CHAPTER III

REVIEW OF LITERATURE

The thesis examines the dilemma of State intervention towards child protection in situations of civil unrest arising out of the aggrieved communities demand for national self-determination in the newly constituted third world States post decolonization. Two issues have principally limited State intervention. First, the nature of the civil unrest expansively interpreted within the broad spectrum of the legally recognized violence threshold varying from a law and order situation at one end to the existence of an internal armed conflict within the meaning of the Geneva Conventions at the other extremity. Invariably the affected State refer to such situations as a law and order problem as against the international community referring such situations as an internal conflict. Second, the risk of defining child participation/victimization within the framework of the Paris Principles which risk the situation being defined as an internal conflict.

There is no literature currently available which examines the above trade off. Available literature invariably links child participation to with child soldiering as defined in the Paris Principles and civil unrest to internal armed conflict. The only published article examining this dilemma is of the PhD scholar itself (Vimug Mukul Saxena, Left out by the Pied Piper: The UN Response to Children in Localized Conflict Settings, Northwestern Journal of International Human Rights, Vol 9). The article examines as to why third world States have been reluctant to define and address child participation in internal secessionist movements. 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. Further, these modern-day conflicts are not labelled as “armed conflicts.” The United Nations permitted international intervention in the civil wars of the 1990s because those conflicts occurred in states lacking any semblance of rule of law. In contrast, the current third-world conflicts occur within states with a certain level of democratic governance and rule of law, thereby limiting international intervention
under the auspices of the U.N. Child involvement in violent movements presents distinct challenges in terms of how to define those children (because there are strong indicators that children voluntarily participate in on-going secessionist movements), and in terms of the state’s recognition of the child soldier problem. Continued advocacy is necessary to encourage international organizations to utilize the approaches applied to child participation in armed conflicts to child participation in localized secessionist movements. This must include urging states to enact domestic legislation to protect child participants in the conflicts.

The paper also examines and proposes a model for State intervention de linking child intervention to the civil unrest situation within the law and order mandate of the State. No State intervention model in the world exclusively de links child rights to the law and order situation prevailing in such areas. Although, Sri Lanka is one of the few states currently dealing with a localized conflict to formally recognize the problem of child soldiers, acknowledging publicly that its local secessionist group, the Liberation Tigers of Tamil Eelam (LTTE), uses child soldiers.

Legislations With Respect to Child Participation.

International Law. Protection of children is governed by two bodies of international law, international humanitarian law (IHL) and international human rights law. While the former seeks to regulate the methods and means of warfare, international human rights law seeks to regulate State’s jurisdiction upon people during times of peace. Despite limited direct protection to children both bodies of law

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116 There is a practice of voluntary child recruitment in most secessionist movements. For example, when the secessionist movement within Sri Lanka gained momentum between 1987 and 1994 child recruitment was largely voluntary or the result of subtle coercion or manipulation. See SONALI, CHILDREN AND CONFLICT: CHILD SOLDIERS AND THE ROLE OF SMALL ARMS. Similarly, a great number of children voluntarily participated in the political violence in Nepal; Palestine is another example where young people growing up in the Occupied Territories are often willing participants in the national struggle and their political consciousness is developed to an extent, and from an age, that commonly takes outsiders by surprise. JASON HART, CHILDREN’S PARTICIPATION IN HUMANITARIAN ACTION: LEARNING FROM ZONES OF CONFLICT (University of Oxford 2004); See also HOGG CHARU LATA, CHILD RECRUITMENT IN SOUTH ASIAN CONFLICTS: A COMPARATIVE ANALYSIS OF SRI LANKA, NEPAL AND BANGLADESH 12 (The Royal Institute of International Affairs 2006).

follow the principle of complimentarily for the protection children during times of armed conflict.\textsuperscript{118}

International humanitarian law is applicable in internal conflicts in two situations. First, in an ‘armed conflict not of an international character’\textsuperscript{119} invoking the application of the Common Article 3 to the Four Geneva Conventions thereby obliging state parties to abide by minimum humanitarian norms. Second, in ‘non international armed Conflict’\textsuperscript{120} under the Additional Protocol - II to the four Geneva Conventions. However in both contingencies the application is subject to the affected State's recognition of the existence of an internal conflict.

The ICCPR and the UN CRC are the two principal treaty documents under international human rights law which impose binding obligations upon State parties to ensure the protection of child rights. The UN CRC is includes the entire spectrum of child rights under one umbrella without the provisions of derogations even at times of emergency/armed conflict\textsuperscript{121} These include civil and political rights as well as economical social and cultural rights addressing the specific needs of the children. In 2002, the CRC was also complemented by two additional Protocols, namely the Optional Protocol on the involvement of Children in Armed Conflict\textsuperscript{122} and the Optional Protocol on the sale of Children, Child Prostitution and Child Pornography\textsuperscript{123}.

Protection to children through IHL is limited to the existence of a conflict and thus remains inapplicable in the present context. The UN CRC is applicable the meaning of the Geneva Conventions without distinction of peace/conflict. Art 37- 40 of the UN

\textsuperscript{118} Prosecutor v. Tadić, “As a matter of customary law, fundamental human rights, as laid out in international instruments, apply fully in all situations of armed conflict.”, Case IT-94-1-AR72, Appeal on Jurisdiction (October 2, 1995), pp. 49-53. Also see GA Res 2675 (XXV) 1970.

\textsuperscript{119} UN Document, Geneva Conventions, Common Art. 3. Part I : General provisions to the Geneva Conventions.

\textsuperscript{120} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

\textsuperscript{121} Unlike art 4 of the ICCPR, the UN CRC does not contain any limitation clause which allows State to derogate from certain provisions of the Convention at eh time public emergency which threatens the life of the nation.


CRC mandates State parties to ensure that juvenile justice mechanisms are intended to dispense restorative justice keeping their vulnerability and age mind. These provisions thus remain equally applicable to civil unrest situations. However, the operative part of the Convention especially intended to protect children from the fallouts of civil unrest is limiting the age of participation of children in hostilities. Art 38 (2) and (3) of the UN CRC also obligates state parties to take all feasible measures to ensure that persons who have not attained that age of fifteen years do not take a direct part in hostilities. In particular, the UN CRC obligates states to refrain from recruiting persons under fifteen\(^\text{124}\) and when recruiting those between fifteen and eighteen years, endeavour shall be made to give priority to those who are oldest\(^\text{125}\). The Optional Protocol to the CRC on the involvement of Children in Armed Conflict 2000 imposed an absolute ban on the use and recruitment of children under the age of eighteen by non state armed forces\(^\text{126}\). However, the Optional Protocol allows voluntary recruitment by state forces after the age of fifteen\(^\text{127}\) and obligates upon states to ensure that person who have not attained the age of eighteen are not compulsory recruited into their armed forces\(^\text{128}\). While allowing recruitment by state forces above the age of fifteen, the Optional Protocol asks states not to expose persons under eighteen to take direct part in hostilities\(^\text{129}\).

**Domestic Law.** There is little reference towards the protection of children in civil unrest situations in the JJ(C&P) Amendment Act 2005. Children affected by armed conflict or civil commotion are only mentioned in the in preamble of the JJ(C&P) Amendment Act 2006\(^\text{130}\) as those in need of care and protection and their protection is couched in the national disaster relief plan.\(^\text{131}\) Unlike international treaties like the UN Convention on the Rights of the Child (UN CRC)\(^\text{132}\) and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed

\(^{124}\) Art 38(2), UN CRC.

\(^{125}\) Art 32 (3), UN CRC.


\(^{127}\) Ibid art. 3(1).

\(^{128}\) Ibid art. 2.

\(^{129}\) Ibid art. 1.

\(^{130}\) Into effect 22 August 2008 by the Juvenile Justice (Care and Protection of Children) Amendment Act 2006 (Act 33of 2006).

\(^{131}\) Para 87, CRC/C/93/Add.5 16 July 2003.

conflict (OP CRCAC)\textsuperscript{133} that specifically address the issue of children in armed conflict, there is no such legal codification in India. Chapter II of the JJ(C&P) Amendment Act 2006 deals with juveniles in conflict with law in terms with their conditions of detention, prosecution, penalty or sentence of imprisonment, etc but there is no specific reference on their treatment when apprehended for their alleged involvement in terrorist acts or grave crimes as part of armed groups. The void is because the State maintains that there are no child participants.\textsuperscript{134} Contrarily, child recruitment and military training by the armed groups is well documented in the Disturbed Areas of Assam Nagaland and Manipur as well as in Maoists affected region of Chhattisgarh.

Special legislation which are in effect in these areas too make no reference to the protection of children. The Armed Forces (Assam and Manipur) Special Powers Act 1972, the Armed forces (Jammu and Kashmir) Special Powers Act 1990, Prevention of Terrorist Act 2001 and the Unlawful Activities (Prevention) Amendment Ordinance, 2004 are some of the legislations which were/are in effect in the Disturbed Areas/ LWE affected regions.

