CHAPTER V

The Complexity of Defining Civil Unrest and Child Associated with an Armed Force or Armed Group: Review of Policy

---------------------------------------------------------------------------------------------------------------------------

Introduction

Civil unrest in third world states is a quintessential trade off of power struggle between the affected State’s sovereign discretion to handle the unrest, the aggrieved community’s demand for secession and the international community’s attempt to arbitrate between the two. This challenge has existed in most third world states formed post decolonization through a loose conglomeration of regions and communities otherwise deeply divided over ethnic, cultural or religious fault lines. This armed violence in the recent years has crystallized around three principle constructs. First, the recognition of the problem by the State within the domestic legal framework. Second, the affected State challenge to calibrate a democratic response within the delicate balance of power as the key tradeoff between security of the State viz. a viz. liberty and democracy. Third, the impact of the situation on the aggrieved communities, particularly children.

Recognition of the problem within the legal framework is primarily guided by the scale of violence and the ideological recognition of the problem. Both issues are extremely risky and run into the risk of directly affecting State sovereignty in the light of the affected State's international treaty obligations. Violence thresholds are defined hierarchically from a law order situation graduating to a public order, state of emergency, armed conflict not of an international nature under Common Article 3 to the Four Geneva Conventions, internal armed conflict to finally an armed conflict between the parties to the conflict. While law and order and public order situations falls within the exclusively domain of the State, a state of emergency concurrently falls under the ambit of the State's international treaty obligations under the ICCPR (art 4.) Internal armed conflict and armed conflict fall within the domain of International humanitarian law.
The legal character of these movements has thus become extremely complex. The situations are strongly interwoven with the history of decolonization, itself a complex internal struggle of accession and secession between newly independent sovereign states and their internal communities. Since the aggrieved communities derive an ideological connect of the violence with the demand for secession, each of the actors have a different response. The aggrieved communities justify armed violence against the state as a fight for secession through self-determination, a right duly recognized under international law (art.1, ICCPR), and in this manner, seek to legitimize the violence and cause against the State.

The international community on the other hand, sees the secessionist activities as internal armed conflicts within the meaning of the Geneva Conventions. This international characterization raises the possibility that the conflicts constitute a humanitarian crisis warranting international intervention. This has deepened the divide with much of the developed international community referring to such violence as internal armed conflict/secessionist violence in order to ensure the application of the least minimal humanitarian norms. The international community has often referred to them as an internal conflict/ a state of emergency or a conflict governed by the Common article 3 to the four Geneva Conventions duly recognizing the controversial right like self-determination and secession in an post decolonization era. Each of these thresholds have a definitive legal bearing on the affected State raising issues of belligerency, the recognition of armed groups as a legal entity, etc.

The affected states on the other hand do not recognize secession as a viable means for the communities establishing themselves as legitimate, independent, democratic states but the people’s right to vote, participate in the political process and elect their own government is self-determination. The established states regard the movements as

---

202 See, e.g., U.N. Human Rights Committee, Third Periodic Reports of States Parties due in 1992: India, ¶ 32, U.N. Doc. CCPR/C/76/Add.6 (July 17 1996), available at http://www.unhchr.ch/tbs/doc.nsf%28Symbol%29/83d5a36cc44d1d3c125640400501466?Opendocument[hereinafter State Party Report: India] (“[T]he right to self-determination is said to have both internal and external aspects.”). It does appear that so far as external aspects are concerned, the context, background, and drafting history, support the view that colonies (and trust territories) were seen as the groups seeking autonomy. The international community continues to affirm that the right of external self-determination does not extend to component parts or groups within independent sovereign States. If attempts are made to promote a thesis favoring the break-up of States on grounds of ethnicity or religion, there would be, as cautioned by the United Nations Secretary General in the Agenda for Peace, “No limit to fragmentation and peace, security and economic well-being for all would become even more difficult to achieve.” U.S. Secretary-General, An Agenda for Peace: Preventive Diplomacy,
issues either of law and order or public order, and sought to exercise sovereign discretion to eliminate the movements. In response, the affected State invariably chose to suspend human rights through special laws for the sake of upholding democracy. The affected states refuse to acknowledge the threshold and have sought to deal with the problem within the traditional law and order mandate through the protracted invocation of special powers and refused to sign the relevant international treaties that risk labeling such violence as an armed conflict within the meaning of the Geneva Conventions.

This inherent contradiction between democratic governance and special laws legitimizing the use of a state’s armed forces against its own people raises serious concerns regarding the state’s capacity to tackle emerging civil unrest. The choice lies between the absolute crushing of opposition, as in a totalitarian system, or by accepting the risks of terror as a permanent feature of developed, mobile and liberal societies. While both scholarly standpoints are extreme views, the State’s response is a delicate balance between the two with the principal aim that the tradeoff should be in favour of protecting democracy. At the same time it also raises a fundamental question on the affected State’s capacity to govern and its corresponding duty towards its own people towards granting fundamental human rights and freedoms.

The classification of such movements also affect regulations regarding child protection. After the 1996 publication of the Grac’a Machel Report (Machel

---


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 included 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.

The chapter examines some of these key questions with respect of the civil unrest situations in India (Disturbed Areas and LWE): the implications of recognizing the

---


legally accepted threshold of violence, and the impact of the problem on children as a consequence of non recognition of the problem.

