article 2
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launching

the Asian Alliance Against Torture & Ill-treatment

plus

The Armed Forces (Special Powers) Act in Northeast India

A decade of *article 2*

2002
1.1. Open letter to the human rights community: Let us rise to article 2 (February)
1.2. International launch of article 2 (April)
1.3. Police in India (June)
1.4. Torture committed by the police in Sri Lanka (August)
1.5. National security legislation & its adverse consequences (October)
1.6. Reparation for victims of human rights violations (December)

2003
2.1. The International Criminal Court (February)
2.2. Permanent People's Tribunal on the Right to Food & Rule of Law in Asia (April)
2.3. Extrajudicial killings of alleged drug dealers in Thailand (June)
2.4. Detention and imprisonment (August)
2.5. The judiciary (October)
2.6. The Depayin Massacre, Burma (December)

2004
3.1. Endemic torture & the collapse of policing in Sri Lanka (February)
3.2. Responses to "Endemic torture & the collapse of policing in Sri Lanka" (April)
3.3. "Honour" killing in Pakistan (June)
3.4. The Bellilious Park Eviction, West Bengal (August)
3.5. Inaccessible justice in Pakistan (October)
3.6. The mathematics of barbarity and zero rule of law in Nepal (December)

2005
4.1. After the tsunami (February)
4.2. Rule of law versus rule of lords in Thailand (April)
4.3. Governments of Asia obliged to respond to torture (June)
4.4. UN Human Rights Committee decisions on Sri Lanka (August)
4.5. An x-ray of the Sri Lankan policing system & torture of the poor (October)
4.6. Two people's tribunals on severe hunger & utter neglect in India (December)

2006
5.1. The rule of law & human rights in Asia (February)
5.2. Impunity versus the rule of law in Indonesia (April)
5.3. Protecting witnesses or perverting justice in Thailand (June)
5.4. Lawless law enforcement & the parody of judiciary in Bangladesh (August)
5.5. A coup, killings & corruption in Southeast Asia (October)
5.6. Militarization & impunity in Manipur (December)

Continued on back inner sleeve...

Contents

A unique regional initiative: The Asian Alliance Against Torture and Ill-Treatment

Erik Wendt & Therese Rytter, Rehabilitation & Research Centre for Torture Victims, Denmark

It is well documented that torture, enforced disappearances and extra-judicial executions are carried out throughout Asia by agents of the state, notably police, military, and special investigation units, who expose ordinary citizens to such heinous crimes in complete disregard of national legislation.

Torture is rampant, but even today it remains a taboo in many countries – and for good reasons. Human rights defenders and civil society organizations strive to break this taboo. They meticulously document torture and other human rights violations and disseminate information about these abusive practices to the governments and the general public in their countries. A human rights movement is growing, demanding an immediate stop to the use of torture. But more needs to be done to bring more people into this movement, notably parliamentarians, medical professionals, media people, and other progressive forces.

This is the motivation behind a unique regional initiative, the Asian Alliance Against Torture and Ill-treatment (AAATI). The Asian Human Rights Commission (AHRC) and the Rehabilitation and Research Centre for Torture Victims (RCT), Denmark, took the lead to organize the foundational meeting of the AAATI, the first of its kind in Asia. The meeting was held from 15 to 19 August 2011 at the AHRC's office in Hong Kong.

Participants from Sri Lanka, India, Bangladesh, China, Nepal, Pakistan, Philippines, Burma, Indonesia, Thailand, Hong Kong and Denmark were represented in the meeting. They shared extensive knowledge and experience of how state-perpetrated torture persists in their countries, often on a systematic scale, and of its underlying causes. These presentations depicted the worst forms of deprivation of individual liberties.

It was heartbreaking to listen to personal testimonials from participants about abductions and torture committed by secret agencies with no regard to the law and beyond normal human

behaviour. Gruesome and inhumane scenes of torture are available on social media such as YouTube – it generates despair and anger to see such crimes of torture. More importantly it creates a strong hope for change, as torture is completely unacceptable and without any excuse whatsoever.

Torture has permeated into everyday life and affects any attempt to boost genuine human development in South and Southeast Asian countries. The negative consequences can hardly be underestimated and hamper broader development goals. While torture is hitting hard on poor men and women, and excluded and voiceless populations, it is also an instrument of terror and a fear factor for progressive forces in society.

"Torture has permeated into everyday life and affects any attempt to boost genuine human development in South and Southeast Asian countries; the negative consequences can hardly be underestimated"

Take for example cases from Pakistan and Bangladesh, where physical and mental torture are used without any reservation in public space and even against high ranking officers in the judiciary, against legitimate parliamentarians from opposition parties, and to deter courageous lawyers and media. Under such conditions, no one is guaranteed freedom from torture.

The participants asserted that there is an urgent requirement for a reorientation within the global human rights movement, from norms education to the understanding of the functioning of domestic legal frameworks, and with that knowledge, to engage with the domestic mechanisms to improve their functioning, or in some jurisdictions where justice institutions are completely dysfunctional, to encourage a comprehensive reform process. The participants expect that international bodies, like the United Nations and regional groupings like the European Union, will reorient their priorities towards this approach in their engagement with Asian states.

The participants emphasized the demand for justice reforms. The basic perception of justice is in most Asian states negated by the impossibility of making complaints; lack of witness protection; absence of training and equipment for scientific investigation of cases; inefficient prosecutions; insensitive and sometimes corrupt judges subdued by the executive, and extensive delays in adjudication that in some jurisdictions can last for decades. Also highlighted in the meeting was the relative difficulty in dealing with detention centres and prisons, and the inhuman practices perpetrated against detainees and convicts. The resultant environment clearly lacks the prerequisites for protecting, promoting and achieving the rule of law, which facilitates the endemic use of torture in Asia.

The participants who laid the foundation of the AAATI believe that it is possible to identify innovative ways of promoting the fight against torture. They observed that today modern facilities, like communication technology, must be used to document and disseminate information and to lobby for change. They also called for the global human rights movement to make fighting torture one of its priority issues. They agreed that justice reforms are crucial, and that fighting impunity without such reforms will remain an illusion.

> **"The elimination of torture depends upon the continued documentation of torture"**

The causes and contributing factors to the prevalence of torture as well as the concrete measures to eradicate it are context specific, but it is possible to extract common features. The AAATI will fill the gap to ensure that a consolidated generic problem analysis drawing on experience and research is constructed. A debate with scholars and practitioners should be initiated on the basis of a conceptual framework for ending torture. Core approaches for eradication within different political, legislative, socio-economic, and cultural settings should be established and the effect should be assessed.

The challenge is to foster political willingness for reforms and to capacitate the progressive agents of the state and in the civil society to support a change agenda. There are human rights champions inside each country and they could be part of a wider alliance. Lessons learned from other regions and research will be essential. What sparked the historical abolition of slavery and torture in the western world was the moral outrage and public cry for change. Once Enlightenment writers and legal reformers—such as Rousseau, Beccaria and Voltaire—began to question the use of torture, an almost complete turnabout in attitudes took place over a couple of decades. The barbarism of judicial torture and cruel punishment became a reform mantra in the 1770s and 80s, which generated the first waves of torture abolition in Europe.

