Reconciling AFSPA with the Legal Spheres

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The present paper analyses and examines the Armed Forces Special Powers Act (AFSPA) in respect of legal aspects. It first discusses it in terms of domestic law, international humanitarian law (IHL) and human rights law. Given India's obligations under international human rights instruments going beyond domestic law is necessary in any such discussion. Ensuring complementarity between the Act in its application in armed conflicts and IHL, would contribute towards making the Act more 'humane'. The second part discusses the Act from security perspectives. In doing so, it reaffirms that respect for human rights and humanitarian law in countering insurgency is of strategic import. In conclusion, it makes some recommendations for the military which will enable it ensure that AFSPA and the IHL complement each other.

Introduction

The Armed Forces Special Powers Act (AFSPA) has been in force in the Northeast since 1958 and in Jammu and Kashmir (J&K) since 1990. It has been in the news lately because of the debate in the public domain and the ministry of home affairs over the need to refine it. The application of the Act in J&K has also figured in the headlines. The military has tendered its position to the government against any dilution of the Act. The cabinet committee on security has taken the army's reservations on board. There is no clarity over its current status.[1] The state government intends to revoke the 'disturbed areas' status of parts of the state that have largely returned to normalcy. This is part of the political outreach under the centre's eight point plan to address the stone throwing incidents of the summer of 2010.[2] The army's position on this initiative weighs-in on the side of prudence and caution.

The Act has acquired centrality in any discussion on India's counter insurgency and anti-terrorism strategy. It has been pilloried as 'draconian' by some and defended as unwarrantedly 'demonised' by others[3] and been assailed on a number of fronts. These include its implications for centre-state relations, its impact on the fundamental rights of citizens, the tacit political message sent to areas singled out for such laws, such as the Northeast and J&K, as being 'different'

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from the rest of India, the possible empowering of the military to an extent of skewing the 'civil-military' balance, the strategic costs of the Act in terms of losing 'hearts and minds' etc.[5] Given this interest and controversy surrounding the AFSPA, its correspondence with domestic law, in terms of protection of human rights, and with international humanitarian law (IHL) and human rights law, assumes significance.

Two approaches can be taken to examine the consonance of the Act with international law can be done through two approaches. One is legal i.e. that is by studying the provisions and powers that accrue thereby; and the other is a study of its effects. The former is the domain of constitutional and legal experts and the latter is more amenable to dissection by professionals and security analysts. This paper takes the former route. It first discusses the legal aspect in terms of domestic law, IHL and human rights law. Given India's obligations under international human rights instruments going beyond domestic law is necessary in any such discussion. Building complementarities between the Act in its application and IHL, that becomes operational in armed conflicts, would help in making the Act more 'humane'. The second part discusses the Act from the security perspective. In doing so, it reaffirms that respect for human rights and humanitarian law in countering insurgency is of strategic import. In conclusion, it recommends some measures for the military for maintaining complementarities.

Domestic law

First a quick recap of the AFSPA antecedents.[5] It is based on a colonial era law enacted to face down the Quit India movement in 1942. Its immediate precedents were similar acts of 1947 as to control partition related riots in Punjab and Bengal. AFSPA was promulgated in September 1958 to control Naga insurgency that had broken out in the mid fifties. It has since been enacted for Tripura in 1970, Manipur in 1980, Punjab in 1983 and J&K and Assam 1990.[6]

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It came into the limelight in 2004 with the custodial death of a Manipuri woman, Thangjam Manorama Devi, accused of being an underground operative.[7] IN November 2010 Irom Sharmilla has completed ten years of her fast for revoking of the Act. Both the government and the opposition in J&K favour a

reframing of its application. The second working group of the PM's Third Round Table led by Hamid Ansari, then chairman of the minorities' commission, had stated: 'Certain laws made operational during the period of the militancy (AFSPA, DAA) impinge on fundamental rights and adversely affect the public. They should be reviewed and revoked.'[8] Consequently, the central government is currently rethinking the Act. This could mean repealing it, reframing the Act to give it a more 'humane' character or by incorporating its provisions, perhaps in a diluted form in the Unlawful Activities (Prevention) Amendment Act, 2008.[9] The army and air chiefs have publicly supported the retention of the Act and its provisions.[10] The current situation is one of status quo.