Part I of the Chapter examines the legally understood threshold that defines violence.

Part II highlights the common reluctance by the affected States to recognize the problem within the international legal framework. Most States view such qualifications as an infringement on their sovereign status given the historical context of these situations.

Part III examines the fallouts of the debate on children.

**The Violence Threshold**

The most elementary State response to violence is aimed at the maintenance of law and order which subsequently graduates to the maintenance of public order and subsequently to a state of emergency. Civil unrest arising out of extremely deteriorating situations where the states begins to lose complete/part control of its territory, the situation can graduate to the existence of an ‘armed conflict not of an international character’\(^206\) invoking the application of the Common Article 3 to the Four Geneva Conventions obliging state parties to abide by minimum humanitarian norms. The subsequent threshold is the existence of a ‘non international armed Conflict’\(^207\) under the Additional Protocol - II to the four Geneva Conventions and finally escalating to a full-fledged armed conflict between the parties to the conflict governed by the Geneva Conventions and Protocol - I to the four Geneva Conventions.

While the maintenance law and order/public order ordinarily remains in place in all states around the world a state of emergency invokes international response with certain level of accountability upon States who have ratified the International Covenant on Civil and Political Rights (ICCPR).\(^208\) This is because there is reference of the declaration of emergency under art 4 of the ICCPR\(^209\) which obligates States to

---


\(^{207}\) 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.

\(^{208}\) UN Document (1976), General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976

\(^{209}\) UN Document (1976), Art. 4 of the ICCPR7 Article 4
inform the UN on the declaration of emergency. However, the moment the State recognizes the presence of any kind of armed conflict, it raises questions of the application of international humanitarian law and thereupon the issue of belligerency. The term ‘armed conflict’ technically refers to a very high threshold where the situation is beyond the conventional law enforcement mechanism and the entire situation is interpreted through international humanitarian law.

Law and Order

It is a state of society where vast majority of population respects the rule of law, and where the law enforcement agencies observe laws that limit their powers. Maintaining law and order implies firm dealing with occurrences of theft, violence, and disturbance of peace, and rapid enforcement of penalties imposed under criminal law. In other words this threshold refers to the situation which normally exists during peace time under the law enforcement mechanism essentially addressing issues of crime prevention. One of the characteristic features of this situation is that the Police exercises effective control and remains unarmed with sophisticated weaponry.

Public Order

Maintenance of public order in Common law countries usually refers to common law offences of riot, unlawful assembly and affray and certain statutory offences relating to public order which include situations to control public processions and assemblies; to control the stirring up of racial hatred, etc. States have referred to this term as all inclusive covering almost all facets of law enforcement. For example, under the Sierra Leone Public Order Act, 1965, the aspect of public order covers issues relating to sedition, electoral provision, prevention of criminal conduct to the beating of the

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

http://www.businessdictionary.com/definition/law-and-order.html
drums under the Processions Act\textsuperscript{211}. Most anti terror legislations in south Asian have incorporated the clause as part of the law and order/public order issues. For example, Sri Lanka’s Prevention of terrorism Act 1979 is a public order issue.\textsuperscript{212}

Chapter X of the Code of Criminal Procedure 1973 of India, refers to the Maintenance of Public Order and Tranquility in respect of unlawful assemblies and public nuisances and also refers to the calling of the armed forces in such instances. There is no definition of the term. However, in the \textit{Ram Manohar Lohia v. State of Bihar},\textsuperscript{213} the Supreme Court attempted to distinguish between the concepts "security of state," "public order," and "law and order" where the court noted “One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of state. It is then easy to see that an act may affect law and order but not public order just as an act might affect public order but not security of state.”

The main distinction between public order and law and order is seen as a disturbance that affects public tranquillity and public order is jeopardized because the repercussions of the act embrace large sections of community and incite them to make further breaches of the law and order. These issues were highlighted in the \textit{Arun Ghosh v. State of West Bengal}\textsuperscript{214} case where the Court attempted to specify the meaning of "public order" further by describing the nature of acts contravening the "public order." The Court reasoned that, ‘Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity ... [Acts of this sort] affect the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order ... ’\textsuperscript{215}


\textsuperscript{212} CCPR/C/LKA/2002/4 18 October 2002, Para 137. Also refer to the Preamble of the Act, ‘...WHEREAS public order in Sri Lanka continues to be endangered ...’

\textsuperscript{213} Dr. Ram Manohar Lohia vs State Of Bihar And Others on 7 September, 1965, 1966 AIR 740, 1966 SCR (1) 709.


\textsuperscript{215} Id. at 1229-30.
Importantly, the role of the Police remains unchanged and they continue to function within their conventional law enforcement mechanism. However, the issue becomes particularly important since the violation of public order can also lead to the suspension of certain rights.

The imprecise definition of public order and its critical overlap with law and order at one end and the state of emergency on the other dangerously confers powers to law enforcement officials to suspend certain civil rights guarantees. This manifestly broadens the scope of possible abuses. The most convenient derogation is the right to liberty. Although, this right can be suspended in times of emergency which threaten the life of the nation……, but it also is the most critical rights since it has the potential of further abuses. Preventive Detention under Art. 22 of the Indian Constitution is also one such right. Similarly, art. 19 of the Indian Constitution guaranteeing free expression under fundamental rights limits the rights when it infringes against the interests of the sovereignty and integrity of India or public order or morality and similarly qualifies that reasonable restrictions can be imposed.

