CHAPTER I

CHILD RIGHTS IN AREAS OF CIVIL UNREST AND THE COMPETING CLAIMS OF CONFLICT AND NATIONAL SELF DETERMINATION

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Introduction

Child involvement in internal armed conflicts is a feature of nearly every area at war in the world. 1 68 percent (37 of the 55) of the ongoing and recently concluded conflicts have children under eighteen serving as combatants. 2 Rwanda, the Democratic Republic of Congo, Côte d’Ivoire, Colombia, Myanmar, Mozambique Angola, Burundi, Somalia, Liberia, Ethiopia, Kenya, Uganda, etc are a few states which experienced a collapse of the rule of law3 and, as a consequence thereof, witnessed the gruesome participation of children as child soldiers. 4 Children fought children in Côte d’Ivoire as both government and armed political opposition groups, Ugandan government and the militias it supported also used child soldiers. In Central Africa, there were as many as 30,000 child soldiers in the DRC; and armed political groups backed by Rwanda and Uganda continued to recruit child soldiers in its eastern provinces. Children fought for both government and opposition forces in

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3 This phenomenon was particularly witnessed during the 1990s. Some examples of these states included Rwanda, the DRC, Colombia Myanmar, Mozambique Angola, Somalia, Liberia, Ethiopia Kenya etc. The background of the conflict in each of these states varied from the tribal blood feud as in the case of Hutu-Tutsi tribes in Rwanda to DRC.
4 The term Child Soldiers’ has now been replaced by ‘A child associated with an armed force or armed group’ [Paris Principles 2(a), (2007)] defined as, ‘Child Associated with an Armed Force or Armed Group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.
Burundi – where children as young as 10 were recruited to the government’s forces. Similarly, Government-backed paramilitaries and other irregular forces in countries including Colombia and Sudan recruited children. The horrors lived by these child soldiers were overwhelming: abducted, subjected to sexual slavery, beaten, deprived, forced to kill and often murdered.

The background of almost all these conflicts varied from the tribal blood feud as in the case of Hutu-Tutsi tribes in Rwanda to natural resources (diamonds) in Sierra Leone and/or the total breakdown of the government machinery. These conflicts highlighted two different trends. First, child recruitment was rampant by the State armed forces and the rebels alike. Second, children were not only victims but a significant segment of juvenile soldiers voluntarily participated in the brutalities violating the laws and customs of war. Under physical and psychological duress child combatants have committed widespread atrocities under the Common Article 3 to the Geneva Conventions, and the Additional Protocol II. Easily acquiesced by armed groups at young and impressionable ages children were manipulated into maiming their own countrymen. Many of those who resisted were killed, manipulated or coerced through the rampant use of narcotics. These crimes not only raised

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7 The issues of natural resources (diamonds) in Sierra Leone led to a civil war in 1991 amidst political upheaval over a multi-party democratic system of governance. The Revolutionary United Front forces in Sierra Leone committed grave atrocities and overthrew the elected government and influenced control over the diamond mines. The Revolutionary United Front forces in Sierra Leone committed grave atrocities and overthrew the elected government and influenced control over the diamond mines.
9 These juvenile soldiers earned a reputation throughout the region as fearless and blood-thirsty killers. See Michael A. Corriero, The Involvement and Protection of Children in Truth and Justice Seeking Processes: The Special Court for Sierra Leone, 18 N.Y.L. SCH. J. HUM. RTS. 337, 339 (2002).
10 See, Joshua A. Romero, The Special Court For Sierra Leone And The Juvenile Soldier Dilemma, Para 10 at 2.
question of their protection as victims but also the question accountability for acts as perpetrators of grave crimes violating the laws and customs of war.

The Graca Machel Report (The Machel Report) was a path breaking document which highlighted the problem children in such situations in the document, ‘Impact of Armed conflict on Children’. The chilling revelations stunned the international community on the rampant use, exploitation and abuse of children in such settings. The magnitude of the problem at that time was so huge in Africa that the Report primarily focused in the African states of Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya and Mozambique. The other States included were Bosnia and Herzegovina, Cambodia, Myanmar, Lebanon and Columbia. These became the ‘States of Concern’ and the international community sought to singularly focus on them.

The Machel Report was also a definitive document towards child protection which raised international concern on the treatment of children but primarily limited in its examination in failed/fragile states where the international intervention had taken place under Chapter VII of the UN Charter and post conflict road map was executed under the aegis of the international community which adopted international standards for the promotion and protection of child rights.

The Report established a de facto precedent over the years of linking children to internal armed conflict within the meaning of the Geneva Convention (discussed

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13 Ibid note 1. Three of the six regional consultations held to determine regional priorities relating to children in armed conflict were in Africa. These were in Addis Ababa, 17-19 April 1995 for the Horn, Eastern, Central and Southern Africa, Cairo, August 1995, for the Arab region; and in Abidjan, 7-10 November 1995 for the children in West and Central Africa. These consultations were designed to draw the attention of Governments, policy makers and opinion leaders. Para 12.
later). Subsequent references by the international community in localized situations post the Machel Report invariably referred to such ongoing/emerging civil unrest\textsuperscript{14} movements as internal armed conflicts and the involvement of children as, children affected by in internal conflict. Seized by the rampant exploitation of children, the UN and other international bodies raised accountability thresholds towards child participation/victimization within the definitive meaning of internal armed conflict. As a result, the ICC in 1998 declared child recruitment a war crime under the Rome Statute of the ICC\textsuperscript{15} and the Security Council passed Resolution 1314 in 2000, which noted that the “committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security.”\textsuperscript{16} This resolution linked the mandatory power of the Council under Chapter VII of the U.N. Charter with the issue of children and armed conflict.\textsuperscript{17} The means of enforcement available under Chapter VII (including complete or partial interruption of economic relations, severance of diplomatic relations,\textsuperscript{18} demonstrations, blockades, and other operations by air, sea, or land necessary for the purpose of maintaining international peace and security)\textsuperscript{19} were also reflected in the subsequent country-specific resolutions.