The legal route has been much trodden. Writ petitions filed in 1980 challenging the central as well as the state Act were dismissed by the Delhi High Court. The central Act was held to be 'not violative' of Articles 14, 19 and 21 of the constitution. The legislative competence of parliament to make the Central Act was upheld. The Supreme Court concurred in its judgment on the Act's validity in 1997. These judgements have scrutinised the Act in relation to the constitution and extant laws. However, the BP Jeevan Reddy committee examining it in relation to the Northeast in 2005,[11] and the Veerappa Moily report of the Second Administrative Reforms Commission of 2007, recommended that the Act be repealed.

The Supreme Court's verdict in 1988 in the matter of *Naga Peoples' Movement of Human Rights vs. Union of India* was essentially that 'Parliament was competent to enact the central Act'.[12] The Court stated that in the event of deployment of the armed forces in aid of the civil power in a state, the forces shall operate in cooperation with the civil administration. It was of the opinion that during the course of such deployment the supervision and control over the use of armed forces would not have to be with the civil authorities of the state concerned and that the state would not have the exclusive power to determine the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power. The powers that the Act conferred were not 'arbitrary and unguided'. Its position on whether section 4 violated fundamental rights was a clear negative: 'The powers conferred…are not arbitrary and unreasonable and are not violative of Articles 14, 19 or 21 of the constitution.'[13]

However, the stipulations made by the Supreme Court place an extraordinary onus on the military for self-regulation. These include that the officer (including an NCO) taking decisions needs to ensure that the action is 'necessary' and that the 'due warning' has been issued and in any case 'the officer shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order.' It held that 'conferment of the power… to destroy the structure utilised as a hide-out by absconders in order to control such activities could not be held to be arbitrary or unreasonable' since the propensity of offenders

of repeating their past activities could not be precluded. It required the handing over of arrested persons to be done in 24 hours (excluding journey) so as to be in compliance with Article 22 of the constitution in which this time limit is stipulated.

It only gave protection in the form of previous sanction of the Central Government before a criminal prosecution of a suit or other civil proceeding was instituted against such person.'

Section 6, it opined, 'does not suffer from the vice of arbitrariness.' Its view was that: 'The protection given under Section 6 was not a conferment of an immunity on the persons exercising the powers under the Central Act. It only gave protection in the form of previous sanction of the Central Government before a criminal prosecution of a suit or other civil proceeding was instituted against such person.' In case the government was to decline permission, then it had to state its reasons as its decision was subject to judicial review. The seriousness with which the Court viewed the 'Do's and Don'ts' is obvious in the following:

> 10.1. The instructions in the form of "Do's and Don'ts" had to be treated as binding instructions which were required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note had to be taken of violation of the instructions and the persons found responsible for such violation had to be suitably punished under the Army Act, 1950.
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> 10.2. In order that the people may feel assured that there was an effective check against misuse or abuse of powers by the members of the armed forces it was necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it was found that there was substance in the allegation, the victim should be suitably compensated by the State and the requisite sanction under s.6 of the Central Act should be granted for institution of prosecution and/or a civil suit or other proceeding against the person/persons responsible for such violation.'