Many states have strongly raised issues of reasonableness and proportionality of actions while assessing culpability which correspond to a public order threshold. Free expression right is a good example to understand this issue – the a dilemmatic choice between the legitimate right to protest which is necessary in a free and democratic society and the extent to which one section of society can be allowed to express those views which will insult other members of society between competing interest of free expression and tolerance in a society.

Similarly, in the case of Norwood v DPP in 2003 in United Kingdom, the appellant was convicted under s. 31 of the Crime and Disorder Act 1998 for the racially discriminatory harassment of a woman with particular regard to the defendant’s race.

---

216 Entry 3 of List III of the Constitution of India, which allows Parliament and state legislatures to pass preventive detention laws in times of peace for “the maintenance of public order or maintenance of supply and services essential to the community.”

217 Part III, Fundamental Rights, Article 19 Protection of certain rights regarding freedom of speech, etc. (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

218 See, Chris Newman Divisional Court -- Public Order Act 1986, s. 5- Compatibility with European Convention on Human Rights, JoCL 69(8) at 1.

aggravated version of the offence under s. 5 of the 1986 Act. The appellant had displayed a poster, containing words in very large print 'Islam out of Britain' and 'Protect the British people' with a reproduction of a photograph of one of the twin towers of the World Trade Centre in flames and a Crescent and Star surrounded by a prohibition sign.\textsuperscript{220} The appellant in this case was a member of the British National Party and he contended that his actions were reasonable, much as the appellant in the present case. The court held that 'in effect that the appellant's conduct was unreasonable, having regard to the clear legitimate aim, of which the section (Public Order Act 1986, s. 5) was itself a necessary vehicle, to protect the rights of others and/or to prevent crime and disorder.\textsuperscript{221}

**State of Emergency\textsuperscript{222}**

An emergency is defined as “an unforeseen combination of circumstances or the resulting state that calls for immediate action”.\textsuperscript{223} “Immediate action” in this context involves the invocation of the ‘national security doctrine’,\textsuperscript{224} under which the affected state imposes a state of emergency when exigencies threaten the life of the nation:\textsuperscript{225} this allows the state to temporarily suspend certain of its human rights obligations provided that any derogation is only “to the extent strictly required by the exigencies of the situation”\textsuperscript{226} with respect to “the duration, geographical coverage and material scope of the state of emergency”.\textsuperscript{227} Thus, the term ‘public emergency’ in Article 4 of the ICCPR embraces a range of situations (including those involving states of emergency, catastrophes, internal wars, national defence, national necessity, military

\textsuperscript{222} Part taken from the an article published towards the fulfilment of the PhD. Vimug Mukul, Lawfully Wedded to Democracy? India and the Armed Forces (Special Powers) Act, Essex Human Rights Review Vol. 9 No. 1 June 2012 at 19-23.
\textsuperscript{225} ICCPR, Article 4(1). See fn.4.
\textsuperscript{226} UN Doc. CCPR General Comment NO. 29, States of Emergency, (Article 4) adopted at the 1950th meeting, on 24 July 2001 (CCPR/C/21/Rev.1/Add.11 31 August 2001) Para. 4.
\textsuperscript{227} UN Doc. CCPR General Comment NO. 29, States of Emergency, (Article 4) adopted at the 1950th meeting, on 24 July 2001 (CCPR/C/21/Rev.1/Add.11 31 August 2001) Para. 4.
regimes, martial law and so forth). 228 These situations are considered to “constitute[e] exceptional circumstances” resulting “from temporary factors of a generally political character which[,] in varying degrees involve extreme and imminent danger, threatening the organized existence of a nation”. 229 The invocation of provisions available under situations of public emergency requires states to formally declare a state of emergency and also to notify the prescribed authority. 230 For instance, the Commission in the Cyprus v Turkey case 231 held that a formal and public act of derogation was essential for application of Article 15 of the European Convention of Human Rights. 232 Moreover, the state is obliged to justify both the exceptional nature of the threat and whether the measure is “necessary and legitimate” 233 (a consideration that should encompass proportionality): 234 the state must also demonstrate that there is no derogation of core rights 235 and that there are reasonable guarantees.