**Enforcement and Implementation**

The State has consistently referred to the issue of children in important documents but there has been negligible/no State intervention to actually improve the Status of children and measures to ensure their protection and vulnerability.

The Bal Bandhu Scheme for the Protection of Child Rights in Areas of Civil Unrest is the only Pilot Project (2010-13) launched by the National Commission for the Protection of Child Rights (NCPCR) which has limitedly intervened eight Blocks in across five States of affected by the civil unrest. The Pilot Project has principally sought to a ensure universal access to health and education for all children without discrimination.

\textsuperscript{133} UN Document Adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000 entry into force 12 February 2002.

\textsuperscript{134} See India’s reply to the CRC on Children and Armed Conflict stating, ‘the possible impact of the conflict on children is that the prevailing situations sometimes disrupts normal life and interferes with children’s access to education, health and other basic services often creating fear and psychological problems’. India’s Second Periodic Report to the UN CRC, Paragraph 1085, pg 323.
The findings of the Scheme has highlighted extreme neglect of children due to the high incidence of poverty, extremely poor HDI and State inability to launch specially designed interventions within the cultural and political context of the situation. Child labour, migration and exploitation, deprivation of State benefits to the migrant children in the receiving state, their vulnerability to enter into the cycle of violence or as part of armed groups due to weak social security and breakdown of family structures are some of the key issues highlighted in the report.

There are equally strong causative indices of deprivation and poverty at the family, community and the State level affecting children. Infrastructure deficits have directly affected children with respect to their rightful access to health and education. Apart from the general collateral security risks of incommunicado detention or ill treatment of children at the hands of the security forces, the State's security centric policies (discussed later in the thesis) has created developmental voids, risked encroachment of development space.

There is equally little information available on the status of children involved in anti national activities as part of armed groups.

**Scholarly Articles and Publications.**

No publication till date (except the article published by the researcher) has examined the status of children such localized civil unrest situations where the aggrieved communities are fighting for their alleged right to national self determination. Most articles and other publications have approached the problem within the context of an internal armed conflict highlighting concerns of child recruitment/victimization by the State and the armed groups.

**Articles on India.**

Usha Ramanathan (2005), *India and the ICC*,[ ICJ 3.3(627)].

The article examines the State's reluctance to ratify the ICC Statute apprehending the inclusion of 'armed conflict not of an international character' in defining 'war crimes' in Article 8 of the ICC Statute. The acceptance risks the situations in Kashmir, the
North-East and as was experienced in Punjab, as well as the violence of more recent vintage in Gujarat, could be referred to the ICC.

**Jo Boyden PhD et al. (2002), Children Affected by Armed Conflict in South Asia**

The paper refers to the situation in Kashmir and Northeast India as an internal armed conflict highlighting the widespread deployment of the armed forces within civilian communities (both in absolute and per capita terms). The study suggests that there are 350-450,000 Indian police and army troops stationed with a ratio of security personnel to civilians of between 1:22 and 1:29 – one of the highest in the world. The number of children who experience the effects of conflict in India is a significant proportion of all war-affected children globally. 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.


The Committee raised concerns that the situation in areas of conflict, particularly Jammu and Kashmir and the north-eastern states, have seriously affected children, especially their right to life, survival and development (art. 6 of the Convention). In the light of articles 38 and 39, the Committee expresses its very serious concern at reports of children who are involved in and are victims of these conflicts. Moreover, it also raised concerns at reports of involvement of the security forces in disappearances of children in these conflict areas. The Committee also called upon the State to ensure at all times respect for human rights and humanitarian law aimed at the protection and care of children in armed conflict.

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Committee on the Rights of the Child, List of Issues: India. 30/06/99, CRC/C/Q/IND/1. (List of Issues) at 32.\(^{136}\)

The CRC sought information on the status of children affected by armed conflict, including those below the age of 18 years enlisted in the armed forces and measures undertaken and/or envisaged to protect the rights of children in conflict areas, particularly in Jammu and Kashmir and the Northern States. Information was sought in light articles 37, 40 and 39 of the Convention, in particular on:

- the use of arrest, detention or imprisonment of a child as a measure of last resort and for the shortest period of time;
- the possibility to have prompt access to legal and other appropriate assistance (interpretation), as well as for challenging the legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and of having a prompt decision thereon;
- deaths of children in custody.

(In reply, India made no mention of the above queries in the State response to the List of issues in 2003).

Report of the Secretary-General to the Security Council 2014.\(^{137}\)

The Report states that there is recruitment and use of children, as young as 6 years of age, by Maoist armed groups in India. Although no disaggregated data on the number of children associated with armed groups in India was available to the United Nations, independent estimates indicate that at least 2,500 children are associated with armed groups in Naxal-affected areas. Notably, Naxalite recruitment also continued to affect girls and women. Children were used as spies and for fighting with crude weapons, such as sticks. At the age of 12, children associated with Naxalites are reportedly transferred to age-specific units and receive military training in weapons handling and the use of improvised explosive devices. According to Government sources, children also continued to be placed in front of combat units as human shields.

\(^{136}\) UN Document (1999), Committee on the Rights of the Child, List of Issues : India. 30/06/99, CRC/C/Q/IND/1. (List of Issues) at 32.

\(^{137}\) UN Document (2014), Office of the Special Representative of the Secretary General, Children and Armed Conflict[Online]. Available at http://childrenandarmedconflict.un.org/countries/india/
ACHR, The Status of Children in India (2003)\textsuperscript{138}

The Report notes that the State has remained silent on the situation of children in armed conflicts situations as if there are no armed conflicts in India. In the process, the State also fails to inform the CRC Committee about the serious violations of international humanitarian laws by the armed opposition groups in India. Children are subjected to arrest, detention, torture, disappearances and extrajudicial executions by the law enforcement personnel of the government of India. The armed opposition groups and government sponsored vigilantes are also responsible for serious abuses against children including execution, rape, and forcible marriage.

The Report further states that at least 3,000 children, 500 in Northeast and Jammu and Kashmir and about 2,500 in Naxal-affected states of the country, are working for armed militant/rebel groups. It has been disclosed by the Asian Centre for Human Rights (ACHR) in its just released report titled ‘India’s Child Soldiers’.

Child Soldiers International (2013)\textsuperscript{139}

The following concerns have been raised by Child Soldiers International:-

- The absence of effective procedures to verify age of recruits to the armed forces, police forces and other paramilitary forces.
- The absence of legislation explicitly criminalising unlawful recruitment and/or use of children by state armed forces, paramilitaries, and village defence militias, as well as non-state armed groups. The continued recruitment and use of children in a variety of roles by armed opposition groups, and the risk of their participation in hostilities.
- The absence of adequate programs to support the release, recovery and reintegration of children recruited into, or otherwise associated with, state armed forces, paramilitaries, village defence militias or armed opposition groups.

\textsuperscript{138} Asian Centre for Human Rights (2003), The Status of Children in India A Submission to the UN Committee on the Rights of the Child at 81.

\textsuperscript{139} Child Soldiers International, UK (2013), Commenting on India's 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
The administrative detention of children suspected of association with armed opposition groups, under the Armed Forces Special Powers Act (AFSPA), Jammu & Kashmir Public Safety Act (PSA) and other emergency legislation.

Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India (2014). 140

The Committee urges the State party to bring its juvenile justice system fully into line with the Convention, in particular articles 37, 39 and 40, and with other relevant standards, and the Committee’s general comment No. 10 (CRC/C/GC/10, 2007).

- Give effect to the Juvenile Justice Rules of 2007 establishing the minimum age of criminal responsibility at 18 and maintain it at an internationally acceptable level;
- Provide the Juvenile Justice Boards with adequate human, technical and financial resources, designate specialized judges for children and ensure that such specialized judges receive appropriate education and training;
- Ensure the provision of qualified, independent, free or subsidized legal and other appropriate assistance to children in conflict with the law at an early stage of the procedure and throughout the legal proceedings;
- Promote alternative measures to detention, such as diversion, probation, mediation, counselling, or community service, wherever necessary, and ensure that detention is used as a last resort and for the shortest possible period of time and that it is reviewed on a regular basis with a view to withdrawing it;
- In cases where detention is necessary, ensure age-appropriate separation of children in Observation and Special Homes and that children in conflict with the law are not detained together with children in need of protection or with adults and that detention conditions are compliant with international standards, including with regard to access to education and health services.
- To that effect, make use of the technical assistance tools developed by the Interagency Panel on Juvenile Justice and its members, including the United Nations Office on Drugs and Crime (UNODC), UNICEF, OHCHR and NGOs,

140 UN Document(2014) (Advance Unedited Document), Committee on the Rights of the Child Concluding observations on the consolidated third and fourth periodic reports of India CRC/C/IND/CO/3-4
and seek technical assistance in the area of juvenile justice from members of the Panel.