In essence, the end to torture in Western Europe can be attributed to two main factors. First, the traditional framework of pain and personhood fell apart, and was replaced, bit by bit, by a new framework, in which individuals owned their own bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same sentiments and sympathies as in themselves. Second, there was a change of the system of penal procedure, whereby witness statements and circumstantial evidence became decisive, and the confession was given less weight. What eventually led to the abolition of slavery was a meticulous effort to document and explain to the English exactly what conditions were like on slave ships and plantations, because slavery was out of sight for the average English family. This evidence of barbarity was used to put relentless political pressure on the politicians who finally decided to abolish slavery.

What can spark outrage and motivate Asia is a continued flow of documentation on torture. The elimination of torture depends upon the continued documentation of torture. It is important to expose what is happening and effectively communicate about torture to the broader population, and especially to wake up the 'sleeping middle class'.

Increasingly local grassroots and civil society organizations have come under pressure in many Asian countries. In fact, this trend is worldwide. But human rights organizations working on issues dealing with torture and other grave state violations of rights in particular have experienced harassment, threats and even direct persecution by state agents. It is important to

counteract the shrinking space for civil influence towards common goals. The AAATI alliance is therefore an effort to intensify the debate on the core problems related to the rule of law and criminal justice systems, and to identify where and how it is possible to act on the national stage or on the international arena.

The RCT is a Danish civil society organization working against torture in many countries around the world in close partnership with local human rights organizations. We work through prevention and rehabilitation of victims of torture. In stark contrast to the reality in many Asian countries, Denmark is a country governed by law, with almost no cases of torture. In fact, our work is strongly supported by the Danish government. The non-tolerance of torture is a core pillar in the Danish society and the anti-torture cause is supported by the vast majority of the population, the government, politicians across parliament, and opinion-makers. However, it was not always so. The history in Denmark is filled with cruel examples of state endorsement and use of torture for confession and for punishment. It was only in the year 1837 that the Danish King abolished torture. And it took a long political and intellectual debate and struggle to come to the conclusion that torture is under no circumstances acceptable in our country.

The AAATI is born from a similar vision as the RCT: to secure a world free from torture. We share a commitment to the long historical struggle against torture. The vision of a torture-free world comes from the necessity to create and expand alliances across national boundaries and between change agents and progressive forces. We are confident that the foundation of the AAATI will create a broader movement that will bring about a stronger engagement of progressive forces working for better results through innovative actions against torture.

“The vision of a torture-free world comes from the necessity to create and expand alliances across national boundaries and between change agents and progressive forces”

Why the Asian Alliance Against Torture and Ill-Treatment

Basil Fernando, Director, Policy & Programme Development, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong

The idea that we have to form the Asian Alliance Against Torture and Ill-Treatment comes after almost 15 years of work to introduce the idea of the elimination of torture and ill-treatment to Asia. When the Asian Human Rights Commission started work on torture, we were pioneers in the region. The human rights movement in Asia did not pay much attention to this problem at that time. Perhaps many thought that it was too big a problem to be addressed. However, in our work we have found so many friends from almost all countries of Asia, and we have also found that the desire to address this issue firmly is very much a part of the consciousness of the ordinary folk in Asia.

Torture in Asia is a problem of the poor. This is not to say that people from affluent classes do not also get tortured. Indeed, there are many of such social backgrounds subjected to torture in almost every country. However, it is still valid to say that torture is a poor person's problem, because it is the poor that are subjected to torture on such a large scale in almost every less developed country. The reason is that torture and ill-treatment are forms of social control of the poor. Torture and ill-treatment are among the basic strategies used to prevent the poor from coming into common association to fight against the forces that keep them poor. This may be a reason as to why often the more affluent social classes in less developed countries show little interest in dealing with the problem of torture and ill-treatment in their societies.

This article is adapted from the keynote speech launching the Asian Alliance Against Torture and Ill-treatment (AAATI), a joint initiative of the Asian Human Rights Commission and the Rehabilitation and Research Centre for Torture Victims, Denmark, held in Hong Kong from 15 to 19 August 2011.

What I will do in this article is to bring up several themes that are relevant to our major concern (which is finding ways to work against the use of torture) and then, correlate them with a view to finding a synthesis. This way we will look at the large picture from a number of points of view.

"When discussing the prevention of torture in Asia, it is essential to examine the contextual differences between developed countries and less developed countries"

Some economic considerations

When discussing the prevention of torture in Asia, it is essential to examine the contextual differences between developed countries and less developed countries. From an economic standpoint, developed countries can be characterized as "economies of modest scarcity", to borrow a term from John Rawls. Indeed, today both Western Europe and the United States have reached a high level of development by means of their capitalist systems. As a result of the creation of wealth in past centuries, their economies do not suffer from problems of scarcity relative to those in other parts of the world. They have resources to deal with the basic wellbeing of members of society, although whether or not they use them effectively is another matter. In any event, modest scarcity determines the possibility of the achievement of human rights in these countries.

Less developed countries do not enjoy modest scarcity. While the situation of different countries under this umbrella term may vary in degree, the overall problem of difficulty in meeting the basic needs of the population remains a major economic challenge.

The contextual difference between developed and less developed countries can be expressed in relation to the principle of the maximizing of minimum share. Over a long period of time, labour movements and other social movements, including philosophical schools, have allowed for a general acceptance of the maximization of the minimum share in developed countries. This means that those who are at the bottom of the economic ladder receive greater attention, as the concept of entitlement and strengthening of the basic minimum share for this stratum of society is built into legislation. Over a long period of time, this concept has become ingrained into the wider social consciousness to the extent that today if measures were taken that would harm the basic economic wellbeing of lower strata, it would generate enormous social protest within these societies. Ultimately, passing the burden of economic crises to those who are already at the very bottom of the economic ladder cannot be easily done in these countries without provoking serious resistance.

In contrast, the principle that is often followed in less developed countries is the minimizing of minimum share. This means that various problems relating to the economy and finances are often resolved by placing the burden on the lowest strata of society, thereby reducing their economic capacity. Often, the poorer sections of society are pushed into destitute poverty by economic measures taken by governments to deal with their budgets at times of economic difficulty. The upper classes and even the

middle classes have agreed to place these burdens on the poor. By means of various forms of state-sanctioned or state-sponsored repression, the poor become increasingly impoverished with no room for resistance to these measures. From the point of view of legal entitlements, there are very few opportunities for the poor to achieve legal redress. If there is an attempt by the poor to resist these repressive measures by way of social movements, then harsher measures are applied to suppress them further. Indeed, extreme forms of violence are part of the strategy of minimizing the minimum share.

“By means of various forms of state-sanctioned or state-sponsored repression, the poor become increasingly impoverished with no room for resistance to these measures”

Another difference between developed countries and less developed countries in the economic sphere is the notion of security. In developed countries, basic securities have now become part of the fabric of society. For example, there are securities relating to healthcare from state institutions, and employment policies to favour the poor. A relatively high level of employment, as well as salaries that allow for a comfortable basic lifestyle are also considered the norm in many developed countries. Moreover, there are unemployment benefits and similar economic initiatives that exist to keep people afloat when they are unable to earn for themselves.

