to life and the prohibition of torture, cruel, inhuman or degrading treatment are reinforced by the *Martens* clause of the Geneva Conventions to the effect that “[i]n the case of armed conflict not of an international character... [p]ersons taking no active part in the hostilities... shall in all circumstances be treated humanely” and that “violence

⁸⁰ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić et al.*, Trial Chamber Judgment of 16 November 1998, at para. 184; *Prosecutor v. Limaj et al.*, Trial Chamber Judgment of 30 November 2005, at para. 84.

⁸¹ Human Rights Watch, “These Fellows Must Be Eliminated”: Relentless Violence and Impunity in Manipur (2008), at p. 19.

⁸² *Ibid.*, at 19-20.

⁸³ *Ibid.*, at 20.

⁸⁴ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports, 2004, at para. 106.

⁸⁵ Human Rights Committee, General Comment No. 31: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), at para. 11.

⁸⁶ Working Group on Arbitrary Detention, Report to the Sixteenth Session of the Human Rights Council, UN Doc. A/HRC/16/47 (19 January 2011), at para. 51.

to life” and “outrages upon personal dignity” of those persons “shall remain prohibited at any time and in any place”.⁸⁷ This fundamental clause of international humanitarian law is undoubtedly recognised as a norm of customary international law applicable in all types of armed conflicts.⁸⁸

2. Compatibility of the specific provisions of the AFSP Act with the rights and fundamental freedoms enshrined in the ICCPR

It is to be noted at the outset that the authoritative interpretation of the ICCPR is given by the Human Rights Committee, both in its general comments and views, that is, the conclusions given in individual cases lodged with it under the First Optional Protocol to the ICCPR.

The Committee is an independent body composed of highly qualified lawyers (Justice P.N. Bhagwati of the Supreme Court of India used to be a long-standing member of the Committee) which is established by the ICCPR itself in order to ensure compliance by States Parties with that instrument. Its authority in interpreting provisions of the ICCPR has been acknowledged by the International Court of Justice, a principal judicial organ of the United Nations, which noted: “Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law... [The Court] should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled”.⁸⁹

2.1. The right to life

The provision of the AFSP Act containing the authorisation to use lethal force⁹⁰ is incompatible with article 6 of the ICCPR which provides the following:

Every human being has the inherent right to life. No one shall be arbitrarily deprived of his [or her] life.

(a) Requirements under article 6

The right to life was characterised by the Human Rights Committee as “supreme” and “basic”⁹¹ includes both so-called negative and positive obligations for states. The negative obligation is reflected in the overall prohibition on arbitrary deprivation of life which is contained in article 6(1). Article 6 also specifies that the right to life “shall be protected by law” and therefore

⁸⁷ Common Article 3 of the four Geneva Conventions of 1949.

⁸⁸ ICRC Study of Customary International Humanitarian Law, www.icrc.org, Rule 87; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, at paras. 102-103.

⁸⁹ *Abmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), International Court of Justice, Judgment of 30 November 2010, at para. 66.

⁹⁰ See page 6 above.

⁹¹ Human Rights Committee, General Comment No. 14: *Right to Life*, UN Doc. HRI/GEN/1/Rev.9, Vol. I (9 November 1984), at para. 1.

“implies an obligation on the part of the State party [to the ICCPR] to protect the right to life of every person within its territory and under its jurisdiction”.⁹² This obligation requires states to take specific legislative, administrative and other measures in order to protect life and investigate all suspicious deaths.

Article 6 requires that “the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State”.⁹³ The use of firearms by law-enforcement personnel may be authorised only if other means of restraint remain ineffective or without any promise of achieving the intended result.⁹⁴ Where law-enforcement officials use firearms, they shall exercise restraint, use them proportionately, minimise damage and injury, ensure medical assistance and prompt notification to the relatives or friends of the injured person if applicable.⁹⁵ In particular, in case of a confrontation with officers of law-enforcement agencies, those involved should be given proper warning and the opportunity to surrender or provide explanations.⁹⁶ Exceptional circumstances, such as internal political instability, or any other public emergency, must not be used as a pretext to justify any departure from these rules and practices.⁹⁷

Any use of firearms should be independently reviewed. Where such use results in death, serious injury or other grave consequences a detailed report should be promptly sent to the competent authorities responsible for administrative review and judicial control.⁹⁸ Those affected and/or their legal counsel should have access to related administrative and judicial proceedings.⁹⁹ Article 6 of the ICCPR taken as a whole and in conjunction with its article 2 contains a procedural obligation of the State “to properly investigate the victim’s death and incidents of torture, and to take appropriate investigative and remedial measures”¹⁰⁰ including “appropriate action against those found guilty”.¹⁰¹

(b) Compatibility of the authorisation to use lethal force under the Act with article 6 of the ICCPR

The authorisation to use lethal force under the Act is incompatible with article 6.