**Dangerous Duty: Children and the Chhattisgarh Conflict**

The report refers to the situation in Chhattisgarh as an internal conflict and notes the 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 sangams, jan militias, and dalams, Naxalites give children weapons training with rifles and teach them to use different types of explosives including landmines. Children in jan militias and dalams participate in armed exchanges with government security forces. Children in bal sangams, sangams, and CNMs do not directly participate in hostilities, but are nevertheless open to attacks by government security forces during anti-Naxalite combing operations. Children recruited into dalams may not be permitted to leave, and may face severe reprisals, including the killing of family members, if they surrender to the police.

**Important International Publications**

**Jenny Kuper, Military Training and Children In Armed Conflict: Law, Policy And Practice**

The book examines the protection of children through the field of international law arguing that within the law of armed conflict, children were linked to other vulnerable non-combatant groups. Only in the 1977 Additional Protocols to the Geneva Conventions was there recognition of child soldiers with the limitations contained in those Protocols on children under the age of fifteen taking a 'direct part in hostilities' and restrictions on recruitment. Similar provisions appeared in the 1989 Convention on the Rights of the Child, although the general age for the end of childhood was laid down as eighteen. Attempts to rectify this anomaly were partially successful in the

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141 Human Rights Watch (2008), Dangerous Duty: Children and the Chhattisgarh Conflict
2002 Optional Protocol on Child Soldiers but compromises still had to be made. The drafting process revealed all too clearly the failure of the human rights community and the law of armed conflict community to understand each other fully. One of the compromises reached in the protocol imposed greater restrictions on armed groups than on Government forces, a breach of one of the cardinal rules of the law of armed conflict, namely that the rules apply equally to all sides.


This article discusses how accountability for serious crimes committed in Liberia during the country's fourteen year civil conflict could contribute to civilian protection and lay a foundation for a lasting peace based on the rule of law. The analysis is carried out against the backdrop of the cessation of hostilities, which culminated in the conclusion of the Comprehensive Peace Agreement ("CPA") by the warring parties in Accra, Ghana in August 2003 and the establishment of the National Transitional Government of Liberia ("NTGL").

**The Women And Children In Conflict Protection Act: An Urgent Call For Leadership And The Prevention Of Intentional Victimization Of Women And Children In War. Lisa Avery143**

The article examines the staggering numbers of civilians affected by armed conflict is the manner in which they are brutally victimized and terrorized. Millions of women and children are raped, tortured, sexually exploited, forcibly conscripted, maimed, and murdered during times of war. Women, forced to flee their homes during conflict in fear for their lives and the lives of their children, find themselves unprotected, without resources, and in environments more perilous than the ones they left behind. Those who survive the initial onslaught of violence are often left to die slow and painful deaths from malnutrition, HIV and AIDS, and other less virulent communicable diseases. These ailments compound the assault on women and children.

143 Loyola Law Review, Spring 2005, 51 Loy. L. Rev. 103
Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children. Melissa A. Jamison

The article discusses the special concerns that arise with the detention of juveniles. It considers the conditions of detention at Guantanamo, generally, and of the juveniles, specifically and explores as to how international law that protects juveniles during an international armed conflict, considering the application of both international human rights law and international humanitarian law. This includes a look at the instruments protecting children, as well as the justifications for providing children with special protection.

U.N. Efforts to Promote Child-Conscious Peacemaking and Peacekeeping: A Step towards Improving the Lives of War-Affected Children. Ilene Cohn

Children suffer disproportionately in war and benefit disproportionately less in peace. The article examines that in the years since the adoption of the first Security Council resolution on children and armed conflict in 1999, the United Nations (U.N.) system and the international community have repeatedly called upon peacemakers and parties-to-conflict to address children's issues during peacemaking processes, in peace agreements, and in the mandates and staffing of peacekeeping operations, lest they be overlooked and under-funded in post-conflict recovery and reconstruction budgets and plans. In 2003, the Security Council called again upon "all concerned parties to ensure that the protection, rights, and well-being of children are integrated into the peace processes, peace agreements, and the post-conflict recovery and reconstruction phases. Whereas the peace processes in El Salvador (1991), Guatemala (1996), and Liberia (1997) failed to take children's concerns explicitly into account, peace agreements in Sierra Leone (1999), Burundi (2000), and Liberia (2003) have included explicit child rights provisions. This trend is attributable to the steadily increasing international attention paid to war's impact on children and the practical realization among warring parties and mediators that addressing issues relevant to children can build confidence among parties and foster further dialogue while ideally also bringing immediate and long-term benefits to children.

144 9 U.C. Davis J. Juv. L. & Pol'y 127
145 Ohio State Journal on Dispute Resolution (2005), 20 Ohio St. J. on Disp. Resol. 99
Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court. William A. Schabas

The article examines the commissioning of the Sierra Leone's Truth and Reconciliation Commission (TRC or 'the Commission'). By and large, truth commissions have existed as an alternative to criminal justice. The parallel operation of these two approaches to accountability raised issues that had hitherto received little attention. Pursuant to section 6(1) of the Truth and Reconciliation Commission Act 2000, the Sierra Leone TRC was to be established 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered'.

Child Recruitment and the Special Court For Sierra Leone. Alison Smith

The article examines the May 2004 decision of the Appeals Chamber of the Special Court for Sierra Leone in Hinga Norman (Hinga Norman Child Recruitment Decision) is a milestone in the enforcement of the crime of child recruitment. The indictments before the Special Court are the first time that the crime of child recruitment has been charged before an international court or tribunal; indeed, the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR, respectively) do not even mention that crime in their respective Statutes. In addition to settling the customary nature of the crime, the decision raises a number of interesting issues. The main issue to be discussed is the standards to be used in determining whether the elements of the crime are established, particularly the meaning of 'to participate actively in hostilities' and any legal distinction between voluntary and forced recruitment. The bitter division within the Appeals Chamber on a decision of such importance and the errors of law in the dissenting opinion about matters on which the majority decision is silent raise the very problematic nature of Rule 72(E) of the Special Court Rules and whether, as considered by one of the Special Court Judges, it extinguishes the right to appeal.

146 2 J. Int'l Crim. Just. 1141
Investigating Psychosocial Adjustment of Former Child Soldiers in Sierra Leone and Uganda. Colin Macmullin, Maryanne Loughry\textsuperscript{147}

This paper describes the methodology employed in two studies into the psychosocial outcomes of former child soldiers: in Sierra Leone, between May 2000 and September 2000; and in Northern Uganda between July and December 2001. The aim of the two studies was to construct instruments with meaningful and relevant indicators of psychosocial adjustment for use with former child soldiers. The involvement of local children, especially former child soldiers and people who knew them well, provided not only relevant examples of adjustment, but also the idiom that allowed the research participants to see their own experience reflected in the questions asked of them.

War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror. Rosa Ehrenreich Brooks\textsuperscript{148}

The article explores that the law of armed conflict is triggered only when an armed conflict actually exists; the rest of the time, other bodies of law are applicable. This Article asserts that these binary distinctions are no longer tenable. In almost every sphere, globalization has complicated once-straightforward legal categories, but this is nowhere more apparent and more troubling than in the realms of armed conflict and national security law. Although the boundaries between "war" and "nonwar," and between "national security" and "domestic issues," have been eroding for some time, September 11 and its aftermath have highlighted the increasing incoherence and irrelevance of these traditional legal categories. Shifts in the nature of security threats have broken down once clear distinctions between armed conflict and "internal disturbances" that do not rise to the level of armed conflict; between states and nonstate actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring; between temporal moments in which there is no conflict and temporal moments in which there is conflict; and between matters that clearly affect the security of the nation and matters that clearly do not.

\textsuperscript{147} 17 J. Refugee Stud. 460
\textsuperscript{148} 153 U. Pa. L. Rev. 675
International Peacekeeping and Child Soldiers: Problems of Security And Rebuilding. Franklyn Bai Kargbo

The article briefly examines the involvement of child combatants both as victims and as perpetrators of atrocities in various armed conflicts, the impact of such involvement on children and on the communities, and the international legal regime intended to thwart the phenomenon. The article later also examines the difficulties involved in using the international criminal justice system and in holding children accountable for crimes they committed during a war.