The BP Jeevan Reddy Committee[14] recommended that it be repealed on the grounds that: 'The act is too sketchy, too bald and quite inadequate in several particulars.' Its finding was that the Act 'has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness.' But it made a constructive suggestion that the main, if diluted, provisions be retained by incorporation into the Unlawful Activities Prevention Act (UAPA). The UAPA, amended last in wake of Mumbai 26/11 on December 31, 2008, includes a comprehensive definition of terrorism.[15] It implicitly envisaged the deployment of armed forces in tackling this threat and had the clause providing cover from legal liability in the form of its Article 49 (b), analogous to Section 6 of AFSPA. The committee framed out

a draft additional chapter for insertion into the Act so as to include the AFSPA within the general law applicable across the land, as against a special law that causes alienation among the people it is imposed on as in the Northeast. The committee found that the powers conferred in Section 4(a) were 'not absolute', but held that 'the opinion formed by the officer concerned must be honest and fair.' The committee was of the opinion that: 'While providing protection against civil or criminal proceedings in respect of the acts and deeds done by such forces while carrying out the duties entrusted to them, it is equally necessary to ensure that where they knowingly abuse or misuse their powers, they must be held accountable therefore and must be dealt with according to law applicable to them.' Its suggestion for insertion of AFSPA provisions in the UAPA was to specify powers, duties and procedures relevant to armed forces deployment and to also provide for an internal mechanism ensuring accountability with a view to guard against abuses and excesses by delinquent members. Its suggestion with regard to Section 4 provisions reads:

The force deployed shall take such steps and undertake such operations as are deemed necessary for the purpose of restoring public order or to quell internal disturbance.

In the course of undertaking operations mentioned in above, any officer not below the rank of a non-commissioned officer, may, if it is necessary, in his judgement, for an effective conduct of operations,

(i) use force or fire upon, after giving due warning, an individual or a group of individuals unlawfully carrying or in possession of or is reasonably suspected of being in unlawful possession of any of the articles mentioned in Section 15 of this Act,

(ii) enter and search, without warrant, any premises in order to arrest and detain any person who has committed a terrorist act or against whom a reasonable suspicion exists that he is likely to commit a terrorist act,

(iii) enter, search and seize, without warrant, any premises, and destroy, if necessary, the firearms or any of the articles mentioned in Section 15 (terrorism definition).

While acting under clauses (a) and (b) of this subsection, the forces deployed shall act in accordance with the directions contained in Appendix-A (Do's and Don'ts)

The Second Administrative Reforms Commission's (Veerappa Moily Commission) Fifth Report on Public Order[16] seconded the BP Jeevan Reddy committee report

that the AFSPA should be repealed and, as recommended by the Jeevan Reddy Committee, a new chapter be inserted in the UAPA. However, it held that 'the proposed insertion of Chapter VI A should apply only to the Northeast.'[17] The reason for this has not been explained, even though it defeats the whole purpose of the BP Jeevan Reddy Committee. The purpose of the latter was to dispel alienation in the NortheEast by enabling military deployment under a general, as against a special law. The Moily Commission's recommendation that the inserted chapter be only applicable to the Northeast is counter-productive. It also ignores the fact that the Act is operative in J&K too.

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Both the Jeevan Reddy and Veerappa Moily reports acknowledged the need to maintain security and the necessity of checks and balances. Moily backed the former's suggestion for a grievance cell and the former supported application of the 'Do's and Don'ts' as approved by the Supreme Court. The Jeevan Reddy committee suggested 'grievance cells' to 'ensure public confidence in the process of detention and arrest.'[18] This need arises from the philosophical issue 'who will guard the guardians'.[19] It bears recall that the National Human Rights (Protection) Act of 1993 leaves the armed forces out of its intimate purview. Its oversight role over the armed forces is considerably restricted.[20] The commission can at best seek a report from the central government. After the receipt of the report, it may make its recommendations to it. The central government is to inform the commission of the action taken within three months. This is to be published and a copy is to be given to the petitioner or his representative. That the NHRC's however is highly restricted which puts the onus of supervision on those at the ministerial level, in terms of political supervision of the military, and on internal self-regulation by the military and its leadership.