---

230 Derogations under Article 4 of the ICCPR require notification of the UN Secretary-General. Derogations under Article 15 of the European Convention on Human Rights or Article 27 of the American Convention on Human Rights require notification of, respectively, the Secretary Generals of the Council of Europe and of the Organization of American States.
231 ECHR Application Nos 6780/74 and 6950/75.
In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.
233 UN Doc. CCPR General Comment NO. 29, States of Emergency, (Article 4) adopted at the 1950th meeting, on 24 July 2001 (CCPR/C/21/Rev.1/Add.11 31 August 2001) Para. 3.
234 UN Doc. CCPR General Comment NO. 29, States of Emergency, (Article 4) adopted at the 1950th meeting, on 24 July 2001 (CCPR/C/21/Rev.1/Add.11 31 August 2001) Para. 4.
235 The core rights include the right to life (Article 6), the prohibition of torture or cruel, inhuman or degrading punishment (Article 7), the prohibition of medical or scientific experimentation without consent (Article 7), the prohibition of slavery, slave-trade and servitude (Article 8, paras 1-2), the prohibition of imprisonment because of inability to fulfill a contractual obligation (Article 11), the principle of legality in the field of criminal law (Article 11), the recognition of everyone as a person before the law (Article 16), and the freedom of thought, conscience and religion (Article 18).
The Siracusa Principle 39 requires that the whole population must be affected by the situation for a state of emergency to be declared, while the European Court of Human Rights, drawing on the ‘Paris Minimum Standards’ in the Lawless case, requires that the crisis or danger be “exceptional” and “imminent”, that it must affect the “whole population” (or one section of the community) and that it must constitute “a threat to the organised life of the community”. However, although the HRC has not defined what is meant by the term “public emergency threatening the life of the nation”, it has judged the proclamation of emergency in certain situations to be unjustified: for instance, Argentina was questioned with regard to a declaration of emergency based on mere probability of internal disturbances, while the UK was asked about the territorial application of emergency measures with respect to Northern Ireland. Similarly Bolivia’s declaration on the grounds of serious political and social disturbances was judged not to fulfill the conditions for proclamation. Furthermore, with regard to Chile, the HRC stated that “latent subversion” was insufficient reason for derogation and with regard to Cameroon, that the high crime rate alone did not warrant a proclamation of emergency.

The European Court of Human Rights (EctHR) dealt with this issue in Lawless Case and stated that:


238 Lawless Judgement, Series A, No 3 of the European Court of Human Rights. The case concerned a state of emergency declared on 5 July 1957 by the United Kingdom under Article 15 of the European ConventionProtection of Human Rights and Fundamental Freedoms Convention. The derogation was a response to the impending release of almost 100 IRA prisoners: this had led the Irish Government as to the intensification of IRA terrorist activities. See Claire Macken, ‘Terrorism as a State of Emergency in International Law’, ANZSIL 2005 Conference, 16-18 June 2005, Canberra, p.4.

239 Ireland v United Kingdom (1978) 2 EHRR 25, at para 207.


241 UN Doc. GAOR, A/33/40, Report HRC, p.32.

242 UN Doc. GAOR, A/44/40, Report HRC, p.95.


244 UN Doc. GAOR, A/44/40, Report HRC, p.103.

245 Lawless Judgement, Series A, No. 3 of ECHR.
the crisis or danger must be “exceptional” and “imminent”,
effect the “whole population” (or of one section of the State community\textsuperscript{246}),
it must constitute “a threat to the organised life of the community”
While dealing with The Greek Case, the Commission added a fourth point:
the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.
However, the court gave the states the margin of appreciation in taking into account any situation of emergency\textsuperscript{247} subject to international supervision. The Commission in the Cyprus v Turkey\textsuperscript{248} case held that the formal and public act of derogation was essential for application of Art 15 of the ECHR.
The Inter-American Court and Commission on Human Rights have not yet had to interpret these terms but have made general statements in their advisory opinion on the conditions justifying suspension of rights and freedoms under the Convention. In \textit{Habeas Corpus in Emergency Situation}, the Court held that the “suspension of guarantees lacks all legitimacy whenever it is resorted to for the purposes of undermining the democratic system”.\textsuperscript{249} However, in examining the report of Nicaragua, the Commission stated that “the ongoing penetration of these armed groups (former members of National Guards) into Nicaraguan territory demonstrates that there was a real and imminent threat to the security of the State”, providing useful case law for examining claims for derogation by other States.\textsuperscript{250}
Internationally, the term ‘public emergency’ in article 4 of the ICCPR has embraced several situations justifying the resort to derogation under exceptional measures like, a state of emergency, catastrophe, internal war , state of exception, national defence,
national necessity, military regime, martial law, etc. In all these cases the terms have been compendiously described as ‘constituting exceptional circumstances’, namely, circumstances resulting from temporary factors of a generally political character in which in varying degrees involve extreme and imminent danger, threatening the organized existence of a nation. However, such an invocation obliges upon states to formally declare the State of emergency and accordingly notify to the prescribed authority. At the same time, the State, while establishing the existence of an exceptional threat, is under obligation to justify as to why such a measure is necessary and legitimate in the circumstances and draw the balance between proportionality and the contemplated threat.

Emergency provisions are mentioned under Article 352 and 356 of the Indian Constitution. Both articles can be invoked by the President when exercising the executive powers of the Union of India, subject to such actions being approved by both Houses of Parliament. There have been three formal invocations of emergency provisions under the Indian Constitution: two on the grounds of external aggression (in 1962 and 1971), and one on the grounds of internal disturbance (in 1975). These emergencies were invoked under the powers in Articles 352-254 and 358-359 of the Indian Constitution relating to emergencies that threaten the life of the nation either as a result of war or external aggression or internal disturbance/armed rebellion.

Following the wide abuse of powers in 1975, Parliament enacted the forty-fourth amendment, which gave shape to the present emergency provision. Under the amendment, a declaration of emergency is only possible in the event of war, external aggression and “armed rebellion”. It requires the Prime Minister’s advice to the

---

252 Ibid, 4.
253 Derogations under Article 4 of the ICCPR have to be notified to the secretary General of the United Nations, while under Article 15 of the ECHR and Article 27 of the American Convention have to be notified to the Secretary General of the Council of Europe and the Organization of American States.
257 The Constitution (Forty-Fourth) Amendment Act 1978. Most of the provisions entered into force on 29 June 1979, coinciding exactly with the entry into force of the ICCPR. Both these measures were intended to present a more robust model aimed at preventing the abuse of emergency powers. As a result, the State witnessed a complete overhaul of its post-1979 emergency provisions.
258 Article 352(1). The phrase “armed rebellion” was substituted for “internal disturbance”.