Psychosocial Issues in Reintegrating Child Soldiers. Dr. Michael Wessells

The term "child" is by no means universal, as views of childhood are culturally, socially, and politically constructed. For example, throughout sub-Saharan Africa, a young person who has completed a cultural rite of passage into manhood or womanhood is thereafter regarded as an adult. Typically, this occurs somewhere around the age of fourteen years, though it may also occur earlier or later, depending on the context. The term "child soldiers" implies that the children chose to ally themselves with the armed forces. The best evidence available indicates that significant numbers of children join armed groups without explicit coercion, often to obtain security, health care, training, or to escape an abusive family situation. Some join to obtain the sense of power and prestige that wearing a uniform and carrying a gun provide. Still others, feeling alienated, join liberation struggles backed by ideologies that provide a sense of meaning and commitment to a higher cause. However, forced recruitment is very widely practiced as well. The definition of the term "child soldier" does not refer to a rigid category. Many children in armed groups serve not as combatants but as laborers, spies, cooks, or sex slaves. Implying that all child soldiers were combatants creates a security risk by triggering retribution from the community. To reduce this problem, many practitioners increasingly prefer to speak of "children associated with armed groups" rather than child soldiers.

149 37 Cornell Int'l L.J. 485
150 37 Cornell Int'l L.J. 513
Talk Is Cheap: Getting Serious About Preventing Child Soldiers. P.W. Singer\textsuperscript{151}

The article looks at potential ways to prevent and deter the practice of child soldiers. To be effective, any effort against the use of child soldiers must seek to realistically understand the doctrine that drives it. Child soldiering stems from a set of deliberate choices and strategies designed to benefit from using children in war. By understanding the causes, as well as the resulting dynamics, one can develop more nuanced strategies that attack the very heart of the practice.

The Child Soldiers Of Sierra Leone: Are They Accountable For Their Actions In War? Mark Iacono\textsuperscript{152}

Political unrest and civil war ravaged the African country of Sierra Leone. The unspeakable brutality of the revolutionary soldiers contributed to the war's intensity. Children comprised a large number of these violent forces furthering the devastation. The article examines international law and non-governmental organizations and the legal tensions created by the status of these individuals as minors and the public outcry to hold the child soldiers accountable for their atrocities.

Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict Shara Abraham\textsuperscript{153}

The explores that despite wide body of international norms and standards for protecting children affected by armed conflict, child soldiers continue to be employed at increasingly alarming rates. Of particular importance is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol), which entered into force on February 12, 2002. The Optional Protocol sets 18 as the minimum age for compulsory military recruitment. It also requires that states mandate a minimum age, never less than 15, at which they will accept voluntary military recruits. The most effective means of ending this offensive practice is a multi-faceted approach. Governments, international agencies, and local actors must continue to pressure armed forces to stop recruiting and deploying child soldiers. The article also recommends that the Governments should

\textsuperscript{151} 37 Cornell Int'l L.J. 561)
\textsuperscript{152} 26 Suffolk Transnat'l L. Rev. 445
\textsuperscript{153} 10-SPG Hum. Rts. 15
regularize recruitment procedures and prosecute those who violate rules precluding underage recruitment. Educating parents and local communities about national and international law strengthens their capacity for advocacy, protection, and monitoring, thus potentially minimizing the risk of recruitment. Further, child soldiers often are products of impoverished and desperate socio-political environments. Addressing these root causes is another key component of reducing the risk of recruitment.

Reclaiming The "Little Bees" And The "Little Bells": Colombia's Failure To Adhere To And Enforce International And Domestic Laws In Preventing Recruitment Of Child Soldiers. Veronica Escobar

The article addresses the recruitment of Colombian children into the insurgent armed groups and the Colombian government's attempts to respond to the issue. It also examines the general history of the civil strife in Colombia and the impact on the lives of the country's children. It describes the existing international laws that protect civilians and children during internal armed conflicts, as well as those laws that address child combatants specifically. Finally, the authors also argue for States to actively implement international standards, strictly enforce existing national laws, and aggressively pursue and punish the guilty parties in order to begin the eradication of Colombian child soldier problem.

Sierra Leone's Search for Justice and Accountability of Child Soldiers, Ismene Zarifis

The Lome Peace Accords were signed in July 1999, ending nine years of internal armed conflict between the government forces of Sierra Leone and the Revolutionary United Front (RUF), an armed rebel group known for committing gross human rights violations. The conflict in Sierra Leone was one of the most brutal in Africa because of the nature and extent of war crimes committed by both sides and the forced recruitment of approximately five thousand child combatants. The United Nations and international human rights organizations reported that RUF combatants adopted a systematic practice of raiding villages, abducting children from their homes, and using them as combatants against their will. According to Amnesty International (AI),
personal accounts by former child soldiers reveal that the RUF threatened children's lives as well as their families' lives if the children refused to join the RUF. After the children were forcibly recruited, they were drugged and indoctrinated into the systematic practice of killing, raping, and maiming their victims.

**Nienke Grossman (2007), Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations**

International law provides no explicit guidelines for whether or at what age child soldiers should be prosecuted for grave violations of international humanitarian and human rights law such as genocide, war crimes, and crimes against humanity. Due to increasing numbers of children participating in armed conflict and engaging in serious human rights breaches, n1 a coherent policy response consistent with international legal standards, including states' duties to promote children's well-being and to prevent and prosecute human rights abuses, is necessary. This paper argues that the hundreds of thousands of children under age eighteen participating in armed conflicts around the globe should be treated primarily as victims, not perpetrators, of human rights violations and that international law may support this conclusion.

**Amnesty International, Child Soldiers Criminals or victims?**

This document concerns Amnesty International’s position on whether child soldiers should be prosecuted for serious violations of international criminal law. It has been prepared mainly as contribution to the discussion surrounding the proposed Special Court for Sierra Leone, and the debate between the United Nations, child protections agencies and the people of Sierra Leone about whether child soldiers should be prosecuted: therefore many of the examples given in this document will concern the actions of child soldiers in Sierra Leone. However, this document outlines issues which are of concern in any situation where child soldiers are recruited by adults to participate in hostilities, and where they are suspected to have committed serious breaches of international criminal law: and unfortunately, the phenomenon of child soldiers is prevalent in all regions of the world.

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156 38 Geo. J. Int'l L. 323
CHAPTER IV

THE POLITICAL CONTEXT OF CIVIL UNREST: DISTURBED AREAS AND LWE AFFECTED AREAS

Introduction

India's recognition to the civil unrest in Jammu and Kashmir, Northeast India and Left Wing Extremism (LWE) areas affected is that that of a law and order problem created as a result of sporadic acts of violence carried out by a few mislead groups but no real threat to democracy. Both the situations are intricately poised. The unrest in Kashmir and Northeast India is an outcome of the communities regional desire to obtain independent Statehood, a claim the communities are fighting since independence in 1947. The State, in turn has intermittently deployed the armed forces of the Union in the affected areas through the Armed Forces (Special Powers) Act 1958 and declared certain areas in Jammu and Kashmir and Northeast India as 'Disturbed Area.'

The situation highlights the complex history of decolonization and the internal struggle of accession and secession between newly independent state and these

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157 A significant part of the Chapter taken for the researcher’s publication, Vimug Mukul, Lawfully Wedded to Democracy? India and the Armed Forces (Special Powers) Act, Human Rights Review Vol. 9 No. 1 June 2012.
159 The abbreviation ‘AFSPA’ is intended to include all amended enactments of the Armed Forces (Special Powers) Act 1958 since these amendments did not involve substantive changes. It continues to be in force by simply changing the material field of application. For example, the Armed Forces (Special Powers) Act 1958 (Act 28) was initially enacted solely with respect to Assam and Manipur. It was amended twice in 1972 (Act 7) for Manipur and in 1986 (Act 69) to make it applicable to Arunachal Pradesh (Act 69), Meghalaya in Mizoram (Act 34), Nagaland and Tripura. The Armed Forces (Punjab and Chandigarh) Special Powers Act 1983 (Act 34) was enacted in Punjab between 1983-92 when the situation turned violent following demands that an independent state of Khalistan be created. Similarly, the Armed Forces (Jammu and Kashmir) Special Powers Act 1990 is still in force in Jammu and Kashmir at FN 15.
160 Vimug Mukul, Lawfully Wedded to Democracy? India and the Armed Forces (Special Powers) Act, Human Rights Review Vol. 9 No. 1 June 2012. 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.
regions is currently marked by protracted armed violence resulting in the deployment of the armed forces. The 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.

Many experts have commented that the application of the AFSPA tantamount to a State of emergency and view that the State has kept democracy at show window and enacted special legislation which do not uphold internationally accepted human rights treaty obligation under the ICCPR to which India has also ratified (discussed later).

No special legislations are in effect in the LWE affected areas but the State has enhanced the security machinery and increased the deployment of Central Para Military Forces. Community grievances in these areas has stemmed from unequal distribution of resources, their marginalization in the decision making process and in negligible distribution of proceeds received from the from the rich natural resources to which these communities are the statutory custodians. State indifference towards the rights of the local communities, their political exclusion over the years has manifested as protracted armed violence by a section of the community demanding secession through self-determination.

The Maoists in the LWE regions ideologically seeks to wage a war against the Indian government with the goals of peasant revolution, abolition of class hierarchies, and expansion of Maoist-controlled “liberated zones." These zones are to serve as the foundation of an independent “Maoist” state.