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There are tensions along two lines. One is in providing the legal cover necessary for the centrally controlled armed forces to aid civil authority in a domain that is also the responsibility of state governments in charge of public order. The Act stipulates that military deployment be reviewed in consultation between the Centre and the states. The second stress area is the autonomy that can be given such forces once deployed. While 'coordination' has been mooted as solution, the structures and procedures are not spelt out. There is also the problem of dispensing justice in case of misuse or abuse of power by the military. This has drawn the critical

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attention of human rights activists, resulting in the AFSPA being in the public eye.

International Humanitarian Law

IHL is the branch of international law dealing with humanitarian problems arising from conflict both international and non-international. It entails a limitation to the right of the parties in a conflict to use unlimited methods and means and entails protection of affected persons and property.[21] Since AFSPA covers 'internal disturbances' as against 'armed conflict', such areas do not come under IHL by definition. That it is not a non-international armed conflict (NIAC) is clear from it not conforming to the definition of NIAC in Article 1 of Protocol II (PII) of 1977 of the Geneva Conventions (GC) of 1949.[22] It is a domestic 'internal disturbance' at best and its intensity has never been of the order to qualify as a civil war. PII is relevant to NIAC.[23] However, since India is not a signatory to PII, it is not of relevance, besides the fact that the internal security situation in which AFSPA is operational does not fit the definition of NIAC in the PII. However, a 'proxy war' or interference by an external power in the form of support, to include military assistance, complicates the issue. It 'internationalises' the internal conflict, giving the situation cadences of the category 'internationalised non-international armed conflict' (INIAC). Even this is not applicable since in law, INIAC involves state actor interference in an NIAC. In India's case, a proxy war is being waged by Pakistan through non-state actors. In view of this, the applicability of IHL gets limited to Common Article 3 of the GC and customary law of armed conflict. Here again, Common Article 3 is for NIAC as against situations as obtain in India – as given below:[24]

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Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors

de combat…shall in all circumstances be treated humanely, without any adverse distinction...To this end, the following acts are and shall remain prohibited:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The aim of IHL being to protect human beings and their dignity, insurgents, terrorists and mercenaries continue to benefit from the protection provided by this Article.[25] Since the GC in which Common Article 3 features have been enacted into domestic legislation as Geneva Conventions Act of 1960, the provisions of Common Article 3 apply, since they inform customary law. Thus, even Pakistani and foreign nationals engaged in proxy war as mercenaries and terrorists are to be treated humanely owing to their being human. The term 'illegal combatant' is also not suitable. Even though they take direct part in the conflict, it is without being entitled to do so and on that account do not have combatant privileges or entitlement to prisoner of war status on capture. The term as such is used in relation to international armed conflict and is unclear in its application. Suffice it to say foreign nationals taking part in fighting come under protection of Common Article 3, such as right against torture, and customary international law, such as right to judicial guarantees on trial. India treats their activity as terrorism and applies domestic jurisdiction in prosecution.

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The treaty law part of IHL, in the form of PII, is not relevant to the Indian situation. Nevertheless, customary international law is. PII provisions do not amount to customary law or 'general practice accepted as law'. Customary international law provisions have been codified into 161 provisions by the International Committee of the Red Cross (ICRC) in a project begun in 1996.[26] PII has 15 Articles.

AFSPA when examined in relation to IHL needs to be seen in comparison with these two sets of provisions. Customary rules include the principles of distinction between civilians and combatants; and between civilian objects and military objectives. They prohibit indiscriminate attacks and entail proportionality and due precautions. This is the stance IHL takes to balance military necessity and humanitarian concerns. In terms of protection to civilians and fighters *hors de combat*, customary law makes allowance for state sovereignty to derogate certain rights in times of emergencies. However, some rights remain non-derogable (covered in the section on human rights law below) so as to constrain abuse of a state's emergency power.[27] Restraint on methods finds mention in customary law and not in PII. Fundamental guarantees, provisioned in GC PII Article 4, being a minimum standard, are given below:

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Art 4 Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities…are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. …the following acts…shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life…in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments…

Human Rights Law

Given the convergence lately of humanitarian and human rights law, the latter deserves separate attention. The human rights issue is more critical given the human terrain in internal security situations. The IHL is relevant but has not evolved sufficiently to cover AFSPA governed situations in India. The key HR

covenants are the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR) of 1976. India ratified both in 1979, but has not enacted corresponding domestic laws since the rights are guaranteed by the constitution and in domestic law such as the Protection of Human Rights Act of 1993. State sovereignty permits derogation from certain human rights in times of emergency- when state survival is at stake. Article 4 of ICCPR (below) has significance in this context:[28]

'Article 4: 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies…

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.'