President accompanied by a decision, in writing, from the Union Cabinet\textsuperscript{259} that will automatically cease to operate on the expiry of one month, unless the decision is specifically approved by resolutions in both Houses of Parliament.\textsuperscript{260} Passing these resolutions requires that at least half the membership of each house vote in favour and that at least two-thirds be present and to vote.\textsuperscript{261} Moreover, the amendment provides that unless an emergency is re-approved every six months, it will cease to operate.\textsuperscript{262}

The Forty Fourth amendment came into on 29 Jun 1979, coinciding with the coming into force of the ICCPR on 10 Jul 1979. Both these measures were intended to present a more robust model aiming to prevent the abuse of emergency powers. As a result, the State witnessed a complete overhaul of the post 1979 emergency provisions.

**Armed Conflict Not of an International Character**

These are situations calling for the application of Common Art. 3 to the Four Geneva Conventions. The Common Article 3 of the 1949 Geneva Conventions has been described as a "Convention in miniature", establishing minimum standards of humane treatment during conflicts without any derogations on grounds of emergency. Common Article 3 speaks of an "armed conflict not of an international character," which is broadly interpreted as meaning one in which armed opposition groups operating in the territory of a state have a degree of organization and are able to carry out a minimum of sustained military activity. The Common Article thus is said to explicitly regulate internal armed conflicts—that is, conflict between states and non-state armed groups.

\textsuperscript{259} Article 352(3). Previously, the Prime Minister could advise the President to declare an Emergency on his/her sole authority.

\textsuperscript{260} Article 352(4). This period previously comprised two months.

\textsuperscript{261} Article 352(6). Previously, the majority prescribed had been a simple majority of the membership of each house.

\textsuperscript{262} Article 352(5). Also see Iyer, States of Emergency, p.201. See fn.135. The Forty Fourth amendment came into on 29 Jun 1979, coinciding with the coming into force of the ICCPR on 10 Jul 1979. Both these measures were intended to present a more robust model aiming to prevent the abuse of emergency powers. As a result, the State witnessed a complete overhaul of the post 1979 emergency provisions.
The original draft of the Common Article 3, as proposed by the ICRC was initially planned to make all internal armed conflicts with the ambit of the Geneva Conventions. The draft article read,

“In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status."

The reference to civil war, colonial conflicts, or wars of religion in many ways sought to include all modern confrontations obliging each of the adversaries to implement the Conventions automatically. Although, the article did not confer any legal status to the parties to the conflict but it was seen as extremely intrusive upon the sovereign prerogative of the states threatening the automatic recognition of belligerency.

Besieged with the idea that such an absolute obligation would impeach upon the sovereign status of the State, the final text adopted in the Diplomatic Conference left many of the fundamental issues unclear with the exception that the Article was able to establish certain recognized minimum humanitarian standards. Many commentators

264 The final text read as “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(b) taking of hostages;

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

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

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
referred to the Common Article 3 as a "Convention within the Conventions" or the "Convention in miniature," the field of application was limited to the interpretation of the term, "armed conflicts not of an international character." While the article served its purposes if only because it brought internal conflict formally within the ambit of Geneva Conventions and of humanitarian law in general. In doing so, it left important issues vague granting enough discretion of its application to the respective states.

Although, the CA 3 mentions that the application of the provisions shall not affect the legal status of the Parties to the conflict but there are many other questions that are left unanswered. For example, what constitutes an ‘armed conflict not of an international character’, when does a situation attain the threshold of a conflict to invoke its application, and what is its binding nature on the party other than the high contracting party? The central difficulty is determining the point at which an internal disturbance becomes an "armed conflict" within the meaning of international law.

While, the Common Article 3 reflects the enormity and the near absolute commitment towards the protection afforded even in times of conflict, the approach has rarely swept through states practice as a matter of its application in the following years. Therefore, when Algeria sought to attain Political independence from France in 1954, France repeatedly maintained that that the operation in Algeria were aimed merely at maintaining public order. During the Biafra struggle for secession from Nigeria in 1967, the Federal Government repeatedly classed the situation as a mere rebellion and stressed that they were fighting to maintain unity. Although, many scholars felt that the conflict was international rather than being internal. Contemporary conflicts have also shown that states like Angola, Rwanda, Afghanistan, Bosnia-Herzegovina and Sri Lanka have still readily disregarded humanitarian laws of war and Article 3 in particular.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

265 Georges Abi-Saab, Non-International Armed Conflicts, in International Dimensions of Humanitarian Law 221 (1988).
268 Derek Jinks, September 11 and the Laws of War, 28 Yale J. Int'l L. 1 at 10.
Non International Armed Conflict

Under art. 2 of the Additional Protocol II the Material field of application of the Protocol is spelt out. The Protocol develops from Common Art. 3 but establishes a much higher threshold. The Protocol applies to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

The Protocol II amplifies that it shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Armed Conflict

The term armed conflict under protocol I of the Geneva Conventions is beyond the scope of the paper since it refers to sovereign States as high Contracting parties. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Protocol mentions, “the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