The above approach in turn created situation of stringent international accountability and in turn witnessed the affected State's reluctance to recognize child participation in such situations as it risked qualifying the particular situation as an internal armed conflict within the meaning of the Geneva Conventions where the aggrieved

\textsuperscript{14} Civil unrest in the thesis refers to situations of protected armed violence existing in States where in the aggrieved communities are allegedly fighting for their right to secession through self-determination being ethnically or culturally diverse. States in turn have referred to such situations as their internal matters and has sought to exercise sovereign discretion to handle these situations within the domestic mechanism through special legislations while the international community invariably refers to such situations as internal armed conflicts within meaning of the Geneva Conventions. These situations continue to exist in third world States like India (Kashmir, Northeast India and the Left Wing Extremism Areas), Pakistan (Baluchistan), Sri Lanka (LTTE), Nepal (Maoists), etc.


\textsuperscript{17} See Id., which notes “that the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard reaffirms its readiness to consider such situations and, where necessary to adopt appropriate steps.”

\textsuperscript{18} U.N. Charter art. 41.

\textsuperscript{19} Id. art. 43.
communities were already demanding secession through national self-determination [India (Kashmir, Northeast India and LWE affected region), Sri Lanka (LTTE), Nepal (Midwestern), etc].

Third world States were particularly affected since most of such situations have arisen post-independence wherein aggrieved communities involved in a protracted confrontation with the State justifying violence as their right to national self-determination and the participation of children as a natural outcome of their cause. In sum, four reasons are mainly attributed to such a reluctance:-

First, the existing situations are complexly interwoven with the history of decolonization, itself a complex internal struggle of accession and secession between newly independent sovereign states and their internal communities. These communities feel threatened by what they view as an oppressive, dominant regime occupying their territory, infringing on their ethnic and tribal identity, and hindering their progress toward self-determination. The communities’ collective grievances form the basis of internal struggles, which in turn has become protracted armed confrontations with the newly established dominant states. These State, established as a result of external decolonization and the internal choice of the people, do not recognize secession as a viable means for communities to establish legitimate, democratic states. Established States believe democratic legitimization of a government contained both the external component of decolonization and the internal component of citizens’ right to choose their own form of government. The right to secede did not fit within this rubric.

Second, over the last several decades the legal character of secessionist movements has become extremely complex. The established states regard the movements as issues either of law and order or public order, and have sought to exercise sovereign discretion to eliminate the movements. The international community, on the other hand, views these secessionist activities as internal armed conflicts. This international characterization has raised the possibility that the conflicts constitute a humanitarian crises warranting international intervention. The classification of the secessionist movements has also affected regulations regarding child protection. Unlike past civil wars, in which the international community was authorized to intervene in armed
conflicts within failed states, the current conflicts occur in states that adhere to
democratic rule of law.

Third, after the 1996 publication of the Grac’a Machel Report (Machel Report),
which examined child participation in internal armed conflicts in failed states
(namely, states lacking any democratic governance or rule of law), the U.N. and
various international non-governmental organizations (NGOs) introduced
accountability mechanisms to stop the recruitment of children for participation in
those armed conflicts. These mechanisms include the option to permit international
intervention when peace and security are at risk, under Chapter VII of the U.N.
Charter, and the ability to declare child recruitment a war crime under the Rome
Statute of the ICC. However, if conflicts stemming from secessionist movements are
only regarded as internal struggles to maintain public order, as the established states
suggest, then international accountability mechanisms are not available to address
child participation.

Technically, most children in such movements can easily qualify within the definition
of Children associated with Armed Forces or Armed Groups within the meaning of
Paris Principles. 20

“A child associated with an armed force or armed group” refers to any person below 18
years of age who is or who has been recruited or used by an armed force or armed
group in any capacity, including but not limited to children, boys, and girls used as
fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer
to a child who is taking or has taken a direct part in hostilities’

The all-inclusive definition of child participant in the Paris Principles is principally
aimed to include most children within the child protection mandate during the
reconstruction/post conflict stage particularly in failed state situations. While the
scope of international intervention is limited by the customarily principle of State
sovereignty but if the definition is applied mechanically it obscures the very intent of
child rights intervention as it risks redefining the nature of violence and threatens the
affected State's sovereignty.

20 See Paris Principles (2007), Principles and Guidelines on Children Associated With Armed Forces
Or Armed Groups, 2.1 at 7.
State's reluctance to accept international norms of conduct towards the protection of child rights arguing that the threshold of the situation is not so high that warrants international intervention has put children at grave risk of victimization and exploitation. Conversely, the law enforcement threshold is not too low that it does not warrant any attention.