The non-derogable rights referred to are:[29]

Article 6: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Article 16: Everyone shall have the right to recognition everywhere as a person before the law.

In monitoring India's human rights record, the Human Rights Committee in 1997 had expressed concern over the AFSPA. The committee favoured a political approach to problems with means that are compatible with the covenant. On the prolonged status of some areas as 'disturbed areas' it observed that 'the State party is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant.'[30] This comment on India's record indicates the gulf between precept and practice and between how India's record is perceived by others and by itself.

India recognises the situation in 'disturbed areas' as internal security issues but not as internal conflicts. These do not warrant imposition of emergency.[31] Nevertheless, they are of sufficient intensity to require employment of the military. Any infringements of human rights that take place are meant to bring

the situation back to normal at the earliest and protect the civilian population from the effects of violence. Prohibitory orders that curtail rights are usually in place. Powers under the AFSPA, under Section 4 (a), have a bearing on 'hard core' rights, such as right to life. This is why the AFSPA has come under criticism on two counts. One is that the Act is a 'colourable' legislation, giving emergency powers without proclaiming emergency.[32] Second is that the extensive power to take life violates international obligations and Article 14. Since the Supreme has ruled on the validity of the Act and that its powers are not arbitrary, correspondence between the AFSPA and human rights law needs to be brought about by a special emphasis on the 'Do's and Don'ts'. The Supreme Court had required that violations be taken as violation of the Army Act 1950. The original list was upgraded after the judgment.[33]

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Conclusion

The assumption that the nation is behind the military is valid. However, the nation is interested in being defended and protected not only effectively but also in the right way. In a democratic system, means are as important as the ends. Since the powers that the military has under AFSPA are unlikely to be interfered with, the onus of their appropriate usage therefore rests primarily on the military. Efforts to this end would keep the military aligned with the spirit and letter of domestic law, international norms, India's civilisational ethos and values of the freedom struggle. This would bring about a correspondence between IHL, human rights law and the military's approach to human rights in 'disturbed areas'. Currently, there are gaps between AFSPA and the stringent stipulations of IHL and IPCCR. Domestic law is unlikely to change though it is constitutionally required to be in line with international law and norms. Given this, the army could instead re-emphasise 'lessons learnt' and 'best practices' to ensure that its record is in sync with expectations of a modern, professional 21st century army.

Currently, there are gaps between AFSPA and the stringent stipulations of IHL and IPCCR. Domestic law is unlikely to change though it is constitutionally required to be in line with international law and norms.

Notes:

1 Samanta, P.,"Valley: PM Tells Home, Defence to Sort Out Differences on AFSPA, "*The Indian Express*, August 8, 2010.

2 "Jammu and Kashmir Violence: Government Pins Hopes on Talks," *India Today*, September 15, 2010, available at http://indiatoday.intoday.in/site/Story/112659/India/jammu-and-kashmir-violence-govt-pins-hope-on-talks.html

3 "AFSPA Has Been Demonized: Army Chief Designate," *Hindustan Times*, March 11, 2010.