Applying the 'Conflict' Threshold

There is no precise definition of what constitutes a civil war\textsuperscript{269} or even a non-international armed conflict\textsuperscript{270} although the latter concept has been the subject of

\textsuperscript{269} See Hernan Montealegre, Conflictos armados internos y derechos humanos, in Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge 735, 735 (C. Swinarski ed., 1984). The author states:
more recent development. Common Article 3 speaks of an "armed conflict not of an international character," which is broadly interpreted as meaning one in which armed opposition groups operating in the territory of a state have a degree of organization and are able to carry out a minimum of sustained military activity. A non-international armed conflict is best described as the range of conflicts that exists between two thresholds in opposition to each other. The high end of the spectrum is occupied by international armed conflicts as defined by Common Article 2 of the Geneva Conventions. The minimum threshold is set by those "situations of internal disturbances and tensions" which Article 1, paragraph 2, of Protocol II asserts "are not armed conflicts." In broad terms, then, a non-international armed conflict is everything in between, that is, any conflict taking place in the territory of a state that rises above the level of sporadic violence or internal unrest, but falls short of interstate war.

Historically States have opposed the understanding of the term armed conflict with reference to internal conflict. States like Australia, Canada, China, France, Greece, Italy, Spain, the United Kingdom and the United States opposed the application of the Common Article threshold in internal conflicts during the drafting process, let alone armed conflict. In fact, when the first draft was proposed during the 1949 Diplomatic Conference, the joint Committee studying the Common Article 3 split into two bodies of opinion, reflecting a conflict between State sovereignty and humanitarianism. The draft Article in its original form was feared to be too intrusive upon state sovereignty and failed to protect state rights adequately in favour of individual rights. It was felt that the article applied to an extremely low threshold covering insurrection, rebellions and civil disorders, compelling a government in the throes of internal conflict to apply conventions concluded for the regulation of war, granting belligerent

“The traditional law of nations, preoccupied with war between States, has failed to develop a generic concept to encompass all internal struggles not rising to the level of [international] war, the effect of which has been that authors do not employ a uniform terminology when referring to these conflicts.”

270 See Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1319, 1348 (Y. Sandoz et al. eds., 1987) [hereinafter Commentary Protocol].


272 See Commentary Protocol II, supra note 313, at 1349, 1351.


status to insurgents who maybe not more than a small group. The apprehension that even criminals forming an organization or supporters of rebels although not living in the part controlled by the rebels would claim for status\textsuperscript{276}. As Jean-Michel Monodas notes, “the vast majority of conflicts in Asia were and still are internal in nature, which means that the ICRC is in a weaker legal position when asking to work in the conflict zone than it would be in an international conflict.”\textsuperscript{277}

United Kingdom and France despite witnessing escalating violence against the IRA and FLN have continued to maintain the situation as a public order situation with intermittent enforcement of emergency measures (United Kingdom). France though unwilling but after the Battle of Algiers (1956-57) later accepted the application of the Law of Armed Conflict only in terms of the authority of the ICRC to render aid. The United Kingdom during the Northern Ireland problem enacted Civil Authority (Special Powers) Act 1922 (1922-1980) and the Prevention of Terrorism Act (1974-96) and the Northern Ireland (Emergency Provisions) Act (1974-98) but did not recognize the situation necessitating the internal conflict threshold. Each of these enactments gave widespread powers to the armed forces to search/arrest without warrant disperse an unlawful assembly etc.

No country in the world till date has recognized an internal conflict. Nepal also considers the secessionist Maoist group to be a law and order problem. The Nepalese government had set up two commissions—the Dhami Commission in 1997 and the Deuba Commission in 2000—to identify the root causes of the Maoist insurgency and suggest remedial action. In identifying the insurgency as “political” in nature, and thus an issue of law and order, both Commissions paved the way for the government to retaliate through police action. Similarly, Sri Lanka’s Prevention of Terrorism Act of 1979 is a public order issue through which Sri Lanka has sought to address the LTTE problem.

\textsuperscript{276} See UK in the Final Record II B, 10 and Canada. Final Record of the Diplomatic Conference of Geneva 1949 (Brene, 1951), vol. II B.

\textsuperscript{277}
The Reluctance to Recognize the Nature of Armed Violence: A Third World Perspective

Localized conflicts in third-world states (including not only those mentioned at the outset of the paper, but also the Philippines, Indonesia, and East Timor) are clearly characterized by: (1) protracted violence against the established order; (2) a common ethnic, religious, or political community seeking self-determination; and (3) the presence of defined military and political wings of the warring armed groups. In order to achieve self-determination, communities engaged in secessionist movements employ protracted violence implemented through organized and hierarchical military and political wings. This easily meets the threshold for classification as an armed conflict. A state’s recognition of either self-determination or armed conflict is extremely risky. Acceptance of an intrastate-armed conflict invokes the application of Common Article 3, signaling that the state is no longer capable of maintaining order and that the armed group has achieved a degree of international legal status akin to that of belligerents. Recognition of self-determination imposes a requirement on states to comply with Article 1 of the Additional Protocol I to the Geneva Convention, which refers to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”