In an effort to deflect international attention, States in turn have referred to such situations as their internal matters and have sought to address them through special legislations. In many instances such special legislations violate the basic fundamental human rights (See AFSPA, discussed later). States argue that such situations are special and therefore require special measures are required but such measures fulfill the stringent test of human rights scrutiny because such statutes have been enacted by a democratically elected parliament. Keeping democracy at its show window, States vehemently insist that rights are internal matters and they have the margin of appreciation as a sovereign state to assess the threshold of the situation.

While most of these States acknowledge that armed groups are recruiting children, there are no substantial domestic safeguards within the provision of special legislations or within the respective Juvenile Justice Acts. In most of these situations special legislations have prevailed and children invariably form part of the criminal justice system. Invariably, this has given rise to two peculiar situations. Firstly, greater degradation of human rights by states in order to apparently control the situation by invoking emergency legislations within the domestic system resulting in the dereliction of official duty and thus creating an atmosphere of impunity within the armed forces. Second, the risk of treating children as any other adult puts them at risk of abuse and victimization.

21 Responding to the HRC question on India’s failure to comply with the requirements under Article 4 of the ICCPR in respect of the special legislations like the AFSPA, India replied in its third periodic report that, ‘It may be emphasized that such statutes were enacted by a democratically elected Parliament, their duration was subject to review…’ UN Doc CCPR/C/76/Add, Para 50.) . Also, India maintains that since the initiation of terrorism in J&K in 1989-90, the people of J&K have voted in Parliamentary elections in 1996, 1998 and 2004, elections to the State Assembly in 1996 and 2002 and in Panchayat Elections in 2000 despite terrorist’s threats and calls for boycott of elections.’ See Ministry of Home Affairs Report, Government of India, 2003-04 para 3.3 at 10.

22 Discussed in the subsequent paragraphs.
Need and Rationale for the Study: Status of Children and State's Recognition in Localized Situations Internationally

Child victimization civil unrest movements complexly interwoven in acts of terrorism, insurgency and/or militancy underlines a new facet of child vulnerability. These diverse forms of political and armed violence have presented new threats in the protection of children.\(^\text{23}\) However, the challenges posed by such kind of participation are quite different from the ones encountered in earlier conflicts (failed/fragile States). There are stronger indicators of voluntary participation. At the same time, coercion is subtle and child participation is recognized as a continuing feature of these protracted situations by the aggrieved communities.

Rarely would one witness instances of extreme violence and coercion like previous situations but child participation is often organized, subtle and voluntary. Increasing voluntary recruitment suggests an important part of the problem because this reflects the shift in the debate from children being ‘just victims’ to calling them to account for their actions. For example, the participation of many minors in Palestine is seen as voluntary. They see their involvement in the struggle to defend their community and affirmed through their sense of sense of grievances and injustices. As Jason Hart notes, ‘Young people growing up in the Occupied Territories are often willing participants in the national struggle. Their political consciousness is developed to an extent and from an age that commonly takes outsiders by surprise.’\(^\text{24}\) Similar views emerge in most third world states where children are participating in the continuing secessionist movement. In Sri Lanka when the movement was gaining momentum between 1987 to 1994, child recruitment was largely voluntary.\(^\text{25}\) Coercion was subtle or manipulated. As Sonali Moonesinghe notes, ‘Although forced recruitment is also practiced in the case of Sri Lanka, a large number of children are not so much coerced as exposed to subtle manipulations, hence the difficulty in determining the practice and eliminating it.’ She further describes such forms of coercion or manipulation as a

\(^{23}\) Children and Conflict in the Changing World. Machel Study 10 Years Strategic Review. Available at http://www.childrenandconflict.org/


“Pied Piper” enticement or the “martyr cult” to which children are exposed during their impressionable and formative years.\textsuperscript{26} The political violence in Nepal too gives out similar indicators. Coercion is not so manifested and the conflict has shown voluntary participation. As Human Rights Watch notes that in Nepal, ‘Not all—not even most—of the children in Maoist ranks are forcibly recruited.’\textsuperscript{27}

There are also different sets of challenges in terms of the nature and extent of participation, accountability and question of international intervention. Crimes committed by children distinctly vary in terms of gravity of the offence as those committed by children in Sierra Leone, Rwanda, DRC and other similar conflicts. Children have allegedly been involved in heinous crimes like mass rapes, female genital mutilation and genocide which constitute grave breaches of the violation of the laws and customs of war or for crimes punishable under Common Art 3 common to the Four Geneva Conventions. Notwithstanding, the State/international community’s response in the latter is more child centric than in the former. For example, in Sierra Leone where children had committed mass atrocities, the court’s jurisdiction was limited only to children between the age of 15 -18 years only for those who bore the greatest responsibility for serious violations of international humanitarian law and Seirra Leonean law.\textsuperscript{28} If at all children were to be brought to the court, the statute explicitly mentioned that such children, ‘be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society’.\textsuperscript{29}

Despite this, Truth Reconciliation Commissions (TRC) were felt to be the better alternative to provide a forum for accountability and restore a sense of justice in the social and political feature order.\textsuperscript{30} The international community with the UNICEF, other UN agencies and Child Protection network developed special procedures as vulnerability and safety checklist as part of the Framework for Cooperation for

\textsuperscript{26} Ibid.

\textsuperscript{27} The HRW also notes, ‘before the ceasefire many children joined Maoist cadres due to ideological training (see below), others because the Maoists offered them a way out of unemployment and poverty.’ See Nepal Children in the Ranks The Maoists’ Use of Child Soldiers in Nepal. February 2007 Volume 19, No. 2(C) at 26.