First, the authorisation is extremely wide. It vests military officers with the power to use lethal weapons, such as firearms, in all circumstances where an officer deems it appropriate. The use of lethal force against anyone within the disturbed area therefore falls within the personal discretion of the military officer(s) concerned. Justification for the use of force – that is, maintenance of public order – is so vague and ill-defined that it effectively does not limit the scope of circumstances where it would be necessary. Individuals against whom force may be used include all those who – again, in the military officer’s opinion – are acting in contravention not only of law but also any order, presumably including orders given by the military officer involved

⁹² *Jiménez Vaca v. Colombia*, Human Rights Committee, UN Doc. CCPR/C/74/D/859/1999 (25 March 2002), at para. 7.3.

⁹³ *De Guerrero v. Colombia*, Human Rights Committee, no. R.11/45 (31 March 1982), at para. 13.1.

⁹⁴ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders (1990), at para. 4.

⁹⁵ *Ibid.*, at para. 5.

⁹⁶ *De Guerrero v. Colombia*, *supra* note 93, at para. 13.2.

⁹⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 94, at para. 8.

⁹⁸ *Ibid.*, at para. 22.

⁹⁹ *Ibid.*, at para. 23.

¹⁰⁰ *Sathasivam and Saraswathi v. Sri Lanka*, Human Rights Committee, UN Doc. CCPR/C/93/D/1436/2005 (31 July 2008), at para. 6.4.

¹⁰¹ *Ibid.*

himself. The mere fact of five persons gathered together suffices to use lethal force against any of them even where there is no suspicion of a breach of the law or any order. The provision of the AFSP Act governing the use of lethal force effectively gives carte blanche to military officers within disturbed areas.

The Act provides no discernable limitations or safeguards aimed at the prevention of abuse of discretion by the military officers involved in maintaining order. There are no requirements, such as to use non-lethal force before recourse to firearms are made, which would guarantee that lethal force is used proportionally and injury is minimised in so far as possible. In addition, the Act is silent on whether and how a warning should be given before lethal force is used and which measures should be taken by the military officers involved to satisfy themselves that those warnings are received and understood by all parties concerned.

Second, the Act does not contain any provision providing for automatic notification of cases in which lethal force was used. This deprives the next-of-kin of the person who might have been killed or injured as a result of the use of lethal force by the military of the possibility to render assistance and to inquire into the circumstances of the incident. In the absence of any other mechanisms of public scrutiny, it effectively provides the cloak of law under which cases involving the use of lethal forces by the military are shrouded in secrecy.

Third, the Act, or any other applicable legislation, fails to ensure that prompt, independent, and effective investigations are conducted into all cases of the use of lethal force, especially those which led to death or severe injury. The immunity provision contained in section 6 of the Act makes any such investigation – even if it were conducted – meaningless as the officers concerned cannot be held accountable. This lack of adequate investigative mechanisms means that victims, their relatives and the broader public have no access to the truth about what has happened. This contributes to the climate of impunity that effectively places the military officers in the disturbed areas above the law, leads to the lack of public confidence in their actions, and, most importantly, facilitates arbitrary deprivations of life in violation of article 6.

2.2. The prohibition of torture, cruel, inhuman and degrading treatment under article 7 of the ICCPR

The provision of the AFSP Act containing the authorisation to arrest,¹⁰² as well as its provisions on the use of necessary force when effecting arrest, entering and searching,¹⁰³ are incompatible with article 7 which provides as follows:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

¹⁰² See page 6 above.

¹⁰³ See page 6 above.

(a) Requirements under article 7 of the ICCPR

Article 7 does not define torture. The Human Rights Committee has emphasised that article 7 protects both the physical and mental integrity of the individual,¹⁰⁴ and therefore relates not only to acts that cause physical pain “but also to acts that cause mental suffering to the victim”.¹⁰⁵ Beyond this, it has not developed a particular definition but adopted a flexible approach, stating that

[...] The Covenant does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.¹⁰⁶

In its jurisprudence, the Committee has drawn on both the definitions contained in article 1 of the UN Convention on Torture and other Cruel, Degrading or Inhuman Treatment or Punishment¹⁰⁷ and developed by the European Court of Human Rights in its jurisprudence on article 3 of the European Convention on Human Rights.¹⁰⁸

The prohibition of torture, cruel, inhuman and degrading treatment or punishment imposes an obligation on states to take legislative, administrative, judicial and other measures to prevent acts of torture and ill-treatment:

The aim of the provisions of Article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.¹⁰⁹

(b) Lack of safeguards and its compatibility with article 7 of the ICCPR

Persons who are in custody or who are subjected to any form of arrest, detention or imprisonment are particularly vulnerable and therefore require special protection.¹¹⁰ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,¹¹¹ which is used by the Committee when interpreting article 7 of the ICCPR, provides for safeguards applicable in the custodial context. This comprises confidential access to a lawyer,¹¹²

¹⁰⁴ Human Rights Committee, General Comment No. 20: *Prohibition of Torture and Cruel Treatment or Punishment*, UN Doc. HRI/GEN/1/Rev. 1 (10 March 1992), at para. 2.