Again in contrast, the situation in less developed countries is often a kind of Dickensian nightmare. There are few standardized health care systems, a lack of subsistence-level salaries even for people who are employed, and there are no unemployment benefits and other safeguards for old age and infirmity.

This brief description of the differences between developed and less developed countries from an economic standpoint helps to explain the wide prevalence of torture in the latter. Governments that do not provide adequately for the basic needs of the people are aware of the protest that this can generate; they are aware of the potential for public backlash. In order to suppress potential protests, law-enforcement agencies and extralegal groups are used to control populations. As such, the violence practiced by these agencies is part of a larger strategy of social control in the context of populations that face great scarcity. Therefore, when we examine issues of torture, we must consider policies that allow state agencies to practice torture and ill-treatment as strategies for societal control.

Some political considerations

A comparison between developed countries and less developed countries from a political viewpoint raises a number of interesting distinctions relating to state development. Europe, which once consisted of many fragmented kingdoms, went through a long process of transformation through the establishment of monarchies followed by democratic revolutions, which led over time to the emergence of sophisticated state structures. Military campaigns played a great role in the process of state creation. The consolidation of states under monarchies

also enabled the development of territorially bounded units. Many big political upheavals pushed states towards the establishment of institutions based on law. Accompanying modernization was the development of a social consciousness, and consolidation of various kinds of organized structures within various professions. The developments of science and technology also encouraged secularization and the predominant place given to reason as the foundation of the state.

A similar process happened in the United States. Separate colonies struggled both for independence from the British and the establishment of this independence under a constitution drew upon political philosophies established in Europe. The state was developed further through a long period of civil war, which transformed the social consciousness of society to great degree. With industrialization and a heavy reliance on technology, the United States emerged as the most powerful state in the modern world.

"Through the process of state development in developed countries, the relationship of the individual to the state has been framed so as to recognize the entitlements of individuals"

Through the process of state development in developed countries, the relationship of the individual to the state has been framed so as to recognize the entitlements of individuals and provide a political and legal structure through which these individuals can assert rights. The basic notions of constitutionalism serve as a foundation of principles relating to the relationship between the individual and the state. Different countries might have different expressions on this issue, but ultimately individual rights and the recognition of liberty together constitute the primary framework within which the relationship between the government and the people is created. Power being based on consensual agreements established through constitutions and laws enables individuals and the state to interact with each other as distinct entities. Although these provisions are constantly negotiated, the basic elements of the relationship are sustained.

The relationship between state and citizens in more developed countries is underpinned by the separation of powers. Again, how separation is expressed differs from country to country, but the notion that the legislature, executive and judiciary are separate branches playing complimentary roles and also operating with checks and balances is accepted. The power of the legislature to make laws and the power of the judiciary to decide on the liberty of the individual and human rights are conceptually entrenched in functioning institutions.

In contrast to all these features, most less developed countries went through a prolonged period of feudalism followed by a long period of colonialism. The creation of the modern state is a recent phenomenon and in many of the countries this process has not yet been completed to any degree, when compared to developed countries. Consequently, there is also precious little recognition of the individual. The citizen is generally considered to be a part

of the state rather than a separate unit with certain legal entitlements. Indeed, the very concept of legal entitlements is rarely adequately recognized in less developed countries.

> "From country to country in Asia there have been some attempts to develop the separation of powers model, but the success of these ventures has been limited"

Similarly, from country to country in Asia there have been some attempts to develop the separation of powers model, but the success of these ventures has been limited. The dominance of the executive is often common, though the degree of dominance varies. The power of the legislature to act independently with regard to the development of laws is often questionable, as is the situation of the judiciary. There are many countries in which judicial power is limited or not recognized at all. Strong, powerful judiciaries exist only in very few countries. By and large, the capacity of the judiciary to protect the rights of the individual is extremely limited.

These overall features of the political structure play a significant role in the use of coercion against individual citizens. In more developed countries, the use of coercion is mediated through legal processes which are also controlled by democratic processes. By contrast, in less developed countries the use of force is naked and direct. Law-enforcement agencies and extrajudicial agencies often have approval to use extralegal violence against individuals.

When discussing the problem of torture and ill treatment, it is imperative that we look at the larger political framework for the approved use of physical force on individual citizens by the state in less developed countries. Much of what happens by way of torture is an approved form of social control. This is the reason that states are reluctant to enforce international norms relating to the absolute prohibition of torture, became it runs contrary to the approved use of torture used within these situations.

A snapshot of political and institutional conditions in some Asian countries

That torture is prevalent across Asia is a given. From the years of work that the AHRC has dedicated to studying torture and dealing with institutions that should enable its elimination, we can summarize the current political and institutional conditions for the combatting of torture country-by-country as follows:

BURMA: Still an effective military dictatorship. No role exists for independent institutions. The police and the courts are subordinated to the military, and totally incapable of addressing the incidence of torture. Civil society is yet to emerge in any substantial way.

CAMBODIA: Still emerging from one of the world's worst human catastrophes, in which established political and legal structures were completely destroyed. Though there is a transition to democracy by way of a new constitution, hardly any independent institutions exist. There is hardly any role for the legislature or judiciary. The system is entirely controlled by the executive. The military has a major role. The police have no independence.

VIETNAM & CHINA: Both one-party states and nominally communist. A transition to capitalism has not been accompanied by political and administrative changes. Both lack independent institutions of the sort required to address torture systemically.

SRI LANKA: Formerly a democracy, now an authoritarian system under an all-powerful executive president. Legislative and judicial power has diminished. There are no independent institutions. Every aspect of the system is politicized. External agents are in control of policing. There is widespread corruption. The rule of law has virtually collapsed.

PAKISTAN, BANGLADESH & INDONESIA: States in transition from military dictatorships to democratic governments. Military institutions, practices and legacies continue to have an enormous impact. Civilian policing is still rudimentary.

THAILAND: A monarchical system in slow transition to democracy. The military still plays a major role in the system. Policing is built on a military model. Corruption is widespread. Most government institutions operate outside of the democratic process and according to their own objectives and interests.

NEPAL: A monarchy for a long time, and now in transition to democracy. Due to long years of internal conflict there is enormous instability. There is not yet an agreement on the nature of the constitution. Political conditions at time border on anarchic. There is also widespread corruption. Civilian policing has not been established. The military still plays a strong role.

THE PHILIPPINES: Basically a democracy; however, with an internal system of administration that retains authoritarian features due to the legacy of the Marcos dictatorship. A military-police nexus prevents effective reform. Corruption is widespread and affects the independence and functioning of important institutions. Gun culture is widespread.

INDIA: A democracy in which social contradictions such as caste and tradition have created serious obstacles to the development of democratic institutions. A system of civilian policing exists and the military does not have any influence over government. There is widespread corruption. There is however greater room for civilian interventions and protests.

SOUTH KOREA: After the defeat of military government it has emerged as a strong democracy. Institutions are independent and there is less corruption than most other Asian countries. Policing is controlled by the strong prosecution system. The prosecutorial system is seen as too powerful. Longstanding attitudes and fears relating to North Korea affect its internal developments.