\textsuperscript{28} See Art 1 and 4 of the statute. Available at http://www.sierra-leone.org/specialcourtstatute.html

\textsuperscript{29} Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone. See Article 1, Competency of the Special Court.

children when they come to the TRC. At every stage of the rehabilitation process it was kept in mind that child prosecution would be exceptional even for those children who are most responsible.

On the other hand, non-recognition of child victimization and the lack of statutory guarantees in civil unrest situations has spiraled increasing chances of victimization of children at the hands of the State. Children are pre dominantly involved as messengers, detailed in administrative tasks, act as couriers while a few are involved in active hostilities like planting an IED, throwing a grenade or even supporting the armed groups. Sometimes they are also involved in combat roles too but such participation is distinctly different than witnessed in previous conflicts. If an analogy is drawn with the other more violent conflicts around the world, the magnitude of acts committed require rehabilitation of such children rather than accountability. Ironically, children under such situations are being made to account on the slightest suspicion. There is a distinct inverse proportionality while making these children accounts for their acts. While at one end, child friendly rehabilitative approach has been strongly advocated even for those children who have been allegedly involved in grave breaches, children in low level terrorist related scenarios have been made to account on the slightest suspicion of their involvement. Primarily because the State forces rarely make a distinction of their vulnerable age.

The term 'Child Soldier' / 'Children associated with Armed Forces or Armed Groups' loses relevance in its true conventional sense but the security forces invariably label such children with greater animosity. In the eyes of the State, they are probably engaged in activity not merely of a criminal nature but also of a treasonable character. On apprehension by the security forces, little concern is given to their special status as children. They are seen as the enemies of the state waging a war against the nation. The rhetoric of nationalistic sentiments runs extremely high whenever such apprehensions take place. The deafening jubilation, more often than not, takes away their special status. With no existing legal obligation and political will, children are either treated as adults or juveniles under special legislations. When such incidents take place, international safeguards are rarely questioned and by the time these child

31 Ibid at 60-61.
terrorist/insurgents are produced in the court of law, much harm has already been done. For example in India, with the age of criminal responsibility as low as 7 years\textsuperscript{33}. Children have been booked under the Prevention of Terrorism Act (POTA). Children as young as 14 years\textsuperscript{34} have been detained under this Act and kept in jails for allegedly waging a war against the State, while in another situation a 17 year old girl\textsuperscript{35} in the state of Bihar was arrested for allegedly being a member of the MCC. Similarly, in Nepal and Sri Lanka where the age of criminal responsibility is as low as 8 years and 10 years.

Children in such situations are often being charged for the slightest offence but there is no accountability for those who recruit them while recruitment of children groups is a war crime under international law. \textit{Norman case}\textsuperscript{36} definitely ruled that the recruitment of children under the age of 15 years was a war crime under customary international law. Optional Protocol to the Convention on the Rights of the Child absolutely prohibits the recruitment of children under the age of 18 years by armed groups. Although most states have ratified the relevant treaties there no existing legal provision under domestic law. With only a limited number of states having ratified the Op Protocol and no such prohibitions existing in domestic legislations armed groups enjoy \textit{de facto} impunity for what is a war crime under international law. The recruitment of children in such situations continues unabated since there is no domestic accountability expressly prohibiting the use of children in such scenarios.

There is another problem too. Invariably when peace is negotiated in such situations, child participation from the point of perpetrator’s accountability is unlikely to figure. This is an uneasy but realistic tradeoff between peace and war criminals \textit{inter alia} grant of amnesty to commanders who possibly bear the greatest responsibility for child recruitment. The best example is of Sri Lanka and Nepal. While Child demobilization and further recruitment of children find mention, there is no agreement

\textsuperscript{34} On 9 July 2002, 14 year old Mayanti Raj Kumari, a student of Class VII was arrested for allegedly waging war against the State (under Sections 121 A and 122 of the Indian Penal Code) and POTA and was detained in Ranchi jail and not in a juvenile home as required under the law. http://www.unhchr.ch/indigenous/bp11.doc (04 August 2004).
\textsuperscript{35} Ibid Note 38.
on the question of perpetrator’s accountability. Understandably, the armed groups will not like to mention this issue. Equally, the State would also avoid the issue recognizing the gravity of the offence and its potential to derail the entire process. Unless a state is a failed/nearly failed state and international intervention is an enforcement mandate it would be difficult to implement international law directly in the presence of domestic legislations. On the other hand the situations in these states are localized. For example, in India it is in Kashmir and some of the Northeastern states. In Sri Lanka the conflict was localized to the North and the east while in Nepal the conflict was in the northeastern part of the country. Under such circumstances states tend to calculatively underscore the threshold of the emergency/conflict settings by resorting special legislations within the domestic legislations. As Jenny Kuper notes, ‘Governments may have a vested interest, for example, in declaring that a conflict in their territories is simply a civil disturbance, and thereby avoiding having to comply with the more stringent standards that would apply if it was accepted as a non-international, or particularly an international, armed conflict.’