4 See for instance, "Armed Forces Special Powers Act: A Study in National Security Tyranny," SAHRDC, available at http://www.hrdc.net/sahrdc/resources/armed_forces.htm

5 MHA, "The Armed Forces (Special Powers) Act, 1958," available at http://www.mha.nic.in/pdfs/armed_forces_special_powers_act1958.pdf

6 For the background, see *Second Administrative Reforms Commission Fifth Report* on Public Order, p. 236, available at http://darpg.nic.in/darpgwebsite_cms/Document/file/public_order5.pdf

7 "HC allows Manipur to Re-Open Manorama Devi Case," available at http://timesofindia.indiatimes.com/topic/article/0bOfbq93RlgAP?q=guwahati+hc

8 Ansari, Hamid, "Confidence Building Measures across Segments of Society in J&K," available at http://www.hinduonnet.com/nic/jk/jkreport_5.pdf.

9 The term 'humane' appears in the terms of reference of the BP Jeevan Reddy Committee "Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958".

10 "Air Chief Marshal PV Naik defends AFSPA," *The Economic Times*, October 5, 2010, available at http://economictimes.indiatimes.com/news/politics/nation/Air-Chief-Marshal-P-V-Naik-defends-AFSPA/articleshow/6687334.cms

11 The committee was appointed subsequent to unrest following the death of Manorama Devi and the unique protest of the Meira Paibis, a women's group, in front of Kangla Fort in July 2004.

12 See text of judgment available at http://judis.nic.in/supremecourt/helddis.aspx

13 The Act envisages the following powers for the military (Sections 4) when employed in areas declared 'disturbed' under Section 3 of the Act: "4. Special Powers of the armed forces – Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force…; (b) …destroy any arms dump, prepared or fortified position or shelter…; (c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists…; (d) enter and search without warrant…"

14 The text of the report was leaked to *The Hindu* and is available at http://www.hinduonnet.com/nic/afa/. The committee included a former Director General Military Operations, Lt Gen (Retd) VR Raghavan.

15 Text is available at http://www.indiacode.nic.in/. The definition of terrorism in section 15 is: 'Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,— (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause— (i) death of, or injuries to, any person or persons; or (ii) loss of, or damage to, or destruction of, property; or (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

16 See text: "Public Order", Second Administrative Reforms Commission, Fifth Report, Government of India, June 2007, available at http://darpg.nic.in/darpgwebsite_cms/Document/file/public_order5.pdf

17 *Second Administrative Reforms Commission Fifth Report on Public Order*, p. 242.

18 Text of recommendations is available at http://www.hinduonnet.com/nic/afa/afa-part-iv.pdf./ See for 'Grievance cell', p. 79.

19 The question dates back to the times of Socrates.

20 Text is available at http://nhrc.nic.in/. The procedure with respect to Armed Forces is on pp. 14-15.

21 Gasser, Hans-Peter, "International Humanitarian Law," in L. Maybee and B. Chakka (eds.), *International Humanitarian Law: A Reader for South Asia,* New Delhi: ICRC, 2008, p. 1.

22 NIAC are taken as conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

23 See text of Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8 1977, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545

24 See text available at ICRC, http://www.icrc.org/ihl.nsf/WebART/365-570006?OpenDocument

25 AP I, Article 47 defines mercenaries as: "1. A mercenary shall not have the right to be a combatant or a prisoner of war. 2. A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party…"

26 'Overview', Customary International Humanitarian Law, ICRC, available at http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm

27 "Continued Applicability of Human Rights Law During Armed Conflict," ICRC, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_intofugu

28 "Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977," text available at ICRC, available at http://www2.ohchr.org/english/law/ccpr.htm

29 Ibid.

30 "Concluding Observations of the Human Rights Committee: India. 08/04/1997', CCPR/C/79/Add.81. (Concluding Observations/Comments) August 4, 1997, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.81.En?OpenDocument

31 The Punchhi committee report on Centre-State relations has envisaged a category of 'local emergency' to cover internal disturbances type situations in its report of April 2010.

32 This was ruled out by the apex court in its 1997 judgment.

33 It is available as Appendix C in the Indian Army *Doctrine for Sub Conventional Operations,* Shimla: HQ ARTRAC, 2006, pp. 68-74.