Some social and cultural considerations

"Social control by way of torture was an accepted norm in pre-modern societies; in many countries, attitudes towards the use of torture as a legitimate form of social control remain"

Industrial revolutions transformed European countries socially and culturally, as have corresponding developments in science and technology. These social shifts have affected wider opinion and helped to bring about secularization of government. Religious reforms have impacted on the basic value systems of people, allowing them to adjust to new circumstances. Today these countries have achieved a complete transformation from medieval times. The religious foundation of society has been altered irreversibly, as religions themselves have gone through deep transformations, compelled by such movements as the Reformation. At present, large populations in these countries live outside the grip of religion and for all purposes, cultural life is secularized. The development of music, art, poetry and dance reflect this great transformation. Furthermore, basic notions of sexuality have undergone considerable changes and attitudes towards romantic and sexual relationships today give more recognition to the freedom of the individual than they did in earlier times.

This is not the case in most less developed countries. Of course, the degree to which social or cultural change has occurred differs from place to place. However, it can be said that most less developed countries remain caught in the transition between feudal and modern capitalist societies. Unfortunately, the societal norms of feudal times often continue to exist to the present day. For example, feudal attitudes relating to woman's place in society illustrate the conflict between the modern and the free modern. Moreover, there are serious taboos relating to women's freedom of choice, ability to gain education and participate freely in social life. These taboos are often reinforced through extreme forms of violence and often very little can be done by way of the enforcement of laws to control this violence.

Feudal attitudes extend across all areas of society and impact on the relationship of people to authority. Authoritarian forms of social control are often prevalent and societal attitudes towards these controls are caught between free modern conceptions and feudal attitudes. A change similar to that which took place in Europe does not seem imminent in Asia, where societies remain pre-modern in their lack of recognition of the individual. Although there is in some places a greater recognition of the individual, intense conflict between authoritarian structures that undermine individual rights and the assertive individual continues in many of these.

These societal factors affect the attitudes of state agencies with regard to the use of coercion and violence. Social control by way of torture and very serious forms of physical punishment was an accepted norm in pre-modern societies. Since a significant transformation has not taken place in many countries, the attitudes towards the use of torture and other forms of violence as legitimate forms of social control remain.

Attitudes regarding the elimination of torture

Attitudes regarding the elimination of torture and ill-treatment in Asia can be classed as follows:

1. *Never-ism:* Some say that torture is a necessary response to weakness in human nature. They hold the view that torture can never be eliminated. They give as reasons such as that torture is a traditional practice, or that due to resource limitations torture is the only way to deal with crime and disorder. Some regard torture as bad but as a necessary evil.

2. *Gradualism:* Some are of the view that torture being such a widespread practice cannot be eliminated quickly. It has to be done gradually. They seem to have no clear idea of when and how torture can be eliminated, or about what gradual steps should be taken to eliminate torture. Often, talk of gradualism is a way of evading the issue.

3. *Immediate-ism:* This is the view of civil society, United Nations agencies, and also human rights organizations. No Asian government seems to agree with this perspective.

Some legal considerations

The above economic, political, social and cultural considerations are all relevant in assessing the differences in legislation to address torture and ill-treatment between more developed and less developed countries.

Perhaps one of the greatest achievements of western civilization is the development of the concept of equality before law. While the notion initially developed in relation to trade and commerce, it has trickled down into numerous other legal areas. The centrality of this notion to law is profoundly important when studying the situation of human rights around the world today. All struggles against discrimination, from the prohibition of the slave trade in the United Kingdom to the abolition of slavery in the United States, were possible because of the recognition of the principle of equality before law. This principle has been well established as a fundamental norm of legal systems in the west, and was extended over time to contend with conflicts between principles and social practices in these societies. Indeed, this principle has been expanded to encompass gender relationships, the recognition of the rights of children, those of the disabled, and so on. Workers' movements in particular have used the notion of equality before law to fight for improved working conditions or higher wages. Laws relating to labour, rent and financial structures to protect various rights have developed through this notion. In common law countries, the entirety of writ jurisdiction was developed under the notion of equality before the law.

> **“ In many less developed countries, the notion of equality before the law is accepted in an abstract, conceptual sense but not in practice ”**

In many less developed countries, the notion of equality before the law is accepted in an abstract, conceptual sense but not in practice. Many of the legal systems in these countries are beset with problems of delivering justice on the basis of equality before the law. There is a common saying that the law is available only for the rich and not the poor. Legal aid, which should exist in order to ensure that the poorer sections of society have access to the law, is almost non-existent in many countries. Even when it does exist, it is incapable of assisting lesser income groups to an adequate degree.

The application of the law very much depends on the attitudes of judges, lawyers and other professionals who play an important role in the administration of justice. In developed countries, many movements have worked to develop new approaches where equality before the law can be realized to a greater extent. Of course, this has not been perfectly achieved in any country; however, it can be easily shown that in less developed countries, the attitudes of judges, lawyers and other professionals are still mostly elitist, and there is a vast gap between the realities of these countries and the notions of justice which remain in the minds of the professional groups.

Such understandings affect attitudes relating to violence and authority. Both of these factors affect the manner in which international norms relating to the prohibition of torture and ill-treatment are practiced. There needs to be vast changes in understanding of these matters, and a commitment to international norms on the part of judges, lawyers and other professionals if the notion of equality before law, which is the foundation of all rights and a prerequisite for the prohibition of torture, is to be given effect in these countries.

The administration of justice is, generally speaking, adequately funded in developed countries. Policing systems have the money to hire and train people and acquire technical resources so as to effectively and competently function. The same principles apply to prosecuting departments and the judiciary. Adequate numbers of judges, prosecutors, courtrooms and other facilities enable judicial systems to function in a reasonably competent and effective manner.

In less developed countries, the situation is very different. Funding for the administration of justice is not usually seen as a priority. Often, budgetary allocations are far less than what is required to maintain even existing standards, let alone to make improvements. Often, structures are obsolete and overloaded, causing great problems, such as enormous delays in court systems. In India, it would take the courts over 300 years working at their current pace to deal with the legal backlog that exists today. There are many other countries facing such problems and as a result a normal criminal trial can take anything between five and 20 years. The biggest complaints about inadequate funding concern a lack of adequate provisions for policing, prosecutorial and judicial agencies. Often they come from

professionals, as well as those who have a leadership capacity within these agencies. However, despite the outcry, which may persist for decades, no significant changes take place.

Dealing with the problem of adequate funding for the administration of justice is an essential element in dealing with the overall strategy of preventing torture and ill treatment. The systemic problems within the administration of justice are a very important contributing factor to the prevalence of widespread torture.

"The adequacy of funding for police, courts and prosecutors is closely linked to the incidence of corruption in a country"

The adequacy of funding for police, courts and prosecutors is closely linked to the incidence of corruption in a country. In more developed countries, there has been a long struggle to eliminate corruption, and various laws and practices have been developed to this end. The call for accountability and transparency is often made in these countries and the possibility for achieving this does exist. While no country can claim to be completely rid of corruption, it can be argued that the elimination of corruption has been achieved on many levels.

In contrast, most less developed countries are seriously lagging behind. Corruption prevails in all areas of life and therefore factors heavily within the administration of justice. Extortion is often the cause of torture and its practice often receives tacit approval by state agencies. Because there is such approval, the state is unwilling to take firm action against the corruption of officials. As a result, extortion and extortion-related torture takes place, reinforced by guarantees of impunity.