While at one end the bar of international accountability prohibiting child recruitment and victimization has been raised but it is unlikely that a single issue of children can create a possibility of adopting a Chapter VII mandate (S/RES/1314 of 2000). The best example is of Sri Lanka. Despite international consensus on the rampant use of child soldiers by the LTTE, the organization being classified as a Foreign Terrorist Organization, banned by the EU, one cannot think of such an enforcement mandate. For this reason, such a mandate would be implemented when the state witnesses wanton destruction of life and property and the total collapse of the rule of

37 The proposal of designating States with serious governance problems as ‘failed States’ was first proposed in 1992. The proponents of this view argued the dire need for world community response to these “failures” warranted more expansive measures, including amending the United Nations (U.N.) Charter and other legal doctrines, to bring “failed states” into international law. See “Failed States,” Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia And Democratic Expectations, Henry J. Richardson, 10 Temp. Int'l & Comp. L.J. 1 at 1.
Also see Cronin Audrey Kurth, Huda Aden, Adam Frost, and Benjamin Jones, CRS Report for Congress Foreign Terrorist Organizations, February 6, 2004. Available at http://www.fas.org/irp/crs/RL32223.pdf
law as a result of a conflict. In fact, the rhetoric of a possible Chapter VII intervention has somehow reduced the focus on the plight of children in other localized situations.

As David Southall, Child Advocacy International points out, ‘many armed conflicts occur within states, making it difficult to assign responsibility for providing assistance to children as stipulated in the CRC – and other human rights conventions’ ⁴¹. Children will be most affected in such complex situations. Their participation continues to remain an integral part of the civil unrest but the affected States rarely will rarely recognize the problem. There is purportedly a stronger argument of their participation in anti-national activities and thus have to be made accountable.

**Status of Civil Unrest in India and International Concerns**

**The Civil Unrest.**

India is currently faced with internal security challenges in more than 16 States of the country. Seven of the 16 States have been declared as Disturbed Areas ⁴² under the Armed Forces (Special Powers) Act (AFSPA) while 83 Districts ⁴³ in the balance nine States of Bihar, Chhattisgarh, Maharashtra, Andhra Pradesh and Odisha, West Bengal, Uttar Pradesh, Jharkhand and Madhya Pradesh are reeling under LWE.

The areas under the AFSPA include States in the north-eastern region (intermittently since 1958) and Jammu and Kashmir (since 1990). The armed forces have been deployed in Jammu and Kashmir and the Northeastern region under the Armed Forces (Special Powers) Act 1991 and 1972 respectively. The State has declared whole of

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⁴² The term ‘Disturbed Areas’ was first used in the Assam Disturbed Areas Act 1955, aimed at restoring and maintaining public order in the face of increasing violence in the Assam province. No precise definition of the term was given but the State Government was empowered to declare any area a ‘Disturbed Area’ through notification in the official Gazette. It also conferred powers on law enforcement officials to quell disturbances.

⁴³ The LWE Districts have varied. For example, the Child Soldiers International refers to 106 LWE districts in nine states of Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa, Uttar Pradesh and West Bengal. See Child Soldiers International, Report to the Committee on the Rights of the Child in advance of India’s initial report on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, July 2013 at2.
Manipur (except the seven assembly constituencies of Imphal),\textsuperscript{44} Nagaland and Assam, as “Disturbed Areas” under the Armed Forces (Special Powers) Act, 1958 as amended in 1972\textsuperscript{45} (hereinafter AFSPA) and in addition, the Tirap and Changlang districts of Arunachal Pradesh and a 20 km belt in the States having common border with Assam. The Government of Tripura has also declared the area under 22 Police Stations and part of areas under 5 Police Stations as “Disturbed Areas”. Similarly, the notified ‘disturbed’ under section of the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 include, “Districts of Jammu, Kathua, Udhampur, Poonch, Rajouri, Doda, Srinagar, Budgam, Anantnag, Pulwama, Baramulla & Kupwara.”\textsuperscript{46} In the Naxalite region, the State continues to deal with the situation with through the State’s Police machinery. However, Chhattisgarh has introduced special security legislation, the Chhattisgarh Special Public Security Act 2005 that allows detention of up to three years for "unlawful activities."\textsuperscript{47}

The situation in the Disturbed Areas is primarily a post-independence problem with the affected communities seeking national self-determination from the parent State (India) as being ethnically and culturally distinct.

The LWE problem on the other hand is primarily limited to the tribal areas with huge natural resources. The problem has manifested due to State neglect and the feeling of alienation amongst the communities. The inhabitants being the custodians to the rich natural resources but they continue to live in abject poverty, remain economically


\textsuperscript{46} According to the state report, 59864 terrorist incidents have occurred since inception and until March 31, 2004, which has claimed 11945 civilians’ lives. 3882 Security Forces personnel have been killed while enforcing the rule of law in J&K. A total number of 17820 terrorists have also been killed including 3396(till Feb.29, 2004) foreign terrorists(Ministry of Home Affairs Report, Government of India, 2003-04 para 3.24 at 15. As on Oct 05, 2007). However estimates from other sources suggest that 63,000 civilians and 9,000 armed forces have been killed. http://www.childrenstrategies.org/Abstracts%20in%20PDF/India%20Children%20and%20Security%20Nirja%20Mattoo.pdf

\textsuperscript{47} Chhattisgarh Special Public Security Act 2005, Act 14 of 226. The term _unlawful activities_ includes a broad-sweeping range of activities, for instance peaceful activities of individuals and civil society organizations, and allows for arbitrary detention for alleged participation in such activities. See Child Soldiers International, Report to the Committee on the Rights of the Child in advance of India’s initial report on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, July 2013 at3.
disadvantaged and vulnerable to marginalization and exploitation. The compounding effect of the situation has led to the demand of national self-determination amongst these communities too.