The State response in these areas (AFSPA and LWE) is twofold. First, a multi-pronged strategy to control the civil unrest through various security related interventions aimed towards the maintenance of law and order through the increase in Security Related Schemes (SRE) and deployment of additional Central Police forces. Second, integrated development through accelerated infrastructure development,

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stress on employment, good governance and decentralization and, the willingness to meet and discuss legitimate grievances of the people and the resolve not to tolerate violence.

Towards this end, the State has maintained controlling the situation by tangibly showing reduction in terrorist related violence, decrease in civilian deaths and security forces killings with the corresponding increase in surrenders, neutralization of terrorists and launching of various flagship programmes aimed at physical and constructive reforms towards the wellbeing of the aggrieved communities. However, the intervention outcomes equally expands to the State's ability to ensure democratic entitlements to the aggrieved communities. Principally, these include, socio economic development in the affected areas, rightful access to basic entitlements like health and education, enabling local self-governance, and systematically creating conditions for withdrawing special measures enacted to control the civil unrest. The latter is equally important, the absence of which risks protracted deployment of forces, increased powers through special legislations and decreasing democratic spaces.

The chapter examines State’s response to the civil unrest in the country. These include the Disturbed Areas under the AFSPA and areas affected by the LWE. Particular emphasis has been accorded towards infrastructural development affecting children in terms of access to health and education. Both the affected regions consist of tribal indigenous population protected as Scheduled Tribes under the Indian Constitution, the Panchayat (Extension to Scheduled Areas) Act 1996 (PESA) aimed to enable tribal self-rule\textsuperscript{162}, the Forest Dwellers Recognition of Forest Rights) Act, 2006 (FRA).

Part I of the paper examines the evolving political context of situation. These include the Disturbed Areas under AFSPA and the LWE affected region.

Part II examines the State’s multipronged intervention model of integrated development to include actions taken towards the maintenance of law and order development related initiatives aimed at physical and constructive access.

\textsuperscript{162} Ministry of Panchayati Raj, Government of India, Of the 76 left-wing extremist-affected districts in the country today, 32 are PESA districts. See Ajay Dandekar & Chitrangada Choudhury, Left-Wing Extremism and Governance: Concerns and Challenges in India’s Tribal Districts at 29.
THE POLITICAL CONTEXT OF THE SITUATION

Disturbed Areas under the AFSPA

India’s independence in 1947 is plagued by two important events. First, the birth of two nation states: the Dominion of Pakistan (later the Islamic State of Pakistan) and the Union of India. Second, the challenge to integrate the 562 princely states and provinces within independent India which became technically sovereign after the British paramountcy lapsed giving the option to the princely states and provinces to remain independent or be part of either of the dominions under the Independence Act 1947. The option with the princely states to proclaim independence *inter alia* accede to either of the dominions was the foremost challenge that confronted India and Pakistan since it threatened to fragment the newly formed states into a cluster of sovereign entities within the nation state. Junagadh in Gujarat, the United State of Gwalior, Orissa (Native state included Talcher, Bamra and Kalahandi), Santrampur, Vindhya Pradesh (native State included Charkhari and Sarila) Jind Hyderabad, Punjab province and, Manipur and Nagaland in the Assam province sought independent statehood but eventually acceded to India. The princely state of Jammu and Kashmir (Kashmir) initially chose independence but later signed the instrument of accession (26 October 1947) following the tribal invasion from Pakistan which precipitated as the first armed conflict between India and Pakistan in 1947-48.

Similarly armed violence has continued to foment in the communities in Manipur, Nagaland and Punjab demanding secession. The State immediately responded with force to quell these disturbances by bringing into force the Armed Forces (Special Powers) Act 1948. This was followed by the Assam Maintenance of Public Order (Autonomous District) Act 1953 and the Punjab Security of State Act 1953 before the Armed Forces (Special Powers) Act 1958(Act 36 of 1957) came into force on the repel of the Armed Forces (Special Powers) Act 1948. The Armed Forces (Special

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163 The Armed Forces (Special Powers) Act 1948 was derived from the British India Armed Forces (Special Powers) Ordinance 1942 brought into force to quell the Quit India Movement.
Powers) Act 1958 (AFSPA)\textsuperscript{164} formally involved the armed forces within the law enforcement paradigm conferring special powers in Disturbed Areas.\textsuperscript{165}

The present Act is in force in the whole of Manipur (except Imphal), Nagaland and Assam, the Tirap and Changlang districts of Arunachal Pradesh and a 20 km belt in the States having common border with Assam and 22 Police Stations and part of areas under 5 Police Stations in Tripura (MHA Annual Report 2002-03 at 32) in the Northeast India and the Kashmir (District of Jammu, Kathua, Udhampur, Poonch, Rajouri, Doda, Srinagar, Budgam, Anantnag, Pulwama, Baramulla & Kupwara) under the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990.

Armed violence demanding secession continues in these regions and the state has responded to these demands by aggressively deploying the armed forces through the AFSPA in the North-eastern Region (intermittently since 1958), Kashmir (since 1990) and Punjab (1983-92) conferring the same substantive powers to the armed forces as the Armed Forces (Special Powers) Ordinance 1942. These include: to fire upon otherwise even to the causing of death for the maintenance of public order,\textsuperscript{[AFSPA, sec 4(a)]} to arrest without warrant, \textsuperscript{[AFSPA, sec 4(c)]} destroy\textsuperscript{[AFSPA, sec 4(c)]} or search without warrant any premises wrongly restrained or confined. \textsuperscript{[AFSPA, sec 4(d)]}. The armed forces are protected from persecution, suit or any legal proceeding except with the previous sanction of the Central Government for acts done or purported to be done in exercise of their duties (AFSPA, sec 6).

The AFSPA continues to draw fierce criticism for being draconian, supplanting civil authority, and violating basic human rights, as well as granting the armed forces impunity.\textsuperscript{166} The State has also been criticized for its failure to protect her own people by conferring excessive powers to armed forces and legitimizing the use of force without sufficient limitations.\textsuperscript{167} Although the Act has been challenged three times since 1975 in the domestic courts (the Supreme Court and the High Court of India),

\textsuperscript{164} The expression AFSPA also includes the Armed Forces (Special Powers) Act 1990 (in force in Kashmir).
\textsuperscript{165} No precise definition of the term was given out but it vested the powers to the State Government to declare any area as ‘Disturbed Area’ by notification in the official Gazette and conferred powers to the law enforcement officials to quell disturbances.
each time it has been upheld. 168 However, in the *Naga People’s Movement of Human Rights v. Union of India* ([1997] ICHRL 117)169 (NPMHR), the Supreme Court not only upheld the constitutional validity of the AFSPA, but also reversed the earlier decision of the Guahati High Court170 on the correctness of the 12 declarations. However, the ruling attempted to moderate the provisions of the AFSPA by issuing a list of ‘Dos and Don’ts’.

The Jeevan Reddy Review Committee171 recommended the repeal of the Act in 2004, but with the caveat that it should be included as an additional ‘Special Power’ chapter in the Unlawful Activities (Prevention) Act 1967172 to enable the armed forces to quell internal disturbances. The Review Committee criticized the Act as a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness.173 The Second Administrative Reforms Commission in 2007, and the National Minorities Commission in 2006, finally recommended the total repel of the

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168 The Act was first challenged in 1983 in the Delhi High Court in the *case of Indrajit Barua v. State of Assam* (A.I.R. 1983 Del 513) in which the Court upheld the constitutionality of the AFSPA. The AFSPA was challenged again in 1990 at the Guwahati high court in the *case of People’s Union for Civil Liberties v. Union of India* (A.I.R. 1991 Gua 23) The court reviewed the army’s powers and overturned the identification of the twelve districts of the State of Assam as disturbed on the grounds that the Government had not provided sufficient evidence to justify the invocation of the AFSPA in all those districts. When the Central Government appealed to the Supreme Court, the case was granted partial stay pending final hearing. The parts stayed were the orders requiring the Government of Assam to withdraw the disturbed area declaration in respect of the twelve districts where the invocation had been held to be unjustified. The Act was thereafter challenged in the Supreme Court of India in the case of the *Naga People’s Movement of Human Rights v. Union of India* ([1997] ICHRL 117).


170 See Fn25.

171 ‘Report of the Committee, headed by Justice (Retd) B.P. Jeevan Reddy, to Review the Armed Forces (Special Powers) Act 1958’ (Ministry of Home Affairs Office Order No 11011/97/2004-NE-III, 19 November, 2004). Available at http://www.hinduonnet.com/nic/afa/. Last accessed 5 February 2011. The Review Committee was constituted following the alleged extra-judicial killing of Ms Thangjam Manorama Devi by the troops of the Assam Rifles in Manipur in 2004. On the night of 11 July 2004, Ms Thangjam Manorama Devi was arrested for being a member of the People’s Liberation Army. Her body was recovered the following day. The Assam Rifles personnel were charged with incommunicado execution and sexual assault. The incident fuelled sentiments against the armed forces and the power conferred on them by the AFSPA. Following this, a group of 32 civil society organizations based in Manipur formed a coalition called the Apunba Lup to protest abuses committed under the AFSPA and call for its repel.