Some basic questions

Can torture be eradicated in any country without an overall improvement of improvement of basic institutions for administration of justice?

Can work to eradicate torture contribute to the overall project of reforming the basic institutions related to justice by revealing the extent and depth of injustice prevalent in a society and demonstrating casual links in the factors that are root causes of torture and other injustices?

Can the eradication of torture in less developed countries point to the defects of development theory, which has not adequately incorporated development of public institutions of law?

A convergence of views

"In almost all Asian countries, public justice systems are profoundly dysfunctional"

These are some of the main areas that need to be discussed in dealing with and building an alliance of countries against torture and ill-treatment in Asia. The task may sometimes seem daunting, however without realistic appraisal of these problems, the mere repetition of various international norms will not result in the creation of any significant changes against torture and ill-treatment. Beyond the repetition of international norms, there is a need to recognize the existing problems and develop an approach that encourages accountability so as to further human rights.

These considerations the Asian Human Rights Commission has worked out on the basis of over 15 years of work on the problem of torture in Asia. However, it is also finding a convergence of its views with those of some organizations in the west who instead of simply iterating human rights norms have also spent years working in specific contexts and studying conditions, upon which they have reached similar conclusions.

Among these, the chairman of the International Justice Mission, Gary Haugen, in a talk given at the University of Chicago Law School during February 2010 raises similar issues to those set out above. (Audio of the talk is online at: http://www.law.uchicago.edu/audio/haugen021810.)

Haugen's talk is not on the elimination of torture and ill-treatment specifically, but in general about the realisation of international norms and standards in less developed countries. After observing the work of the global human rights project relating to the articulation of international norms as the initial stage in this process, and the development of domestic legislation embodying international norms into domestic laws, he observes that these achievements will not reach the people in less developed countries unless public institutions for the administration of justice exist. He makes the following observations:

> Looking back… one can see that two generations of global human rights work have been predicated, consciously or unconsciously, upon assumptions of a functioning public justice system in the developing world which, if incorrect, effectively undercut the usefulness of those efforts for their intended beneficiaries. Now, absent an effective enforcement mechanism, the great work of the first two generations of the international human rights movement can deliver to the poor only empty parchment promises.

From the long experience of the AHRC we can confirm this observation about global human rights work being predicated upon the assumption of the availability of a functioning public justice system similar to that of developed countries existing in less developed ones. The AHRC has over some years and through very extensive documentation—much of it published in this journal, *article 2*—demonstrated that such an assumption is completely baseless. In almost all Asian countries, public justice systems are profoundly dysfunctional. Therefore, it is imperative

that the global human rights movement should look as a matter of priority into the ways to deal with the issue of dysfunctional public justice systems, if the long years of work on the articulation of international norms and the adoption of domestic legislation on the basis of such norms are to bear any fruit.

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Haugen further observes:

> This reality should, I think, radically impact the way we prioritize the investments of the human rights movement in the 21st century. Suppose for example that scientists worked feverishly for two generations to develop and fill warehouses with miracle vaccines that hundreds of millions of sick people in the developing world desperately needed but could not access. The absence of a delivery system that would effectively carry those vaccines to those who needed them the most would take nothing away from the medical advances the scientists had achieved, but it would suggest an urgent new priority for the international public health community. Likewise, it takes nothing away from the historic significance of the modern human rights movement to say that the brokenness of the public justice systems in the developing world render the promise of that movement largely undelivered to those who need it the most. But it suggests the urgent need for a fundamental shift in the agenda for human rights in the twenty first century. After sixty years of developing and refining vaccines that rarely reach the bloodstreams of actual sick people, we must now shift our focus toward delivering those vaccines to those who are dying without them.
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> …
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> Now given all this, one might expect that remedying the failure to provide the rule of law to the poor would become the central focus of human rights efforts. Yet few if any international human rights organizations or development agencies focus specifically on building public justice systems that work for the poor. These agencies do other very important work but none measures organizational success by its ability to help police and courts in the developing world bring effective law enforcement to the poor. None.
>
> The problem is not that these agencies fail to see the dysfunction of public justice systems in the developing world. Indeed, some of their researchers have been meticulously documenting the problem for decades. Why then, have none of these great international agencies made it a fundamental operational priority? First, international human rights organizations and development agencies manifest doubts that building functioning public justice systems in the developing world is even possible. However, as a historical matter, the fact that almost all functioning public justice systems in the developed world were once malfunctioning suggests otherwise. For example, 125 years ago, police and courts in the United States were nothing like the professional, albeit still very imperfect, law enforcement system that we generally take for granted. In fact, they very much resembled the public justice systems that we see in the developing world today.

These observations are completely consistent with the findings of the Asian Human Rights Commission, independently reached through intense work in several of the countries of Asia. Therefore we can say, happily, that at least so far as some in the west are concerned there is a convergence of views with those of our own organization.

Asian examples of eradication of torture through institutional reforms

HONG KONG: The introduction of the Independent Commission Against Corruption reformed police discipline, paving the way for the elimination of the use of torture.

SOUTH KOREA: Mass actions to oust a military regime and replace it with a democratic government encouraged considerable improvements in administration leading to a significant overall reduction in the use of torture.

Some important ideas that emerged from the first consultation of the Asian Alliance Against Torture and Ill-Treatment

An alliance working towards the elimination of torture and ill-treatment already effectively exists in Asia. This alliance is the result of consistent and strenuous work done by the Asian Human Rights Commission, which has gathered around it several partners from countries in Asia. Some of these partners have quite extensive networks of their own, as in Sri Lanka and Nepal. In many other countries also initial work has been done. The AHRC's Urgent Appeals system has provided a forum for many activists to engage in global advocacy against torture, as well as many other human rights violations, through regular Internet-based networking with a large number of associates. Already there is considerable work on documenting torture, as well as the providing of various types of assistance to torture victims, such as medical assistance, psychological assistance, legal assistance and assistance in advocacy and lobbying. The Asian Alliance Against Torture and Ill-Treatment (AAATI) should be built on this existing network by way of collaboration to strengthen the work that has already been done and by adding new initiatives and bringing about a closer association of all those who are engaged in this work. Closer associations can be formed around the issue of torture among groups working on diverse issues, such as those focused on economic, social and cultural rights and others who are engaged in issues such as assistance to refugees and other vulnerable groups.

The alliance should be built on a comprehensive concept with its core ideas being expressed clearly. The issue of accountability also needs to be placed in the forefront. Reforms of basic institutions of justice should always be accompanied by the call for accountability, made with reference to the reality of conditions in less developed countries, lest the call be meaningless because basic institutions of the administration of justice are not given the funds to develop adequately deal with the problems faced. Calling for accountability without fundamental institutional reform is illusory, just as the idea of fighting impunity without

an adequately functioning justice system is illusory. These matters must become issues of international discussion and debate. The sooner such discussion and debate takes place, the greater will be the possibilities for the elimination of torture and ill-treatment. Intellectual energy should replace the present-day apathy in this regard.