Despite the extensive deployment of the armed forces (including Para Military Forces) in the two regions (Disturbed Areas and LWE), the State continues to maintain that the situation falls within the law and order mandate and the deployment of the armed forces is in aid to civil authority. Similarly, the Naxalite problem too is referred to as a law and order but without any special legislation like the AFSPA. The international community in turn has vehemently argued that such situations are internal armed conflicts within the meaning of the Geneva Conventions and the enforcement of special legislations like the AFSPA in fact constitutes a State of emergency within the meaning of art. 4 of the ICCPR.

India has only mentioned of the existence of armed conflict in its first periodic to the Human Rights Committee while referring to the state of Punjab. In the second periodic report, India declined any situation of armed conflict but acknowledged that that there were major instances of terrorism, both cross border and internal and that children were victims of this strife.

In specific response to the AFSPA, the UN-HRC while considering India’s Third Periodic Report pursuant to Art 44 of the ICCPR has noted, ‘some parts of India have remained subject to declaration as disturbed areas over many years - for example the Armed Forces (Special Powers) Act has been applied throughout Manipur since 1980 and in some areas of that state for much longer - and that, in these areas, the State party is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant’. The Committee further noted that sweeping powers have been

49 Para 1082, CRC/C/93/Add.5 16 July 2003 (04 August 2004). India’s Second periodic to the Committee on the Rights of the Child
vested upon the Security Forces\textsuperscript{51} which can be justified only with reference to the exigencies of the situation within the meaning of Article 4 of the ICCPR.\textsuperscript{52}

The State has denied the existence of an emergency in the AFSPA affected areas but have argued that legislative measures like the AFSPA have been enacted to meet certain special situations such as organized forms of terrorism, insurgency and acute law and order situations\textsuperscript{53}. Therefore, some areas have been declared ‘disturbed’ but ‘emergency’ under Article 4 of the ICCPR has not been declared.

**Civil Unrest and the Status of Children in India.**

India too has been regularly confronted with dilemmatic situation wherein the international community continues raise concerns on the status of child rights in Kashmir, Northeast India and LWE regions alleging recruitment of children by the armed groups, ill treatment at the hands of the State and the armed groups.

The State first acknowledged the impact of civil unrest on children in 1993 while submitting the first period report to the UNCRC. The State recognized that the possible impact of the situation on children is that the prevailing situations sometimes disrupts normal life and interferes with children’s access to education, health and

\textsuperscript{51} For Example, Section 4(a) of the Armed Forces Special Powers Act as amended in 1972, grants the armed forces personnel the power to ‘shoot to kill’ and unfortunately the qualification clause to use these powers is loosely worded. Wordings like “...prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or fire-arms, ammunition or explosive substances.”, obscure the meaning of wordings like “assembly” which well be a lawful assembly, such as a family gathering, and since "weapon" is not defined it could include a stone. (UN Human Rights Commission).

Preventive detention laws can allow the detention of the arrested person for up to three months. Under 22(4) any detention longer than three months must be reviewed by an Advisory Board.

Under Section 4(c) of the Act, a person can be arrested by the armed forces without a warrant and on the mere suspicion that they are going to commit an offence. The armed forces are not obliged to communicate the grounds for the arrest. In Luituklka v. Rishang Keishing, (1988) 2 GLR 159, a habeas corpus case, exemplifies the total lack of restraint on the armed forces when carrying out arrests. The case was brought to ascertain the whereabouts of a man who had been arrested five years previously by the army. The court found that the man had been detained by the army and that the forces had mistaken their role of "aiding civil power". http://www.hrdc.net/sahrdc/resources/armed_forces.htm (05 August 2004).


\textsuperscript{53} CCPR/C/37/Add.13, Para 57 of India’s Second periodic report under article 40 of ICCPR and CCPR/C/76/Add.6, the third periodic report at Para 37

These Armed Forces (Special Powers) Act and the Terrorist and Disruptive Security (Amendment) Act legislative measures have been enacted to meet certain special situations such as organized forms of terrorism and insurgency and are subject to adequate safeguards to ensure against violation of human rights.
other basic services often creating fear and psychological problems (UN.
CRC/C/93/add.5 2003, Para 1085). The protection was couched within the ‘national
disaster relief plan’ and the State had not launched special programmes for children in
these affected areas except those which are ordinarily applicable across the country.

However, the involvement of children as part of armed groups was acknowledged
when the State was responding to the list of issues taken up during the consideration
of the State first periodic report to the UN- CRC. The Committee had asked for
information and statistical data, on the status of children affected by armed conflict,
including those below the age of 18 years enlisted in the armed forces. In reply, the
India stated that it was the militant groups were recruiting children for military
purposes, thereby violating Article 38 of the Convention.” With the exception of this
reply, India has made no subsequent mention on the involvement of children in the
conflict in J&K or Northeast India. The state however, made no mention in the report
in respect of ‘children and armed conflict’ in reference to Article 38 and 39 of the
UN-CRC. While on the other hand, the UN CRC in the both the concluding
observations have raised concerns raised concerns on the rights of the children
involved in the conflict.