¹⁰⁵ *Ibid.*, at para. 5.

¹⁰⁶ *Ibid.*, at para. 2.

¹⁰⁷ “For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...”

¹⁰⁸ See *Vuolanne v. Finland*, Human Rights Committee, UN Doc. A/44/40, at 311 (7 April 1989), at para. 9.2.

¹⁰⁹ Human Rights Committee, General Comment No. 20, *supra* note 104, at paras. 2 and 8.

¹¹⁰ *Ibid.*, at para. 11.

¹¹¹ Adopted by the UN General Assembly Resolution 43/173 of 9 December 1988.

¹¹² *Ibid.*, Principles 17 and 18.

notification of the next-of-kin (or other appropriate person) of the whereabouts of a detainee,¹¹³ a medical check-up upon admission to the place of detention and the provision of adequate medical care and treatment throughout the duration of detention.¹¹⁴ These safeguards imply that *incommunicado* detention, which is conducive to torture and ill-treatment and may amount to torture or ill-treatment, should be abolished.¹¹⁵

The AFSP Act grants military officers broad power to detain individuals without providing any safeguards against arbitrary detention, contrary to the State's obligation to adopt legislative measures aimed at preventing torture.

The Act is silent on any of the recognised safeguards, which are therefore not available to arrested or detained persons. A person arrested by the military is not only prohibited from having any contact with the outside world (held *incommunicado*), there is also no procedure in place to have the very fact of his or her detention acknowledged. This regime therefore effectively amounts to sanctioning "secret detention".¹¹⁶

The independent UN special procedures acknowledged a twofold link between secret detention (*incommunicado* detention) and torture and other forms of ill-treatment: secret detention as such may constitute torture or cruel, inhuman and degrading treatment; and secret detention may be used to facilitate torture or cruel, inhuman and degrading treatment.¹¹⁷ This is evident in Manipur where allegations of torture abound in situations where individuals are detained under the Act.¹¹⁸

The Human Rights Committee has recognised that prolonged *incommunicado* detention may amount to inhuman treatment (or torture, depending on the circumstances) within the meaning of article 7 of the ICCPR.¹¹⁹ As held by other human rights courts, the suffering and fear inherent in this form of detention constitutes inhuman and degrading treatment.¹²⁰ The UN General Assembly reminded all States "that prolonged *incommunicado* detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment".¹²¹

Incommunicado detention can also amount to a separate violation of article 7 in relation to the detainee's close relatives who undergo mental suffering and anguish being deprived of information about the whereabouts and fate of their relative. The Human Rights Committee recently found a violation of article 7 in respect of the wife and children of an individual who spent several months *incommunicado* in army custody.¹²²

¹¹³ *Ibid.*, Principle 16.

¹¹⁴ *Ibid.*, Principle 24; *Mika Miha v. Equatorial Guinea*, Human Rights Committee, UN Doc. CCPR/C/51/D/414/1990 (8 July 1994), at para. 6.4.

¹¹⁵ Human Rights Committee, General Comment No. 20, at para. 11.

¹¹⁶ Special Rapporteurs on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Working Groups on Arbitrary Detention and on Enforced or Involuntary Disappearances, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, UN Doc. A/HRC/13/42 (19 February 2010), at para. 8.

¹¹⁷ *Ibid.*, at para. 34.

¹¹⁸ See above at pages 7-8.

¹¹⁹ *Polay Campos v. Peru*, Human Rights Committee, UN Doc. CCPR/C/61/D/577/1994 (6 November 1997), at para. 8.6.

¹²⁰ *Ando and Esma Palčić*, Human Rights Chamber for Bosnia and Herzegovina, Case no. CH/99/3196, Decision on Admissibility and Merits (11 January 2001), at paras. 73-74.

¹²¹ UN General Assembly Resolution 60/148 of 16 December 2005, at para. 11.

¹²² *Giri v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/101/D/1761/2008 (24 March 2011), at para. 8.