Among the alliance's other core concepts must be the protection of the poor. The protection of the victim of torture as well as the human rights defender fighting for the interests of the victim should be taken into serious consideration. There are intense pressures against those who seek redress and also against those who promote the interests of the victims. The alliance should come to a greater understanding of protection in all its aspects, and also develop various forms of advocacy for victims and others who need protection. Providing opportunities for victims to air their own ideas and to share their experiences should also be one of the regular pursuits of the AAATI. Through partner organisations such work should be carried out consistently.

"The protection of the victim of torture as well as the human rights defender fighting for the interests of the victim should be taken into serious consideration"

The concepts expressed in United Nations conventions should also be situated centrally among the alliance's core ideas. UN mechanisms for the protection of human rights are of the greatest significance in promoting the elimination of torture and ill-treatment. The recommendations of the Committee Against Torture as well as the Special Rapporteur against Torture should be disseminated widely and pursued consistently.

The alliance should have a comprehensive approach to the economic, political, social, cultural and legal aspects set out above, which together contribute to factors enabling torture. Effective, long-term work not only provides data with which to reveal the forces at work and extent of torture, but also how the incidence of torture and ill-treatment is tied to political, economic, social, cultural and legal systems. We need such a comprehensive understanding of the problem both for the benefit of our own work and also to attract the attention of others, including scholars in a variety of fields. The alliance should provide a forum for scholars from various disciplines to come together and give their perspectives on the issue based on their respective disciplines. It should also have meetings for parliamentarians, and professional groups with direct involvement in the issues—such as doctors, psychologists and lawyers.

Victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as post-traumatic stress disorder and many other psychological consequences are little understood in our societies. It is not only the victims that suffer such psychological consequences but also the officers who engage in torture. This psychological aspect should be highlighted very much through the alliance, because

a much larger number of people will support it if the consequences are better understood in society. Governments also would direct greater attention to the issues if highlighted properly.

"Engagement in documentation work requires a moral belief in the search for the truth as a powerful agent of change"

Documentation is the most important activity in any human rights work for the prevention of violations, and this is the case also regarding torture and ill-treatment. During the inaugural discussion of the alliance, participants reflected upon the work done by the activists for the prohibition of slavery in the United Kingdom. The manner in which slaves were being transported in ships was meticulously documented. Pictures graphically portrayed the inhumanity and cruelty involved in this trade. These documents shook the conscience of many people in the United Kingdom. It was due to such advocacy that the slave trade was prohibited, even though the prohibition cost the country large sums of money in lost revenue and in new costs incurred through use of the navy to stop the trade.

On the issue of torture and ill-treatment much more documentation is needed in order to expose the frequency as well as the utter brutality and senselessness of such use of violence on human beings. The causes of torture and ill-treatment also need to be documented meticulously, as do the links between the backward and ineffective justice systems which allow governments to adopt a policy of torture and the failed attempts of victims and human rights activists to obtain redress for such violations. For example, the scandalous length of delays in criminal trials as well as the negligent attitudes of judges, prosecutors and the investigators who have become accustomed to such delays in some countries is a major cause of impunity for torture and ill-treatment. Those who live in the developed world often fail to understand such links between torture and ill-treatment and the obstacles to attempts to eliminate them. Documentation and incisive analysis is essential to address such misunderstanding.

Engagement in documentation work requires a moral belief in the search for the truth as a powerful agent of change. The capacity to challenge official versions of events and approved explanations of institutional arrangements can be built only on a moral foundation. The capacity to seek out victims, record their versions of events and make observations on the circumstances under which they are forced to live is elementary to documentation work, and it too must have a moral basis.

After documentation, the next most important activity is effective communication. Modern technology has created huge advantages for the present generation of activists that did not exist in previous times. The potential to communicate is practically unlimited. However, activists are often rooted in habits formed before this period. It is necessary to make activists aware of the full potential of communication under these new circumstances. The creating of such awareness should be accompanied by the provision of opportunities for exposure and training for the use of new technologies in communications.

Investment in such technologies in all local associations linked to the AAATI would likely produce great results. The transition from 'never-ists' to gradualists and in turn from gradualists to 'immediate-ists' could be achieved rapidly by better use of communications facilities. The AAATI should very consciously develop its people and technology to make the best use of the facilities and mentalities of the communication age.

The AAATI should also communicate constantly with UN agencies on the actual situation in various countries, so as to bring about a greater appreciation of the problems faced in reality among the staff and mandate-holders of those agencies. There are many aspects of the UN mechanisms that need to be improved in order to achieve their aims. One very important area is to bring to the realisation of these agencies that the implementation of international norms requires local institutions for the administration of justice that are able to provide the kind of redress required under international norms. Mere recommendations to governments to investigate abuses and to prosecute offenders are of little use if the justice system concerned is beset with such problems and contradictions as to make it incapable of doing that which has been recommended. UN agencies should develop their capacities to assess the adequacy and credibility of relevant government institutions. Problems such as the absence of witness protection, delays in adjudication and corruption should be constantly raised, and UN agencies should develop their capacities to do work on these issues.

"Recommendations to governments to investigate abuses and to prosecute offenders are of little use if the justice system concerned is beset with such problems and contradictions as to make it incapable of doing that which has been recommended"

The Armed Forces (Special Powers) Act, 1958 in Manipur & other states of Northeast India: Sanctioning repression in violation of India's human rights obligations

REDRESS, UK; Asian Human Rights Commission, Hong Kong, & Human Rights Alert, Manipur, India

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 50 years. 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 northeastern India with the longest history of the military abusing its powers under the Act and with a vibrant civil society indefatigably denouncing those violations.

This special feature consists of edited text from a report of the same title co-authored by staff of the Asian Human Rights Commission, Hong Kong; REDRESS, a London-based human rights group (www.redress.org) and Human Rights Alert, based in Imphal, Manipur, India. The original 31-page report was issued on 18 August 2011.

The human rights obligations analysed in the present report concern, first of all, those flowing from the Constitution of India, 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, and 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 Government of India set up a special committee to review the Act; the committee was of the firm and unanimous view that the Act should be repealed"

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. 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 to a challenge before the Supreme Court of India.[1] However, in its judgement of 1997, the Supreme Court did not address the Act's compatibility with international human rights law, ignoring a specific request of the Committee. Since then, India has not submitted any further periodic reports, thereby effectively depriving the Committee of the opportunity to reconsider the matter.[2]

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. 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".[3] The committee emphasised that it found it impossible to recommend that the Act remain 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"

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, the Asian Human Rights Commission and Human Rights Alert 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 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.

The AFSP Act in context

Historical background on enforcing the Act in Manipur

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

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 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 has been 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 northeastern 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". The AFSP Act replaced the ordinance later that year. The Act was passed by both Houses of Parliament on 18 August 1958 and received presidential assent on 11 September 1958. Subsequent amendments to the Act, which mainly dealt with the territorial scope of its application, were enacted in 1960, 1970, 1972 and 1986.[4] Even though there was some resistance within the parliament against the passing of the Act, the majority prevailed and the law was passed. Today the Act is applicable to the northeastern 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.