Despite State denial, India has been under constant scrutiny with respect of child
victimization in the AFSPA affected and LWE areas. According to Coalition to stop
the Use of Child soldiers Child soldiers, 17 armed opposition groups recruit child
soldiers in their cadres. Following the criteria laid out in UN Security Council
Resolution (UNSC) 1379, paragraph 16, which was adopted in November 2001,

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54 CRC/C/Q/IND/1 30/06/99. List of Issues to be taken up in connection with the consideration of
the initial report of India (CRC/C/28/Add.), Para 32.
55 Summary record of the 591st meeting of the CRC, Consideration of the Initial Report of India, UN
Doc. CRC/C/93/5, 18/1/00, Para 18. Mrs Rao stated, ‘It was the militant groups which recruited
children under 18 for military purposes, thereby violating article 38 of the Convention. Every effort
was being made to discourage the practice and to build up social pressure against it…….’
56 CRC/C/93/add.5 16 July 2003. Consideration of reports submitted by states parties under article 44
of the Convention.
57 CRC/C/28/Add.10 7 July 1997. The Government’s response is couched in the context of a ‘national
disaster relief plan;’ the chapter on armed conflict (Pages 339-340) makes no mention of such a plan
While it is commendable that the SPR contains a chapter on this subject, the text is just one and a half
pages, and lacks both detail and depth.
58 See, CRC/C/15/Add.115 22 February 2000(Concluding Observations first Report), Para 63 and
CRC/C/15/Add.228 26 February 2004(Concluding Observations Second Report), Para 68.
59 The government of India also recognizes these groups. http://www.mha.nic.in/annual-2002-2003/ch-
3.pdf (8 August 2004)
60 Para 16 of the Security Council resolution 1379 (2001) on "Children and armed conflict reads
Coalition to Stop the Use of Child Soldiers in its 1379 Report, mentions the use of children as part of armed opposition groups in J&K and North East India and has proposed their inclusion in the 1379 list.\textsuperscript{61} In Oct 2003, the offensive launched by the Bhutanese armed forces expel members of ULFA, NDFB and the KLO, thirty seven women and 27 children were reportedly among ULFA rebels captured in Bhutan.\textsuperscript{62}

A journalist who spent two weeks in April-May 2000 with the NSCN-IM\textsuperscript{63} in the Northeast India too reported that an estimate half of all combatants in most groups in the North East India children and the youngest reported age is of 11 years\textsuperscript{64} and that of the 250-300 troops in the group, "the vast majority were children between 13 and 17 years of age".\textsuperscript{65} In Manipur there are reportedly 900 to 1,000 girl soldiers fighting with armed groups.\textsuperscript{66}

Similarly, the UN Special Rapporteur on Torture reported the arrest of a 15-year-old student from Manipur by the troops of the 57th Mountain Division of the Indian army, "on suspicion of having links with an armed opposition group. He was in incommunicado detention and was later handed over to the Police after three days. Late in the evening, his condition supposedly deteriorated and he was taken to hospital where he died the next day."\textsuperscript{67} In February 1998, 15-year-old Yumlembam Sanamacha was arrested and allegedly tortured by members of the 17th Rajputana Rifles. Two others -- Bimol Singh (aged 15) and Inao Singh (aged 22) who were also

\textsuperscript{61} Page 40.
\textsuperscript{63} Ibid Note 14.
\textsuperscript{64} http://www.ipcs.org/newDatabaseIndex.jsp?database=1004 (23 September 2004).
\textsuperscript{65} http://www.childsoldiers.org (05 August 2004).
\textsuperscript{66} http://www.cwa.tnet.co.th/vol16-2/guns11.htm (11 August 2004)
arrested were later released. A local survey presented to the Asia-Pacific Conference on the Use of Children as Soldiers reported 28 children arrested or injured and 10 children killed in Manipur between January and May 2000. In 2003, there was an alleged killing of three Kuki children. The Assam Rifles claimed that they were hardcore KNF militants killed in an encounter; the villagers alleged that these children were picked up from their houses and later killed.

A University of Oxford Study in 2002 has gone far to state that the number of children who experience the effects of conflict in India is a significant proportion of all war-affected children globally and that the combined population of those states suffering insurgency (Jammu Kashmir, Assam, Nagaland, Mizoram, Tripura, Arunchal Pradesh, Manipur, Megalaya) is more than the combined population of Sierra Leone, Sudan and Afghanistan, countries where armed conflict and its consequences for the young has a much higher profile.

Most international organizations over the years have also maintained that there is a wide prevalence of the use of children by the armed groups operating in North East India and LWE. The HRW has documented the manner children are recruited in to the rank and file of the armed groups.