(c) Use of “necessary force” and its compatibility with article 7 of the ICCPR

Law-enforcement officials may use force “only when strictly necessary and to the extent required for the performance of their duty”.¹²³ Law-enforcement officials may be authorised to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of (suspected) offenders but must not use force going beyond that requirement.¹²⁴ Whenever the lawful use of force is unavoidable, law-enforcement officials shall exercise restraint and act in proportion to the seriousness of the offence and the legitimate objectives to be achieved. This entails minimising damage and injury, ensuring that medical assistance and medical aid are rendered to any injured or affected persons, and notifying their relatives and close friends at the earliest possible moment.¹²⁵

The Act also vests military officers with the power to use “necessary force” at any time when effecting arrest or entering and searching the premises. While the use of necessary force is the recognised standard, in practice there does not appear to be any guidance or jurisprudence that would define the term in line with international standards or ensure that the force used was indeed necessary. This is reinforced by the blanket immunity provided in the Act (see below) for military officials. In practice, these factors have resulted in a number of incidents of apparent excessive use of force incompatible with article 7.¹²⁶

2.3. The right to liberty and security of person

The provision of the AFSP Act containing the authorisation to arrest persons¹²⁷ is incompatible with article 9 of the ICCPR which provides the following:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his [or her] arrest and shall be promptly informed of any charges against him [or her].

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ...

4. Anyone who is deprived of his [or her] liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his [or her] detention and order his [or her] release if the detention is not lawful.

¹²³ Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly Resolution 34/169 of 17 December 1979, Article 3.

¹²⁴ *Ibid.*, Commentary to Article 3, (a).

¹²⁵ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 94, at para. 5.

¹²⁶ See pages 7-8 above.

¹²⁷ See page 6 above.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

(a) Requirements under article 9 of the ICCPR

The lack of arbitrariness requirement under article 9 (1) is wider than simply requiring lawfulness of detention. The “quality of law” is one element of article 9 (1) as interpreted by the Human Rights Committee, which includes, besides appropriateness, “predictability and due process of law”.¹²⁸ In other words, remand in custody must not only be lawful but also reasonable and necessary in the circumstances.¹²⁹

The necessity to keep an individual in custody must be justified throughout the period of his or her detention. Even where an initial arrest was considered reasonable and necessary, the subsequent detention may become unreasonable and therefore incompatible with article 9 (1).¹³⁰ This applies equally where a detainee is suspected of terrorism-related offences. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism affirmed that “[c]ompliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful... strategy to combat terrorism”.¹³¹ He also acknowledged that past experience showed that arrest and detention of terrorist suspects may involve the violation of several human rights and fundamental freedoms.¹³²

In addition to the prohibition of arbitrary detention, article 9 provides a list of procedural safeguards which must be complied with and should be reflected in national legislation, including:

- Informing anyone arrested of the reasons for his or her arrest (at the moment of arrest) and “promptly” of any charges brought against him or her (article 9 (2)). This notification, apart from minimising the mental distress of an arrested person, provides him or her with the information needed to challenge the grounds for detention.
- The right of anyone who is arrested or detained on a criminal charge to be brought “promptly” before a judicial officer and to be tried within a reasonable time or released (article 9 (3)). This right has a dual function: it provides a judicial safeguard to ensure the lawfulness of detention and seeks to prevent unnecessarily prolonged detention, imposing an obligation on the authorities to conduct pre-trial proceedings expeditiously.
- The right of anyone who is arrested or detained on whatever grounds to take proceedings before a court, in order for the court to decide “without delay” on the lawfulness of the detention in question and order his or her release if the detention is unlawful (article 9 (4)). This procedure, known as *habeas corpus*, constitutes an essential judicial guarantee against an arbitrary detention in all circumstances.

¹²⁸ *Mukong v. Cameroon*, Human Rights Committee, UN Doc. CCPR/C/51/D/458/1991 (21 July 1994), at para. 9.8.

¹²⁹ *Marinich v. Belarus*, Human Rights Committee, UN Doc. CCPR/C/99/D/1502/2006 (16 July 2010), at para. 10.4.

¹³⁰ *Spakmo v. Norway*, Human Rights Committee, UN Doc. CCPR/C/67/D/631/1995 (5 November 1999), at para. 6.3.

¹³¹ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Report to the Sixteenth Session of the UN Human Rights Council, “Ten Areas of Best Practices in Countering Terrorism”, UN Doc. A/HRC/16/51 (22 December 2010), at para. 12.

¹³² *Ibid.*, at para. 36.

- The right of anyone who has been unlawfully arrested or detained to be compensated (article 9 (5)). This is an important safeguard that provides victims of unlawful arrest or detention with the right to reparation and establishes corresponding State responsibility.