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 under section 4(c)(d) allows the military officers involved to "use such force as may be necessary" 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 extraordinary powers to the military, including the powers to detain persons, use lethal force, and enter and search premises without warrant"

Section 4 of the Act grants the following powers 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:

Use of lethal force: 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: A military officer can arrest, without warrant, any person who committed a cognisable offence [an offence against which ordinarily police are authorized to act without requiring prior consent from a court] 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: 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.

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 in section 6 that: "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" (emphasis added).

Application of the AFSP Act in practice, and responses

"Action taken pursuant to the Act reportedly led to 260 killings in 2009 alone"

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 northeastern states of India. Even the proponents of the Act have acknowledged that the general administration in Manipur is wholly dependent on the security forces.[5]

Action taken pursuant to the Act reportedly led to 260 killings in 2009 alone.[6] The military has also widely used its powers to detain persons. As held in a number of judgments, those arrested pursuant to the Act remained in military custody without being brought before a judge for prolonged periods of time, such as five days or even two weeks.[7] In several cases, courts found that persons who had been arrested by the military under the Act disappeared subsequently, which suggests that they have become victims of enforced disappearances.[8]

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.[9] 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, 22 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.[10]

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.[11] No investigation followed, and the Indian Army Vice Chief of Staff explained that what happened to Manorama had been "unfortunate".[12] 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.[13] 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 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.

"Private admissions of military officers characterise civilian casualties as 'errors in judgment' in the application of the Act"

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 share angle or more than 60 degrees".[14] 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 2011, which led to the killing of Ms. Waikhom Mani in the village of Nongangkhong, and assault against the justice of the Guwahati High Court in Imphal on 20 April 2011.[15]

Private and confidential admissions of military officers reportedly characterise civilian casualties as "errors in judgment" in the application of the Act.[16] 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.

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.[17] 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 northeastern part of India. Sharmila has been repeatedly arrested on charges of attempt to commit suicide under section 309 of the Indian Penal Code, and forcibly fed by her prison wardens. Her protest is probably the world's longest hunger strike.[18]

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 human rights treaties and customary law"

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

The ICCPR, 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 has also been a state party to the International Convention on the Elimination of All Forms of Racial Discrimination ("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 in article 2(1)(c) states parties "to amend, rescind or nullify all laws and regulations which have the effect of creating or perpetuating racial discrimination".

India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997. Although it has not yet ratified it, under article 18(a) of the Vienna Convention on the Law of Treaties, the very act of signing entails an international obligation not to defeat the treaty's object and purpose. 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* irrespective of whether or not a state is a party to a particular treaty.[19] 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.[20]

Review of the AFSP Act

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*.[21] 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, that the courts must have regard to international conventions and norms when interpreting domestic statutes.[22]

> **"The position of the Supreme Court of India carries immense persuasive weight when interpreting the constitutional *vires* of the Act"**

The position of the Supreme Court of India carries immense persuasive weight when 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 1996 the Supreme Court extensively drew inspiration from the General Comment adopted by the Human Rights Committee to decide upon the question of reservations.[23] 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 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.[24] 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".

"Under Indian domestic law, wherever possible, a statutory provision must be interpreted consistently with India's international obligations"

The principle was developed further and applied without hesitation in the *Vishaka* case [cited above] 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.

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.

Considering the question of domestic applicability of the principles of customary international law the court did not have any hesitation in holding that:

> [O]nce 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 Courts of Law.[25]

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:

> 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.

"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"

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 five 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.[26] The authors of this report are not aware of a single case prosecuted so far.

Committee to review the Act set up 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 Reddy 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.[27] Having conducted extensive studies and consultations, the committee reported in 2005 that it had formed "the firm view" that the Act should be repealed as "too sketchy, too bald and quite inadequate in several particulars", emphasising that "recommending the continuation of [this] Act, with or without amendments, [did] not arise".[28]

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 become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness".[29]

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

> "The UN Human Rights Committee underscored its concern about the fact that the Act had remained in force in certain areas of India for decades, thus effectively making emergency powers permanent"

In addition to the Jeevan Reddy Committee, the Second Administrative Reforms Commission in its fifth Report of 2007 also recommended the repeal of the AFSP Act. The Commission stated that "after considering the views of various stakeholders [it] came to the conclusion that AFSP [Act] should be repealed".[30]

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

> [I]nquired 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.[31]

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.[32] 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*.

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. It further stressed that decisions on continued detention must be taken by an independent and impartial tribunal and that a central register of detainees be maintained and shared with the International Committee of the Red Cross.

The Committee noted with concern [at paragraph 23] 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".

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 paragraph 21], in particular, its concern

> [T]hat 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.

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".[33] 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. 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. 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.

"The fourth periodic report of India to the UN Committee was due in 2001; it has not yet been submitted, which means that it is overdue by 10 years"

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 10 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 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.[34] 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 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.

> **“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”**

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, specifically underlining 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 northeastern States which are inhabited by tribal peoples".[35]

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".[36]

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.

Compatibility of the AFSP Act with international human rights law

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]".[37]

Most armed groups, with the exception of the more marginal ones, have now ceased hostilities in Manipur. The remaining ones are reportedly mostly involved in extracting money from the local population rather than in fighting governmental forces. 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" rather than an active armed conflict.[38]

If 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]."[39] 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".[40] 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."[41]

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 to life" and "outrages upon personal dignity" of those persons "shall remain prohibited at any time and in any place".[42] This fundamental clause of international humanitarian law is undoubtedly recognised as a norm of customary international law applicable in all types of armed conflicts.[43]

"In relation to the issues of deprivation of liberty and associated judicial guarantees, 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'"

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

"The right to life has been characterised by the Human Rights Committee as 'supreme' and 'basic'; it includes both so-called negative and positive obligations for states"

It is to be noted at the outset that 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 ICJ, 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.[44]

2.1. The right to life

The provision of the AFSP Act containing the authorisation to use lethal force 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 has been characterised by the Human Rights Committee as "supreme" and "basic".[45] It 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 "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".[46] 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".[47] 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; 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.[48] 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.[49] 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.[50]

"The Act provides no discernable limitations or safeguards aimed at the prevention of abuse by the military officers involved in maintaining order"

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, and those affected and/or their legal counsel should have access to related administrative and judicial proceedings.[51] 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" including "appropriate action against those found guilty".[52]

(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 officers 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 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 insofar 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.

"The Act, or any other applicable legislation, fails to ensure that prompt, independent, and effective investigations into cases of the use of lethal force"

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, as well as its provisions on the use of necessary force when effecting arrest, entering and searching, 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."

(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, and therefore relates not only to acts that cause physical pain "but also to acts that cause mental suffering to the victim".[53] 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.[54]

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 Punishment, and developed by the European Court of Human Rights in its jurisprudence on article 3 of the European Convention on Human Rights.[55]

"A person arrested by the military is not only prohibited from having any contact with the outside world, there is also no procedure in place to have the very fact of his or her detention acknowledged"

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.[56]

(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.[57] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 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 [principles 17 and 18], notification of the next-of-kin (or other appropriate person) of the whereabouts of a detainee [principle 16], 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 [principle 24].[58] 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.[59]

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".[60]

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. This is evident in Manipur where allegations of torture abound in situations where individuals are detained under the Act.