---

278 See supra ¶4-¶6 (providing various definitions for “armed conflict”).
279 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 3, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II], available at http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument. This Protocol, which develops and supplements the Geneva Conventions Common Article 3 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (Organization and territorial control refers to the issue of belligerency). See also Moir Lindsay, THE LAW OF INTERNAL ARMED CONFLICT (Cambridge University Press 2004).
280 Protocol I, supra note 48, art.1(4).The situations referred to in the preceding paragraph include armed conflicts in which communities are fighting against colonial domination, alien occupation, and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
This uncertainty of labeling localized situations as armed conflicts has led many states facing secessionist movements to refuse to acknowledge the problem or ratify treaties that would label the violence as an armed conflict. The post-1990s era of internal conflict has introduced the challenge of labeling violent secessionist movements as armed conflicts in order to ensure the application of at least minimal humanitarian norms. Although the Geneva Conventions do not provide a definition of “armed conflict,” the International Criminal Tribunal for the former Yugoslavia (ICTY) decision in Prosecutor v. Tadić,281 the Prosecutor v. Akayesu decision out of the International Criminal Tribunal for Rwanda (ICTR),282 and the Rome Statute of the International Criminal Court,283 provide more detailed, comprehensive definitions of “armed conflict,” all recognizing the need to expand the reach of the accountability process under humanitarian law to cover internal conflicts. In Prosecutor v. Tadić, the ICTY appeals chamber held:

[A]rmed conflict exists whenever there is a resort to armed force between States or protracted armed violence between such groups within a State. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.284

However, “the use of military force by individual persons or groups of persons will not suffice” to constitute an armed conflict.285

The Tadić decision created a new temporal element, finding that an armed conflict exists whenever there is “protracted violence” extending beyond the cessation of

283 Rome Statute, supra note 12, art. 8(2)(e).
284 Prosecutor v. Tadic, supra note 50, ¶70; see also Derek Jinks, September 11 And The Laws Of War, 28 YALE J. INT’L L. 1, 27 –28 (2003).
hostilities until a final settlement is reached. In *Prosecutor v. Boškoski*, the ICTY expanded the definition to take into account the intensity of the conflict (as measured by both the escalation of violence and the reaction of the government), and the command structure of the parties (and their corresponding abilities to carry out organized operations). The ICTR made the temporal element even more explicit in *Prosecutor v. Akayesu*, finding that armed violence extending over a few months satisfies the “protracted” requirement. In that case, the ICTR also found that the intensity of the violence was such that it constituted an “armed conflict” within the meaning of Common Article 3.

The Rome Statute also maintains that an armed conflict is defined by “protracted violence,” it fails to offer any substantive definition of the term “armed conflict.” It excludes from the definition of internal armed conflict any “situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence.” However, the wording of the Rome Statute’s Article 8(2)(f) suggests that it applies to one type of internal armed conflict—one involving protracted violence.

This wide spectrum can accommodate a number of contemporary terms often used to describe internal violent situations, including armed rebellion, insurgency, terrorism, and militancy.

The international legal definition of “armed conflict” raises a number of concerns. The low ‘protracted violence’ threshold, combined with the ICTY’s statement that an armed group does not have to exercise control over territory within a state, means that

---

286 *Prosecutor v. Tadić*, supra note 50.
288 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 619-627 (Sep. 2, 1998), reprinted in 37 I.L.M. 1399 (1998); see also Jinks, supra note 53, at 10. Common Article 3 does not specify the term “intensity of violence.” However, when read in conjunction with Article 1(2) of Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, the violence does not apply to, “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”
289 *See* Rome Statute, *supra* note 12, art. 8.
290 *Id.* art. 8(2)(f) ¶ 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. See also *Prosecutor v. Tadic*, Appeal on Jurisdiction, Case No. IT-94-1-AR72 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), 35 I.L.M. 32, 54 (1996).
a greater number of intrastate conflicts qualify as armed conflicts.\textsuperscript{291} As a result, these internal situations open states up to international monitoring. Skepticism toward international interference in domestic affairs is often cited by states as a reason for failure to ratify international treaties.\textsuperscript{292} South Asian states provide perfect examples of this skepticism. While many states in the region suffer from protracted, internal strife (which qualifies as armed conflict), neither Afghanistan, Bangladesh, Bhutan, India, Indonesia, Iran, Iraq, Malaysia, Myanmar, Pakistan, Nepal, nor Sri Lanka have ratified the ICC Statute or the Additional Protocols I or II to the Geneva Conventions.\textsuperscript{293} The level of internal conflict and the reasons for its existence vary in each of these states. The internal conflicts in India, Sri Lanka, and Nepal turn on the issue of self-determination, while the conflicts in Iran and Iraq have to do with politico-religious clashes.\textsuperscript{294} During discussion regarding the definition of “war crimes” within Article 8 of the Rome Statute, many states openly voiced concerns regarding defining “armed conflict” as ‘armed conflict not of an international character.’ For example, India opposed the language on the grounds that it would result in the labeling of situations in Northeast India and Kashmir as armed conflicts.\textsuperscript{295}

States’ concerns over the labeling of internal situations as armed conflicts are also concerns over whether internal communities have the right to self-determination under international law. The right exists under Article 1 of the International Covenant

\textsuperscript{291} For example, many intrastate conflicts in South Asia qualify as armed conflicts under the current international legal definition.