The temporal requirements under article 9(2)-(4) have been interpreted in the case-law of the Human Rights Committee. The Committee found a violation of article 9 (2) where a person was detained for seven days without a charge or an arrest warrant.¹³³

The Committee has interpreted the requirement of bringing someone detained on a criminal charge “promptly” before a judicial officer under article 9 (3) as not exceeding “a few days,”¹³⁴ specifying that this is to be determined on a case-by-case basis.¹³⁵ In practice, the Committee found a violation of article 9 (3) where the authorities failed to bring a person before a judicial officer within four days after arrest.¹³⁶

The *habeas corpus* guarantee of article 9 (4), in contrast to article 9 (3), is applicable in respect of all individuals deprived of their liberty, irrespective of whether it has been done in the context of ongoing criminal proceedings or otherwise. The ICCPR requires that a *habeas corpus* petition is considered “without delay”.¹³⁷ The review itself should not be limited to a mere verification that the detention is in conformity with domestic law. It must include the possibility, in law and in practice, that the release of the detainee is ordered if the detention is incompatible with the requirements of article 9 (1),¹³⁸ that is if it is unlawful and/or unreasonable and/or unnecessary. In other words, the ability to challenge detention before a court of law implies the latter’s jurisdiction to review the substantive grounds for the appellant’s detention.¹³⁹

Article 9 (5) of the ICCPR governs the granting of compensation for detention that is unlawful either under the terms of domestic law or within the meaning of the ICCPR.¹⁴⁰

(b) India’s declaration on article 9 of the ICCPR

The declaration made by India upon acceding to the ICCPR may impact on the Covenant’s applicability in relation to arbitrary arrest and detention in Manipur. The declaration was formulated in the following terms:

“With reference to article 9 of the [ICCPR], the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further, under the Indian legal system, there is no enforceable right to compensation for

¹³³ *Kurbanova v. Tajikistan*, Human Rights Committee, UN Doc. CCPR/C/79/D/1096/2002 (6 November 2003), at para. 7.2.

¹³⁴ Human Rights Committee, General Comment No. 8: *Right to Liberty and Security of Person*, UN Doc. HRI/GEN/1/Rev. 1 (30 June 1982), at para. 4.

¹³⁵ *Stephens v. Jamaica*, Human Rights Committee, UN Doc. CCPR/C/55/D/373/1989 (18 October 1995), at para. 9.6.

¹³⁶ *Freemantle v. Jamaica*, Human Rights Committee, UN Doc. CCPR/C/68/D/625/1995 (24 March 2000), at para. 7.4.

¹³⁷ According to the case-law of the Human Rights Committee this requirement is akin to that of promptness under article 9 (3) of the ICCPR, see: *Kelly v. Jamaica*, Human Rights Committee, UN Doc. CCPR/C/41/D/253/1987 (8 April 1991), at para. 5.6.

¹³⁸ *Baban v. Australia*, Human Rights Committee, UN Doc. CCPR/C/78/D/1014/2001 (6 August 2003), at para. 7.2.

¹³⁹ *Bakhtiyari v. Australia*, Human Rights Committee, UN Doc. CCPR/C/79/D/1069/2002 (29 October 2003), at para. 9.4.

¹⁴⁰ *A. v. Australia*, Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993 (3 April 1997), at para. 9.5.

persons claiming to be victims of unlawful arrest or detention against the State”.¹⁴¹

A statement of the State Party to the ICCPR constitutes a reservation if, irrespective of its form, name or title,¹⁴² it purports to exclude or modify the legal effect of the relevant treaty. It follows that India’s declaration with reference to article 9 should be treated as a reservation. In order to validly exclude the application of certain provisions of the Covenant, reservations should: a) be compatible with the “the object and purpose” of the ICCPR;¹⁴³ b) not concern the provisions of the ICCPR that represent customary international law and have the character of peremptory norms, such as the prohibition of torture and arbitrary deprivation of life and liberty;¹⁴⁴ and c) be specific and transparent.¹⁴⁵

The Human Rights Committee firmly rejected reservations that subject and confine the ICCPR’s provisions to domestic law: “Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law”.¹⁴⁶ The application of the ICCPR provisions pursuant to domestic laws would undermine its object and purpose as formulated in its preamble, namely promotion of universal respect for and observance of human rights and freedoms. In response to the “interpretative declaration” of Kuwait that the rights guaranteed under the ICCPR “must be exercised within the limits set by Kuwaiti law”, the Human Rights Committee found that “[s]uch broad and general limitations would undermine the object and purpose of the entire [ICCPR]” and that such statement contravenes “essential obligations” under the ICCPR “and is therefore without legal effect”.¹⁴⁷

The same considerations apply to the declaration made by India, with the effect that the ICCPR remains fully applicable in Manipur. This applies equally to the reference to article 9 (5), with the effect that India must ensure that persons claiming to be victims of unlawful arrest or detention have an enforceable right to compensation against the State. This part of the declaration is effectively redundant as the Supreme Court of India has ruled that the state can be held liable to pay compensation for arbitrary arrest and detention.¹⁴⁸

(c) Compatibility of the authorisation to arrest under the AFSP Act with article 9 of the ICCPR

Under the Act, the military officer concerned may arrest and detain a person where “a reasonable suspicion exists” that the person has committed any cognisable offence or “is about to commit” such an offence. There is nothing in the text of the Act that would require the military officer concerned to assess the reasonableness and necessity of the arrest in the circumstances. The reasonable suspicion element is seemingly in line with international

¹⁴¹ United Nations Treaty Collection, Status of Ratifications of the International Covenants on Human Rights, Declarations and Reservations: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-3&chapter=4&lang=en>.