"The Act vests military officers with the power to use 'necessary force'; there does not appear to be any guidance or jurisprudence that would define the term in line with international standards"

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.[61] As held by other human rights courts, the suffering and fear inherent in this form of detention constitutes inhuman and degrading treatment.[62] 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".[63]

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.[64]

(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".[65] 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. 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.[66]

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.

2.3. The right to liberty and security of person

The provision of the AFSP Act containing the authorisation to arrest persons is incompatible with article 9 of the ICCPR which provides the following [in subsection 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."

(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".[67] In other words, remand in custody must not only be lawful but also reasonable and necessary in the circumstances.[68]

"The necessity to keep an individual in custody must be justified throughout the period of detention; even where an initial arrest was considered reasonable and necessary, the subsequent detention may become unreasonable"

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).[69] 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".[70] 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.

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:

1. 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.

2. 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.

3. 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.

4. The right of anyone who has been unlawfully arrested or detained to be compensated [article 9(5)] is an important safeguard that provides victims with the right to reparation and establishes corresponding state responsibility.

"A statement of the state party to the ICCPR constitutes a reservation if, irrespective of its form, name or title, it purports to exclude or modify the legal effect of the relevant treaty"

The temporal requirements under article 9(2)(3)(4) have been interpreted in the caselaw 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.[71]

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,"[72] specifying that this is to be determined on a case-by-case basis.[73] 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.[74]

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 be considered "without delay".[75] 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),[76] 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.[77]

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.[78]

(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 persons claiming to be victims of unlawful arrest or detention against the State.[79]

A statement of the state party to the ICCPR constitutes a reservation if, irrespective of its form, name or title, it purports to exclude or modify the legal effect of the relevant treaty.[80] 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; (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; and, (c) be specific and transparent.[81]

"The UN Human Rights Committee firmly rejected reservations that subject and confine the ICCPR's provisions to domestic law"

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".[82] 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".[83]

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.[84]

(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 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 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"

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. 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 [as per article 14(3)(b)(g) of the ICCPR].

2.4. Freedom of assembly

The provision of the AFSP Act containing the authorisation to use lethal force 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."

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; and, 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.[85]

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.

"The ASFP Act's provision that provides immunity for military officers 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"

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."

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 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.

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.[86] 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.

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 Law specify that the right to an effective remedy has two components. It comprises a procedural right to effective access to justice and a substantive right to receive adequate forms of reparation, 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.

"The all-embracing immunity provision of the AFSP Act effectively precludes the possibility of redress for victims of serious human rights violations"

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.[87] 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.[88] 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.

(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.

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".[89] 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.[90] There has been no change in the law or in practice that would undermine the validity of the Committee's findings in this regard.

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"[91] 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"

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.

Conclusion & recommendations

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 northeastern 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 AFSP Act is essentially an emergency legislation and therefore, by definition, its temporal scope of application should be limited and clearly defined"

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 rights but also erode the mutual confidence between the authorities and society and may contribute to the delegitimation of the state as a whole.

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, the AHRC and the 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:

1. Repeal the AFSP Act in entirety and with immediate effect.

2. 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.

3. 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:

1. 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.

2. 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.

3. 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.

Notes

[1] Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add. 81 (8 April 1997), at para. 18.

[2] 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.

[3] See: http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf, at 74.

[4] 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.

[5] See for instance A. Kamboj, Manipur and Armed Forces (Special Powers) Act 1958, in 28 *Strategic Analysis* (2004), at 618.

[6] Interview with Mr K.S. Subramanian, a retired Indian Police Service officer, in *The Times of India* (21 December 2009).

[7] *CLAHRO v. PL Kukrety*, (1988) 2 GLR 137. *Bacha Bora v. State of Assam*, (1991) 2 GLR 119.

[8] *Nungshitombi Devi v. Rishang Keishang, CM Manipur*, (1982) 1 GLR 756, and *Luithukla v. Rishang Keishing*, (1988) 2 GLR 159.

[9] South Asia Human Rights Documentation Centre, *Armed Forces Special Powers Act: A Study in National Security tyranny*, undated.

[10] R. Shukla, Why Temperance Will Not Work With AFSPA, *in ManipurOnline* (6 November 2010).

[11] G. Pandey, Woman at the Centre of the Manipur Storm, in *BBC World* (27 August 2004).

[12] Manorama Devi had links with terrorists: Army, in *Times of India* (11 December 2004).

[13] Manorama Devi rape and murder: Assam Rifles indicted, in *NDTV* (11 September 2010).

[14] Amnesty International, Briefing on the Armed Forces (Special Powers) Act (8 May 2005).

[15] Reported in *Imphal Free Press* (4 April 2011), at 1; and, in *The Sangai Express* (22 April 2011), at 1 and 4.

[16] Human Rights Watch, "These Fellows Must Be Eliminated": Relentless Violence and Impunity in Manipur (2008), at 44-45.

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

[18] 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.

[19] *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.

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

[21] 1998 AIR 431.

[22] *Vishaka et al. v. State of Rajasthan et al.*, 1997 AIR 3011.

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

[24] *Kesavananda Bharathi vs. State of Kerala*, (1973) Supp. SCR 1.

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

[26] A case that could be considered to have come close 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.

[27] 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.

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

[29] Report of the Committee, at 75.

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

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

[32] 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.

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

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

[35] 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.

[36] 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.

[37] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delaliæ 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.

[38] Human Rights Watch, "These Fellows Must Be Eliminated": Relentless Violence and Impunity in Manipur (2008), at p. 19-20.

[39] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports, 2004, at para. 106.

[40] 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.

[41] 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.

[42] Common article 3 of the four Geneva Conventions of 1949.

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

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

[45] 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.

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

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

[48] 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. 4-5.

[49] *De Guerrero v. Colombia*, at para. 13.2.

[50] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, at para. 8.

[51] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, at para. 22-23.

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

[53] 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. 5.

[54] Human Rights Committee, General Comment No. 20, at para. 2.

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

[56] Human Rights Committee, General Comment No. 20, at paras. 2 and 8.

[57] Human Rights Committee, General Comment No. 20, at para. 11.

[58] *Mika Miha v. Equatorial Guinea*, Human Rights Committee, UN Doc. CCPR/C/51/D/414/1990 (8 July 1994), at para. 6.4.

[59] Human Rights Committee, General Comment No. 20, at para. 11.

[60] 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

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

[62] *Avdo and Esma Palić*, Human Rights Chamber for Bosnia and Herzegovina, Case no. CH/99/3196, Decision on Admissibility and Merits (11 January 2001), paras. 73-74.

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

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

[65] Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly Resolution 34/169 of 17 December 1979, article 3.

[66] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, at para. 5.

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

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

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

[70] 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.

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

[72] 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.

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

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

[75] According to 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.

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

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

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

[79] United Nations Treaty Collection, Status of Ratifications of the International Covenants on Human Rights, Declarations and Reservations.

[80] 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.

[81] *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. Human Rights Committee, General Comment No. 24, at para. 8 and 19.

[82] Human Rights Committee, General Comment No. 24, at para. 19.

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

[84] *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.

[85] 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 and 27.

[86] Human Rights Committee, General Comment No. 31, at para. 18.

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

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

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

[90] Human Rights Committee, Concluding Observations on the Third Periodic Report of India, at para. 21.

[91] 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].

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