172 The Jeevan Committee Report, UN Doc. CCPR/C/10/Add, 13 Jul 1983, 83.

Act on the basis that it violates fundamental rights. The State is yet to respond, while the armed forces oppose any dilution of their current powers.

India came under international scrutiny after the submission of the first State report to the UN Human Rights Committee (HRC) pursuant to Article 41 of the International Covenant on Civil and Political Rights. During the examination of the first report, the HRC questioned the rationale for the lack of any kind of mention in the Indian Constitution, to the non derogable rights found in article 4 of the Covenant. The HRC raised concerns on the situation in the Northeast, in general, and the AFSPA, in particular. The HRC said that certain provisions of the Act (AFPSA) effectively derogated the rights contained in Article 6, 9 and 14 of the Covenant and also raised concerns that the existing practice has led to a ‘de facto’ declaration emergency which were not in line with the Covenant provisions.

The HRC also commented on the protracted duration of the AFSPA in its concluding observation on the State's third periodic report expressing concern that some parts 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.

In the similar vein, the Special Rapporteur on the Question of Human Rights and States of Emergency, in almost identical language, has referred to the situation of emergency in the Northeast India in his annual reports since 1993.
The question of whether the AFSPA requires a declaration of emergency under Article 352 of the Indian Constitution and, under Article 4 of the ICCPR, whether it must notify all the treaty’s States Parties’ (via the UN Secretary-General) “of the provisions from which it has derogated” came under scrutiny during the examination of India’s second periodic report to the HRC, as well as during the NPMHR case. India argued that, since the AFSPA had not been applied throughout the country, the Government is not obliged to make a formal derogation. Moreover, since the situations in which the AFSPA is invoked does not constitute an armed rebellion and, thus, no threat to the security of the country or part thereof is posed, the Government is not obligated to issue a formal proclamation of emergency under Article 352 of the Indian Constitution. However, the HRC has disputed this argument on the basis that the State is effectively using emergency powers without resorting to Article 4 of the ICCPR. Moreover, the phrase “Public emergency threatening the life of the nation” is intended to prevent the abuse of provisions concerning derogation of rights, so States are required to list the specific circumstances justifying derogation: “Two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.” Moreover, the General Comment on Article 4 of the ICCPR requires that “States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers”. 


The passage reads, ‘The Special Rapporteur awaits more precise information from the Government concerning the measures taken in Kashmir, Punjab, areas in the north-east and in Andhra Pradesh, where, according to non-governmental sources, certain constitutional guarantees were said to have been suspended under special laws which in effect established a continuing state of emergency.’

182 UN Doc CCPR/C/76/Add.6, para. 50. This was in response to the HRC question during the examination of India’s second periodic report as to whether the special laws met with the test of ‘strict requirement’ laid down in article 4 of the ICCPR (UN Doc CCPR/C/37/2004).


184 ICCPR General Comment 29, UN Doc. HRI/GEN/1/Rev.6, 2003, para. 3.
185 ICCPR General Comment 29, para. 3. See fn.128.
While India maintains that the AFSPA does not supplant civil powers, these powers have been, *de facto*, institutionalized within the system, sacrificing individual guarantees and sidelining the country’s obligation to restoration normalcy. Increasing the geographical base of the AFSPA has only increased the scope of application in the disturbed areas. Despite the extensive use of troops in Kashmir and Northeast India, the State continues to maintain that the situation falls within a law and order framework such that the use of troops constitutes aid to civil authorities.\(^{186}\)

The material application of the Act too is risky since it is contingent on the State declaring an area as 'Disturbed Area' without any substantial definition to the term. The Court too did not define what is meant by the term ‘disturbed area’\(^{187}\) in the NPMHR case, it did rule that under Section 3 of the AFSPA (as amended by Act 7 of 1972) the Central Government was empowered to make such a declaration without consulting the specific State in whose jurisdiction the area falls.\(^{188}\) Indeed, a declaration that an area is disturbed depends on the satisfaction of Government officials and is not subject to judicial review. However, the Court sought to clarify that such an order does not result in the taking over of the State’s civil administration

\(^{186}\) The issue of the deployment of the armed forces in aid to civil authority was also raised during consideration of India’s second periodic report U.N. Human Rights Committee in 1996. In reply, India noted that “[T]he Armed Forces (Special Powers) Act 1958 was enacted when India was faced with an acute law and order situation on account of activities of insurgents in the border areas in the eastern frontiers of India. Armed raids were being carried out by such insurgents in the small towns, villages and in the tea gardens followed by destruction of property, wanton killings, kidnapping and other acts of violence with the result that people in these areas were living under constant terror and were apprehensive about the safety of their lives and property. The army had to be called out to aid civil authorities for the apprehension of the offenders, who were usually armed, and to assist in the detection and search for the sources of weapons and ammunition supply.” See UN Human Rights Committee (HRC), UN Human Rights Committee: Addendum to the Third Periodic Reports of States Parties Due in 1992, India, CCPR/C/76/Add.6 (June 17, 1996), available at http://www.unhchr.org/refworld/docid/3ae6b02f3.htm. Similarly when the Act was challenged in the Nagaland People’s Movement for Human Rights v. Union of India case ([1997] ICHRL 117) on the imposition of the Armed Forces (Special Powers) Act calling for the deployment of the armed forces in disturbed areas on grounds that maintenance of public order was a state subject and the Parliament had no legislative competence to enact the Act. The court ruled that deployment of armed forces was in aid of civil power. See Supreme Court of India on Armed Forces (Special Powers) Act, 1958, A.I.R. 1998 S.C. 463-464, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/COHR_IND_UPR_S1_2008anx_Anx%20XXIII_Supreme%20Court%20ruling%20on%20AFSPA.pdf.

\(^{187}\) The question of the ambiguity of the term ‘disturbed area’ in the AFSPA was first challenged in the case of Indrajit Barua v. State of Assam (AIR 1983 Del 513). The Court decided that the lack of precision was not an issue because the Government and people of India understood its meaning. On the other hand, the Disturbed Areas (Special Courts) Act 1976 states that when “a State Government is satisfied that (i) there was, or (ii) there is, in any area within a State extensive disturbance of the public peace and tranquility, by reason of differences or disputes between members of different religions, racial, language, or regional groups or castes or communities, it may ... declare such area to be a disturbed area.”

\(^{188}\) The *NMMHR* case. See fn.20.
by the armed forces of the Union since the powers granted by the AFSPA can only be exercised with the cooperation of the civil authorities. The ruling remained silent on the substantive provisions of the AFSPA but did issue a list of legally binding ‘Dos and Don’ts’ within the terms and reference of the Act.

The communities’ collective grievances is the basis of internal struggles, which in turn has become protracted armed confrontations with the newly established dominant states. The present localized conflicts in Kashmir and North eastern India are fallout of the State’s attempts to integrate these communities against their aspirations of self determination towards an independent statehood.

**Left Wing Extremism (LWE)**

Maoist violence can be traced back to the emergence of the communist political movement in the 1920s which propagated the creation of a classless society and recognized armed violence as one of the tactics to achieve these objectives. In 1946, the Communist Party of India (the CPI) first succeeded in mobilizing the people, on the principle of armed struggle, in Telangana, Andhra Pradesh. It continued for almost five years or so. This movement is known as Telangana Uprising (1946-51).

The creation of the Communist Party of India (Marxist-Leninist) in 1969 by Charu Mazumdar first formally embarked on this mission. The CPI(ML) was totally opposed to the electoral process and advocated violent revolution as the only means of realizing its political objectives. The initial movement epicentred around West Bengal and Andhra Pradesh until 1972 when the State was able to wrest control on the activities.

The subsequent period from 1972-1991 remained subdued with sporadic acts of violence dominated by two factions of naxalites, namely, the People's War Group of Andhra Pradesh and Maoist Communist Centre (MCC) of Bihar.