The Naxalites recruit children between ages six and twelve into children’s associations called bal sangams, where children are trained in Maoist ideology, used as informers, and taught to fight with non-lethal weapons (sticks). Naxalites typically promote children above age 12 to other wings—chaitanya natya manch or CNMs (street theater troupes), sangams (village-level associations), jan militias (armed informers), and dalams (armed squads). In

69 http://www.childsoldiers.org/cs/childsoldiers.nsf/0/ca0b4919a2c0d3d480256b1e003b6a8f?OpenDocument
71 http://www.thirdworldtraveler.com/Life_Death_ThirdWorld/Child_Soldiers.html
http://www.cdi.org/friendlyversion/printversion.cfm?documentID=583
http://www.essex.ac.uk/armedcon/story_id/000050.pdf
http://www.cwa.tnet.co.th/Publications/Newsletters/vol16_2/v16_2_mungovern.html
(All the above sites visited on 28 Sep 2005)
72 According to the Coalition, seventeen armed groups operating in Northeast India use children.
sangams, jan militias, and dalams, Naxalites give children weapons training with rifles and teach them to use different types of explosives including landmines.\textsuperscript{73}

National and international NGOs too have continued to raise concern on the use of children in the ongoing problem. In the Shillong Declaration\textsuperscript{74} concern was raised that that special legislation in areas of emergencies and armed conflict situations inter alia Armed Forces (Special Powers) Act 1958, National Security Act 1980, Punjab Security of State Act 1953, Public Safety Act, and re-promulgated Prevention of Terrorism Ordinance, 2001, violate India’s commitments to International Humanitarian Law and Human Rights Standards and have grave implications on the safety and security of children.

The Child Soldiers International (then Coalition to Stop the Use of Child Soldiers) in 2003 identified India as a state of highest priority where child soldiers are being used. In 2013 too, the Child Soldiers International has raised concern on the recruitment of children while submitting a Report to the Committee on the Rights of the Child in advance of India’s initial report on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.\textsuperscript{75}

In 2013, India has, for the first time been mentioned in the UN Security Council fifth Cross-Cutting Report on Children and Armed Conflict (2011). The only limitation being that the State has been referred in the body of the Report and not on and not on the agenda of the Council. In response India has referred there is a need to check the tendency of “mandate creep” while Russia in response to the report has stated that the situation in India is not an internal conflict.

Irrespective of the non-recognition by the government, children are involved in the civil unrest are increasingly coming in contact with the Police and the Security Forces and therefore are also being victimized.

\textsuperscript{73} HRW (2008), See Dangerous Duty Children and the Chhattisgarh Conflict at 9.
\textsuperscript{74} Shillong Declaration on India's Children in Armed Conflict. National Workshop on Children in Armed Conflict Shillong 10 - 12 January 2002. Available at http://www.coremanipur.org/Articles%20folder/child/children_4.htm
It was only in 2010 that India launched its first formal Scheme in the form of a pilot project for the protection of children in areas of civil unrest: ‘the Bal Bandhu Scheme for the Protection of Child Rights in Areas of Civil Unrest.’ In 2012, the NCPCR adopted the Protocols For Police and Armed Forces in Contact With Children in Areas of Civil Unrest which spells out the protocols that are to be adopted when police, armed forces or other law enforcement agencies come in contact with children.

It focuses on considering all such children as children in need of care and protection and safeguarding their basic human rights and constitutional guarantees. These children are to be regarded as victims of circumstances, which are not of their making, and therefore they require rehabilitation, as suggested by this document. Indeed there have to be mechanisms for prevention of children from even getting into the fold of armed groups. They have to be treated as children and not as adults in such circumstances.

The thesis examines the debate surrounding the status of children in areas of civil unrest. Children are the inevitable victims of such civil unrest situations and State's non recognition of the problem further compounds the problem in the light of special legislations which have little or no concern for the rights of children. Little if any

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76 The thesis refers to the term 'civil unrest' as against internal conflict or conflict since the latter has a definitive legal interpretation within the meaning of the Geneva Conventions with respect to the threshold of armed violence. Civil unrest is referred in the thesis is referred to situations in Kashmir and Northeast India where the state has imposed the Armed Forces (Special Powers) Act and situations affected by Left Wing Extremism. In both contingencies the aggrieved communities as involved in protracted violence demanding secession from the parent State.

76 MHA (2012), Ministry of Home Affairs Government of India, Annual Report pg 36 2.9.18(i)

76 Author, while participating in a Trialogue on Children Affected By Armed Conflict, organized by the Human Rights Centre, University of Essex. http://www2.essex.ac.uk/human_rights_centre/news/human_rights_week_Events.shtml (12 September 2004).


(a) To intervene in ten Districts in five States in areas of civil unrest with the mandate to protect child rights, focusing attention on mobilization of communities through trained local volunteers or 'Bal Bandhus' who will act as child defenders.

(b) To bring stability in the lives of children in the process of ensuring that all their entitlements to protection, health, nutrition, sanitation, education and safety, are fulfilled through Government action.

(c) To enhance democracy through community participation and action and renew hope in harmonizing the society and stabilizing lives while a child’s well-being becomes the focus of all action in the area.

77 NCPCR(2012), Protocols for Police and Armed Forces in Contact With Children in Areas of Civil Unrest.
consideration has been given to the fact that some of the suspected or alleged members of the armed opposition groups could be children or juveniles under the age of 18. As a result, children are being ill-treated, kept incommunicado detention even on suspicion of having links with the armed opposition groups.

State's non-recognition of the problem not only risks the absence of strong rehabilitation but the State invariably does not institute measures to reduce further harm at the hands of the security forces and other instruments of the State. The socio-political trigger of the lack of health and education related measures in these areas is abysmally weak/nonexistent which in turn creates a cycle of violence-deprivation-poverty and neglect creating conditions for children to the easier option to join the armed groups rather than to be apart of the vicious cycle which had forced them to join armed groups at the first place. Even if peace forthcoming, it may just be a buffer peace between two conflict time zones because if justice and rehabilitation is denied to these children at this formative stage of their mental and social development then the likelihood of their later involvement increases manifolds.