¹⁴² Human Rights Committee, General Comment No. 24: *Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (4 November 1994), at para. 3.

¹⁴³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, at p. 24.

¹⁴⁴ Human Rights Committee, General Comment No. 24, *supra* note 142, at para. 8.

¹⁴⁵ *Ibid.*, para. 19.

¹⁴⁶ *Ibid.*

¹⁴⁷ Human Rights Committee, Concluding Observations on the Initial Report of Kuwait, UN Doc. CCPR/CO/69/KWT (27 July 2000), at para. 4.

¹⁴⁸ *Arvinder Singh Bagga v. State of Uttar-Pradesh et al.*, AIR 1995 117, and *DK Basu v. State of West Bengal* (1997) 1 SCC 416.

standards. However, no adequate legal procedures are in place to review that there were objective grounds to justify arrest or detention on these grounds. In addition, the preventive arrest envisaged under the Act and the lack of provisions to ensure the reasonableness of arrest and detention are incompatible with article 9 (1).

The arresting military officer is not obliged under the Act to inform the detainee of the reasons for his or her arrest and any charges brought against him or her at the moment of arrest or at any moment thereafter. The absence of any provision to this effect is in clear violation of article 9(2).

The lack of judicial review of the lawfulness of the detention up until the time the detainee is transferred to police custody, which may in practice take several weeks after the initial arrest, is incompatible with the requirements of article 9 (3) (in criminal cases) and with the *habeas corpus* guarantee of article 9 (4). Where, exceptionally, *habeas corpus* writs have been issued, military officers have ignored them in the disturbed areas such as Manipur.

The Supreme Court has recognised a right to compensation in cases of unlawful arrest or detention.¹⁴⁹ However, the grounds for such arrest and detention are extremely broad under the Act, which means that arrests and detentions that may be incompatible with article 9 may still be considered lawful as a matter of national law.

The AFSP Act allows arbitrary arrest and detention, with no information provided to the arrestee or detainee, with no possibility of independent review of the lawfulness of such detention and no statutory right to receive compensation if the detention is unlawful, in violation of all paragraphs of article 9 of the ICCPR.

The secret character of the arrest and detention under the AFSP Act is prejudicial to the fair-trial guarantees of the persons arrested and detained if criminal charges are brought against them, in particular, their access to a lawyer and their right not be compelled to testify against themselves or to confess guilt.¹⁵⁰

2.4. Freedom of assembly

The provision of the AFSP Act containing the authorisation to use lethal force¹⁵¹ is incompatible with article 21 of the ICCPR which provides the following:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others”.

¹⁴⁹ *Supra* note 148.

¹⁵⁰ ICCPR, Article 14 (3) (b) and (g).

¹⁵¹ See page 6 above.

(a) Requirements of article 21 of the ICCPR

Article 21 provides for the right to assemble peacefully. Restrictions on its exercise must be in conformity with domestic law, be based on any of the recognised grounds and be necessary and proportionate in the circumstances. The exercise of the right to assemble peacefully implies, in particular, that the police should not use excessive force against demonstrators.¹⁵² In respect of vulnerable groups, such as members of minorities, the State should go further and take special positive measures in order to protect them from possible intimidation when exercising their right to assemble peacefully in practice.¹⁵³

(b) Compatibility of the authorisation to use lethal force under the AFSP Act with article 21 of the ICCPR

The AFSP Act allows the military officer to use lethal force whenever five or more persons assemble together. This provision effectively introduces a presumption of the non-peaceful character of any gathering of five or more persons in Manipur and effectively renders any exercise of the right to peaceful assembly impossible, in breach of article 21.

2.5. Right to a remedy under the ICCPR

The ASFP Act's provision that provides immunity for military officers from any prosecution, suit or any other legal proceeding in respect of anything done or purported to be done in exercise of the powers conferred by the Act is incompatible with article 2 (3) of the ICCPR which provides the following:

“Each State Party to the present Covenant undertakes: (a) [t]o 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 an official capacity; (b) [t]o 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; (c) [t]o ensure that the competent authorities shall enforce such remedies where granted”.