Post 1991, was a phase of reunion and merger. In September 1993, the MCC, the CPI (ML) (PWG) and the CPI (ML) Party Unity formed All India People’s Resistance Forum (AIPRF) to coordinate their struggle in different locations of the country. In

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1998, Guerilla Zones emerged in North Telangana and Dandakaranya with the merger of CPI(ML) with PWG leading to the creation of the People's Guerrilla Army in 2000. This creation led to the rapid spread of activities to through contiguous forest and hilly areas of Orissa, Chhattisgarh, Madhya Pradesh, Maharashtra, Bihar and Jharkhand. By 2002, a Tactical Counter Offensive was launched by the party by forming striking forces.¹⁹¹

Meanwhile, the Dakshin Desh group which had broken away from CPI-M in 1968 became the Maoist Communist Centre (MCC) in October 1969. It indulged in squad activities mainly in forest and mountainous regions of West Bengal (WB) and spread to undivided Bihar. Later on, it became Maoist Communist Centre of India (MCCI).¹⁹²

In the 2003-04 Report of the Ministry of Home Affairs, Government of India officially recognized that there was Maoist problem fomenting in the nine states of the country. The Reports stated, ‘Naxal violence continues to pose a serious challenge to internal security in the country. 55 districts in 9 States, namely, Andhra Pradesh, Bihar, Maharashtra, Orissa, Madhya Pradesh, Chhatisgarh, Jharkhand, West Bengal and Uttar Pradesh were identified to be afflicted with naxalism’. The same report also mentioned that the Maoists were augmenting their armed strength by embarking on extensive induction of misguided youth into their formation. Military reliance was assessed as one of the core strategies of the movement and there was greater emphasis on the militarization by acquiring technology and gaining skills relating to fabrication and firing mechanism for improvised explosive devices (IEDs) and weapons. The unabated violence of the cadre during this period was identified as a serious threat to internal security in the country with the incidents of violence increasing by 8.5% and resultant deaths increasing by 6.4%. This accounted about 88% of the countrywide naxalite violence and 90% of the resultant deaths.

¹⁹² Ministry of Home Affairs, Government of India (2011), D. M. Mitra, Genesis and Spread of Maoist Violence and Appropriate State Strategy to Handle it, Institute of Social Sciences, New Delhi, Executive Summary
However, the merger of the Maoist Communist Center (MCC) and People's War Group (PWG) in 2004 led to further increase in violence in Chhattisgarh and Maharashtra. In Chhattisgarh, there was a sharp increase while in Maharashtra violence increased by 15% during 2004 as compared to 2003, the CPML-PW continued to dominate the forest and mountainous tracts of Gadchiroli and Gondia districts.

A new dimension was added to the naxal scenario when the CPML-PW leaders announced (October 14, 2004) merger of the CPML-PW and the MCCI and creation of a single outfit called the Communist Party of India (Maoist). The 2004-05 report further elaborated on this issue and notified that the number of districts affected has increased to 76 and the merger of the CPML-PW has added a new dimension to naxal scenario. The report clearly acknowledged that the issue was no longer simply a law and order problem and that it was being tackled on political, social, economic and security fronts through a multi-pronged strategy.

This was the first official recognition that the problem had a higher threshold than merely a law and order problem. This was also the first time when the state officially recognized that Naxalites have an assessed strength of 9300 hard-core underground cadres with about 6500 regular weapons besides a large number of unlicensed country-made arms.

The 2006-07 MHA Report gave not statistics but the situation referred to have deep socioeconomic dimensions beyond the traditional law and order mandate. In 2009, the CPI Maoist with all its formations and front organizations was banned under the existing Unlawful Activities (Prevention) Act, 1967.

The LWE violence, though being more than fifty years old has only recently been recognized as a serious threat to national security. No special legislations have been passed and the affected region continues to remain under normal laws as applicable in the rest of the country like the Unlawful Assembly (Prevention) Act 1967. In 2010 the activities of the Maoist movement revived calls for the deployment of the armed forces, following the death of seventy-three Central Reserve Police Force (CRPF)

194 Government of India (2010-11), Ministry Home Affairs, Annual Report 2010-11, 2.7.4 at 21. Also Government of India (2011-12), Ministry Home Affairs, Annual Report 2011-12, 2.9.2 at 30
personnel on 6 April 2010 in Chattisgarh. The Cabinet Committee on Security is currently examining whether the armed forces should be deployed in the most affected regions.

The prime motive behind the expansionist designs of CPML-PW and MCC-I together with the Communist Party of Nepal (Maoist) is to spread into new areas to carve out a ‘Compact Revolutionary Zone’ spreading from Nepal through Bihar and the Dandakaranya region to Andhra Pradesh. Efforts are being made by the naxal outfits to plug gaps in North Bihar and North Chhattisgarh being steadily to link up their strongholds in Andhra Pradesh/Dandakaranya with those in Bihar/Jharkhand, besides increasing influence in North Orissa/South East Jharkhand.

STATE INTERVENTION

State Intervention

Table 5.1 shows a broad intervention model enunciated by the State in the civil unrest areas affected by LWE and under the AFSPA. A multi-pronged strategy towards enhancing security coupled with integrated development is the twin objective of State intervention.

The end state objective is to mainstream communities, strengthen capacities through popular control in the decision making process and enhancing democracy through the right to development.
<table>
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<th>Integrated</th>
<th>Security</th>
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- Monitoring of Implementation of Flagship Programme to include, PMGSY; NRHM; Ashram Schools; MGNREGA; SSA; NRDWP; RGGVY; ICDS; IAY;
- Recognition of rights of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.
- Civic Action Programme
- Surrender and Rehabilitation Policy
- Central Scheme for Assistance to Victims/Family of Victims of Terrorist and Communal violence

- Modernization of State Forces.
- Security Related Expenditure (SRE) Scheme
- Deployment of Central Armed Police Forces (CAPFs)
- India Reserve Battalions incl SIRB
- CoBRA Battalions
- CIAT Schools
- Scheme for Special Infrastructure
- Recruitment in CPFs.
- Fortified Police Stations

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- Physical and constructive access
- Mainstreaming communities.
- Popular control: decision making.
- Enjoyment of ESCR.

- Maintenance of law order
- Upholding Constitutional democracy
- Enjoyment of CCPR

**END STATE**
- Enjoyment of rights (CCPR and ESCR).
- Physical and constructive access to development and decision making.
- Mainstreaming communities.
- Popular control: decision making.
- Enjoyment of ESCR.
Security

State response is twofold. First, enhance security related efforts for the maintenance of law and order. Second, establish the writ of the State within democratic principles. Security interventions are aimed at building up of local capabilities for intelligence, specially trained and well equipped police forces to facilitate effective police action, in a coordinated manner. The strategy includes assistance through SRE, Police modernization, raising of India Reserve (IR) Battalions, intelligence gathering and sharing, training of Police Forces.\(^{198}\)

**Security Related Expenditure (SRE) Scheme.** The funds are provided for meeting the recurring expenditure relating to insurance, training and operational needs of the security forces, rehabilitation of Left Wing Extremist cadres who surrender in accordance with the surrender and rehabilitation policy of the State Government concerned, community policing, security related infrastructure for village defence committees and publicity material.

**Special Infrastructure Scheme (SIS).** The Scheme has been approved in the Eleventh Plan for the LWE affected Districts with an allocation of Rs. 500 crore. The Scheme aims to cater to critical infrastructure gaps, which cannot be covered under the existing schemes, mobility for the police / security forces by upgrading existing roads / tracks in inaccessible areas, providing secure camping grounds and helipads at strategic locations in remote and interior areas, measures to enhance security in respect of police stations / outposts located in vulnerable areas etc.

**Central Scheme for Assistance to Civilian Victims/Family of Victims of Terrorist, Communal and Naxal violence.** An amount of Rs. 3 lakh is given to the affected family under the scheme. The assistance given to those who are adversely affected by naxal violence under this scheme is in addition to the ex-gratia payment of Rs. 1 lakh paid under the Security Related Expenditure (SRE) scheme.

**Fortification of Police Stations.** 400 police stations in 9 LWE affected States at a unit cost Rs. 2 crores under this scheme have been sanctioned.

**Civic Action Programme.** Financial grants are sanctioned to CAPFs to undertake civic action in the affected states. This is a successful scheme which aims to build bridges between the local population and the security forces.

Broadly, this has led to the modernization of State Forces, deployment of Central Armed Police Forces (CAPFs), India Reserve Battalions incl SIRB, CoBRA Battalions, CIAT Schools, recruitment in CPFs and fortification of Police Stations. Some of the key financial support include:-

- SRE scheme has increased from Rs. 78.86 crore in 1999-98 to 130.96 crore in 2011-12.

- Funds for modernization of Police Stations varied between Rs. 48 to 80 crore from 2000-01 to 2011-12 with a maximum allotment of Rs.88.12 crore in 2007-08.

- During the period 2002-03 to 2006-07, total Central assistance given to naxal affected States for modernization of the Police was Rs.2,140.70 crore. In 2007-08, a provision of Rs.538.39 crore was made. In 2008-09, Rs.501.52 crore was allocated to nine naxal affected States. This included Rs. 2 crore each to 32 of the 33 focus districts as 100 % Central grant for strengthening the police infrastructure.

- Indian Reserve Battalion (IRB) have increased from seven in 2004-05 in Assam to 8 in 2007-08 and to 9 in 2008-09. Similarly, the two IRB in each in Chhattisgarh and Maharashtra and, five in Andhra Pradesh have increased to six, two and eight respectively in 2008-09.