(a) Requirements of article 2(3) of the ICCPR

It is a well-established principle of international human rights law that violations of human rights, such as unjustified deprivation of life, torture, cruel, inhuman and degrading treatment and arbitrary arrest and detention entail a duty on the part of state authorities to conduct a

¹⁵² Human Rights Committee, Concluding Observations on the Sixth Periodic Report of the Russian Federation, UN Doc. CCPR/C/RUS/CO/6 (24 November 2009), at para. 25.

¹⁵³ *Ibid.*, at para. 27.

prompt, impartial and effective investigation. This principle is reflected in article 2 (3) which requires that individuals have accessible and effective remedies to vindicate their human rights.¹⁵⁴

Where public officials or State agents have committed violations of the Covenant rights such as those guaranteed under articles 6, 7, and 9 thereof, the state may not relieve perpetrators from personal responsibility, for example, through amnesties or immunities.¹⁵⁵ Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or statutes of limitation.¹⁵⁶

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁵⁷ specify that the right to an effective remedy has two components. It comprises a procedural right to effective access to justice¹⁵⁸ and a substantive right to receive adequate forms of reparation,¹⁵⁹ namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Failure to ensure a remedy in respect of effective access to justice or obtaining adequate forms of reparation could in and of itself give rise to a separate breach of the ICCPR.¹⁶⁰

The right to an effective remedy includes a corresponding duty of the state to conduct effective investigations. Indeed, the Committee frequently states in its views that respondent States parties found to have violated substantive rights should undertake “a comprehensive and impartial investigation” of the issue found to be in breach of the Covenant.¹⁶¹ Where sufficient evidence is available, states must bring to justice perpetrators of human rights violations through criminal prosecution and punishment of those responsible for such violations.¹⁶² Perpetrators may not be relieved from personal responsibility if they are public officials or State agents. No official status justifies immunity from legal, primarily criminal, responsibility for persons who may be accused of serious human rights violations, such as arbitrary killings, torture, cruel, inhuman and degrading treatment, and enforced disappearances.¹⁶³

(b) Compatibility of the Act with article 2 (3) of the ICCPR

The all-embracing immunity provision of the AFSP Act effectively precludes the possibility of redress for victims of serious human rights violations resulting from its application. The law itself is in breach of article 2 (3) in relation to cases where substantive rights guaranteed by the ICCPR, including the right to life, to be free from torture, cruel, inhuman and degrading treatment, and not to be arbitrarily arrested and detained, have been violated, or there is a credible allegation that they have been violated.

¹⁵⁴ Human Rights Committee, General Comment No. 31, *supra* note 85, at para. 15.

¹⁵⁵ *Ibid.*, at para. 18.

¹⁵⁶ *Ibid.*

¹⁵⁷ Adopted and proclaimed by the UN General Assembly Resolution 60/147 of 16 December 2005, <http://www2.ohchr.org/english/law/remedy.htm>.

¹⁵⁸ *Ibid.*, para. 12.

¹⁵⁹ *Ibid.*, para. 18.

¹⁶⁰ Human Rights Committee, General Comment No. 31, *supra* note 85, at para. 18.

¹⁶¹ *Wilson v. The Philippines*, Human Rights Committee, UN Doc. CCPR/C/79/D/868/1999 (30 October 2003), at para. 9.

¹⁶² *Bautista v. Colombia*, Human Rights Committee, UN Doc. CCPR/C/55/D/563/1993 (13 November 1995), at para. 8.6.

¹⁶³ Human Rights Committee, General Comment No. 31, *supra* note 85, at para. 18.

In its practical effect, the immunity provision of the AFSP Act resembles amnesty laws that make it impossible to investigate and prosecute perpetrators of serious human rights violations, including torture. It effectively shields the military officers operating in Manipur from prosecution and results in impunity. Indeed, no cases are known in which the Central Government waived the immunity of military officers alleged to have been responsible for violations.

This runs counter to the Vienna Declaration and Programme of Action adopted at the seminal World Conference on Human Rights, which urged all states to “abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law”.¹⁶⁴ The Human Rights Committee expressed its concern about the fact that criminal prosecutions or civil proceedings against members of the security forces acting under special powers (such as the Act) may not be commenced without the sanction of the central Government of India. It noted that this contributes to a climate of impunity and deprives those individuals who are on India’s territory and within India’s jurisdiction of remedies to which they are entitled in accordance with article 2 (3) of the ICCPR.¹⁶⁵ There has been no change in the law or in practice that would undermine the validity of the Committee’s findings in this regard.