- Expenditure required to raise an IRB has been increased from Rs.13 crore (2003-04)\(^{199}\) to Rs. 20.75 crore (2006-07).\(^{200}\)

- In 2008-09 additional CPF were deployed in Andhra Pradesh (04) Chhattisgarh (06) and Maharashtra (01).

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• In 2003-04, 33 Naxal affected districts were identified as Backward Area Districts (BAD). This was increased to 55 of the 76 affected district in 2004-05 and later increased to 78 of the 83 affected districts in 2011-12.

• Local groups like Special Police Officers (SPOs), Nagrik Suraksha Samitis (NSSs) and Village Defence Committees (VDCs) in the affected villages are operating.

• Three CIAT Schools were opened in Chhattisgarh to fight the Naxals were increased to four in 2010-11.

• Two Special IRB have been planned for raising in Chhattisgarh by 2013-14.

Development

Integrated Action Plan

The Planning Commission is implementing the Integrated Action Plan (IAP) for 82 Selected Tribal and Backward Districts for accelerated development. The aim of this initiative is to provide public infrastructure and services in 82 affected / contiguous Districts.
Originally, a sum of Rs. 25 crores and Rs. 30 crores was released to 60 Districts during the financial years 2010-11 and 2011-12 respectively. This Scheme has now been extended to 22 more Districts, taking the total coverage to 82 Districts.

The nature of major works/projects taken up by the districts under the IAP include construction of School Buildings / School Furniture, Anganwadi Centres, Drinking Water Facilities, Rural Roads, Panchayats Bhawan / Community Halls, Godowns / PDS shops, livelihood activities, skill development/ trainings, Minor Irrigation Works, Electric Lighting, Health Centres/Facilities, Ashram Schools, construction of Toilets, construction of multi-purpose chabutra, construction of passenger waiting hall, special coaching classes for students, construction of ANM Centres, development of play grounds etc. Out of 100133 projects taken up by the states under the IAP, 69056 projects have been completed till 8.1.2013.

**Flagship Programmes**

Development related programme which include the monitoring of the flagship programmes, civic action, surrender and rehabilitation and rendering assistance to the victims/family of the victims of terrorist and communal violence. The Monitoring of Implementation of Flagship Programmes include:-

- Pradhan Mantri Gram Sadak Yojana (PMGSY);
- National Rural Health Mission (NRHM);
- Ashram Schools. The Central Assistance for the Ashram Schools in the tribal sub-plan areas, and for hostels for tribal boys and girls has been increased from 50 to 100 percent.
- Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA);
- Sarva Shiksha Abhiyan (SSA);
- National Rural Drinking Water Programme (NRDWP);
- Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY);
- Integrated Child Development Services (ICDS);
• Indira Awaas Yojana (IAY)

• Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

**Road Requirement Plan for LWE Areas.**

The Road Requirement Plan (RRP) Phase-I was approved in February, 2009 for improvement of road connectivity in 34 extremely LWE affected districts in 8 States viz. Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa and Uttar Pradesh. The RRP-I envisages development of 1126 kms of National Highways and 4351 kms of State Roads (total 5477 kms), at a cost of Rs. 7300 crore. A length of 1891 kms has been built at an expenditure of Rs 2346 crores (as on 31.10.2012). The stretches for Phase-II of the Road Requirement Plan have been finalised by the Ministry of Home Affairs, based on the priority indicated by the State Governments and is under consideration with the Ministry of Road Transport & Highways.

In 2003-4, an additional allocation of Rs. 37.50 crore per annum was made by the Ministry of Rural Development to execute rural roads in naxal affected areas under the Pradhan Mantri Gram Sadak Yojana (PMGSY).

In 2007-08, a road requirement/connectivity plan, over and above the PMGSY, has also been prepared and approved for all the 33 LWE districts and its peripheries.

**Assessing State Control**

**Assam (Disturbed Area under the AFSPA)**

An assessment of the Violence indicate increased violence in 2002 and later in 2007. However, since 2007 violence levels have come down considerably. Conversely, terrorist killing have spiked since 2007 with commensurate reduction in the security forces and civilian deaths

There is a 64% (412 to 145) reduction in the incidents since 2002. Similarly, there is a 69% (472 to 145) since 2007 when the incidents suddenly increased.
Terrorist killings were initially attributed to 308 in 2002. However, fresh violence sparked on 2007. The rise in the number of incidents also led to a dramatic increase in the neutralization of terrorists. In a single year in 2007, there was an approximately 10 times increase in the number of terrorist neutralized. 76 terrorists were neutralized in 2006 while in 2007, 759 terrorists were neutralized. The trend has continued since then with the security forces neutralizing 1237 in 2008, 1259 in 2009, 1025 in 2010 and 1084 in 2011.

Corresponding to the terrorist neutralization, there is a commensurate increase in the surrenders during the same period. Surrenders in 2008 suddenly increased from 524 in 2007 to 1112 in 2008. Since then, there are substantial number of surrenders. These include 1109 in 2009, 846 in 2010 and 1122 in 2011.
• Security forces killing and civilian deaths indicate a similar pattern. Twenty six deaths were reported in 2002 which increased to 32 in 2006. However, since 2006 the security forces deaths have remarkably reduced by half to 14 in 2011.

• Reduction in civilian deaths is one of the most important benchmarks of State control in civil unrest areas. There is a eleven times decrease in the civilian deaths in 2011 (18) as compared to 2002 (193).

Trend of violence in the Naxal affected regions is marked by fluctuating violence levels due to two important incidents. First, the merger of the CPML-PW resulting in the increase of violence by 8.5% and resultant deaths by 6.4%. Second, the merger of the CPML-PW with the MCCI creation of a single outfit called the Communist Party of India (Maoist). This led to the increase in violence in Chattisgarh and Maharashtra.

• Andhra Pradesh has witnessed reduction of incidents by more than 8 times and similarly deaths. In 2001, the number of recorded incidents were 461 as compared to 54 incidents in 2011. Similarly, there were 180 reported deaths in 2001 as against nine in 2011.

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### Table 3.4: Trends of Violence in Naxal Affected Region

<table>
<thead>
<tr>
<th>Year</th>
<th>Andhra Pradesh</th>
<th>Chattisgarh</th>
<th>Maharashtra</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Incident</td>
<td>Deaths</td>
<td>Incident</td>
<td>Deaths</td>
</tr>
<tr>
<td>1 2001</td>
<td>461</td>
<td>180</td>
<td>105</td>
<td>34</td>
</tr>
<tr>
<td>2 2002</td>
<td>346</td>
<td>96</td>
<td>304</td>
<td>55</td>
</tr>
<tr>
<td>3 2003</td>
<td>577</td>
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<td>256</td>
<td>74</td>
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<tr>
<td>4 2004</td>
<td>310</td>
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<td>352</td>
<td>83</td>
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<tr>
<td>5 2005</td>
<td>535</td>
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<td>385</td>
<td>168</td>
</tr>
<tr>
<td>6 2006</td>
<td>183</td>
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<td>388</td>
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<tr>
<td>7 2007</td>
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<tr>
<td>8 2008</td>
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<td>9 2009</td>
<td>66</td>
<td>18</td>
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<td>290</td>
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<tr>
<td>10 2010</td>
<td>100</td>
<td>24</td>
<td>625</td>
<td>343</td>
</tr>
<tr>
<td>11 2011</td>
<td>54</td>
<td>9</td>
<td>465</td>
<td>204</td>
</tr>
</tbody>
</table>

Incidents and deaths have increased in Chhattisgarh if comparisons are drawn since 2001. This area has been most affected by the merger of the naxal outfits in October 2004. In 2006, the recorded incidents and deaths have suddenly increased from 385 in 2005 to 715 and from 168 to 388 respectively. However, post 2006 the State has
been able to reduce the incidents by 65% from 715 to 465. Similarly, deaths too have reduced by 52% from 388 deaths in 2006 to 204 in 2011.

- Maharashtra too has shown dramatic rise in incidents and deaths from 84 in 2004 to 94 in 2005 and 15 in 2004 to 53 in 2005. Maharashtra continues to show an increasing trend of violence.

**Attack on Police Stations**

- From 2003 to 2007 there is lesser number of Police Stations where naxal violence has been reported. Overall, the State has been able to wield influence to limit naxal activities with a substantial decrease in the affected Police stations in Andhra Pradesh, while a marginal increase in Chhattisgarh and Maharashtra.

- In Andhra Pradesh, there is a 32% decrease in the number of Police stations from 183 in 2003 to 59 in 2007.

- In Chhattisgarh, there is a 20% increase in the number of affected Police stations from 57 in 2003 to 71 in 2011. Notwithstanding, violence levels have been consistently high since 2006.

- Maharashtra has increased from four Police stations in 2003 to six Police Stations in 2007 but with substantial rise in incidents and deaths.