3. The effects of the AFSP Act and prohibition of racial discrimination

Racial discrimination under the ICERD does not require special intent. The Committee on the Elimination of Racial Discrimination concluded unequivocally that an indirect discriminatory measure which objectively leads to “an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or... origin”¹⁶⁶ is covered by the ICERD prohibition. Measures that have discriminatory effects may therefore violate the internationally recognised prohibition of racial discrimination binding on India pursuant to the ICERD.

The application of the AFSP Act in Manipur, as well as several other States of India, singles out the population of the so-called “disturbed areas” and seriously affects their enjoyment of the most basic human rights and fundamental freedoms, such as the right to life, the right to be free from torture, cruel, inhuman or degrading treatment, and the right to personal freedom and security. This creates a discriminatory effect upon groups of India’s population that are ethnically and linguistically distinct. These *de facto* effects of the application of the AFSP Act in several parts of the Union and the special legal regime in the so-called “disturbed areas” create a distinction that is not justifiable from the standpoint of the ICERD. The Committee on the Elimination of Racial Discrimination has criticised the applicable regime on these grounds and called for the outright repeal of the AFSP Act.¹⁶⁷

¹⁶⁴ UN Doc. A/CONF.157/23 (12 July 1993), at para. 60.

¹⁶⁵ Human Rights Committee, Concluding Observations on the Third Periodic Report of India, *supra* note 3, at para. 21.

¹⁶⁶ Committee on the Elimination of Racial Discrimination, General Recommendation No. 14: *Definition of Discrimination*, UN Doc. A/48/18 (22 March 1993), at para. 2. The Human Rights Committee, in interpreting the non-discrimination clause of the ICCPR (Article 26), referred to the ICERD definition (General Comment No. 18: Non-Discrimination (10 November 1989), at para. 6).

¹⁶⁷ See *supra* note 7.

IV. CONCLUSION

The AFSP Act's central provisions, including the blanket authorisations to use lethal force, arrest and enter and search without any additional warrant or pre-condition, coupled with the all-embracing immunity provision that indiscriminately covers all military officers effectively providing them with *carte blanche* to act as they see fit, are incompatible with India's international obligations under the ICCPR, namely its articles 2 (3), 6, 7, 9, 17, and 21. This finding is borne out by concerns over the Act's application in Manipur and other States of north-eastern India, which has been characterised by a number of credible allegations of extrajudicial killings, torture, ill-treatment, enforced disappearances and arbitrary detention in a climate of complete impunity. There are no reported cases of any military officers involved having been held accountable.

India has not availed itself of the right to derogate from the ICCPR pursuant to article 4 with the effect that the ICCPR is fully applicable in Manipur.

However, the AFSP Act is essentially an emergency legislation and therefore, by definition, its temporal scope of application should be limited and clearly defined. The prolonged application of emergency legislation sustains, reinforces or even creates the exceptional state that may justify emergencies, and has therefore become the cause rather than the effect of the prevailing situation. Unsurprisingly, the Act, that is the most visible legal manifestation of this undeclared state of emergency, has been repeatedly condemned by various UN treaty bodies.

The extraordinary legislative measures which were originally conceived of as being of an exceptional and temporary nature but were subsequently left to apply for an unlimited period of time not only undermine internationally recognised human rights¹⁶⁸ but also erode the mutual confidence between the authorities and society and may contribute to the delegitimation of the state as a whole.

V. RECOMMENDATIONS

Based on the findings of this report, namely the incompatibility of the AFSP Act with India's international obligations and its role in facilitating if not sanctioning human rights violations in Manipur, REDRESS, AHRC and HRA call on the key actors to take urgent action with a view to preventing further violations and providing accountability and justice for any violations committed under the Act to date.

Recommendations to the Indian Government:

- Repeal the AFSP Act in its entirety and with immediate effect.
- Ensure the effective investigation and prosecution of human rights violations committed in Manipur and other disturbed areas under the AFSP Act and provide effective access to justice and reparation for the victims of such violations.

¹⁶⁸ *Djema'a al Seyed Suleymane Ramadban v. Egypt*, Working Group on Arbitrary Detention, Opinion No. 18/2008 of 8 September 2008, UN Doc. A/HRC/13/30/Add.1 (2 March 2010), at para. 21.

- Prepare and submit the fourth periodic report to the Human Rights Committee pursuant to article 40 of the ICCPR as soon as possible but not later than in 2012.

Recommendations to the Human Rights Committee:

- Request the Government of India to prepare and submit the fourth periodic report pursuant to article 40 of the ICCPR which is more than ten years overdue.
- If the report is not submitted, proceed with the assessment of India's compliance with its obligations under the ICCPR in the absence of the report, on the basis of information otherwise available.
- When scrutinising India's performance under the ICCPR, pay special attention to the serious human rights violations committed by the military in Manipur and other disturbed areas, in particular those which have taken place by means of recourse to the extraordinary powers granted under the AFSP Act.