\textsuperscript{292} For example, during the drafting process of additional Protocol II to the Geneva Conventions, the Indian delegate noted, “the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of states. The definition of non-international armed conflicts was still vague and no convincing argument has been put forward to justify the need for draft Protocol.” CDDH/I/SR.23:VIII, 215 at 224 (taken from Moir Lindsay, THE LAW OF INTERNAL ARMED CONFLICT 92 (Cambridge 2004)). See also Usha Ramanathan \textit{India and the ICC}, J. INT’L CRIM. JUSTICE 3, 627-631 (2005).


\textsuperscript{295} Ramanathan, supra note 60, at 631. India’s skepticism toward the term “armed conflict” became clearer during the question of ratification of the Statute of the International Criminal Court (ICC Statute). India was also strongly against the very concept of Additional Protocol II during the drafting process, fearing that it encourages intervention in domestic affairs. India noted, “the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of States. The definition of non international armed conflicts was still vague and no convincing arguments had been put forward to justify the need for draft Protocol II, the provisions of which would not be acceptable to (his) delegation.” See CDDH/I/SR.23:VIII, 215 at 224.
on Civil and Political Rights (ICCPR). In most developing states, decolonization has been closely linked to self-determination. The situations in India, Sri Lanka, and Nepal are highlight the issue itself, as well as the states’ corresponding understanding of the periods of unrest caused by self-determination movements. In all three states, protracted situations of violence continue as armed groups claim to be fighting for self-determination. And yet all three states refer to these situations as issues of law and order rather than armed conflicts.

The ICCPR Article 1 right to self-determination can be linked to situations that qualify as armed conflicts under international law. When a local ethnic or tribal population seeks self-rule or independence (and subsequent de facto control over certain territory) through protracted strife, the international right to self-determination is implicated and the violence qualifies as an international armed conflict. Thus, state sovereignty is threatened both when the international community invokes the right to self-determination and when states themselves recognize the right. Kosovo’s unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, and the International Court of Justice (ICJ) ruling approving the legality of Kosovo’s independence from Serbia, strengthen the cause of secessionist movements seeking self-determination through the creation of conflict with state sovereignty. The ICJ concluded that “general international law contains no applicable prohibition of declarations of independence,” and that the February

---


1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.


298 Id. The Court has concluded above that the adoption of the declaration of independence of Feb. 17, 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.
17, 2008 declaration of independence did not violate general international law. On the question of lex specialis, as created by Security Council Resolution 1244 (1999), the ICJ ruled that there is no general prohibition against a unilateral declaration of independence. The ICJ also examined the lawfulness of declarations of independence under general international law against the background of Resolution 1244, and noted: “…the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation…[and]…a great many new States have come into existence as a result of the exercise of this right.” However, the ICJ also stated that questions regarding declarations of independence must be analyzed “on a case-by-case basis, considering all relevant circumstances.”

Recognition of an existence as an armed conflict raises other questions too. Does the state accept a criminal conduct and grant the armed groups as the right to belligerency? How would the state attach individual criminal liability to all violations of the laws of war? There is a prescribed code of conduct, and only serious violations of the laws of war are considered "war crimes."

---

299 Id.
300 Id. at 30.
301 Id. at 41.
304 “Grave breaches” are serious violations of the law of war committed against “protected persons” under the Geneva Conventions of 1949. See Geneva Convention I, supra note 27, art. 49; Geneva Convention II, supra note 27, art. 50; Geneva Convention III, supra note 4, art. 129; Geneva Convention IV, supra note 27, art. 146. Regarding simple breaches of the respective conventions, all four conventions contain the following language: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than grave breaches defined in the following Article."
States have rarely accepted the presence of an internal or a conflict governed by the Additional Protocol II to the Geneva Conventions in the recent times. The rare application of these instruments have been through triangular agreements between parties to the conflict initiated by the ICRC delegates who took the initiative to collect declarations of all parties agreeing to abide by the principles or the provisions of the Conventions.  

For example, in Nigeria, before the outbreak of hostilities, both sides agreed that they would apply the Geneva Conventions. More recently, a number of liberation or insurgent movements provided the ICRC with unilateral declarations of intent to abide by humanitarian law: the African National Congress (ANC), on November 28, 1980; the Southwest Africa People's Organization (SWAPO), on February 25, 1977; the National Union for the Total Independence of Angola (UNITA), on July 25, 1980; three Afghan movements, in 1980, 1981, and 1982; the Moro National Front (Philippines), on May 18, 1982; and the Palestine Liberation Organization (PLO), most recently on June 7, 1982.

---

Table 4.2: Internal Conflict and Public Order/Law and Order

---


The Complexity in Defining and Recognizing Child Participation

Child participation in violent secessionist movements is an on-going problem in developing states. Ever since the states gained independence from colonial rule, these secessionist movements have fought for self-determination on grounds of ethnicity, political rivalry, or religious fundamentalism. 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. Further, the conflicts stemming from secessionist movements present new threats to the protection of children.

Over the last several decades, the legal character of secessionist movements has become extremely complex. The concept of extending protections to children in “localized civil unrest situations” (this term will be used throughout the article to refer to these secessionist movements) gained traction after the 2001 adoption of U.N. Security Council Resolution 1379, which hereafter primarily sought

---

307 Secessionist movements are active in India within Kashmir and Northeast India, Sri Lanka from the Liberation Tigers of Tamil Eelam (LTTE), Pakistan from Balouchistan, and Nepal from the Maoists.

308 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, Children Recruitment in South Asian Conflicts: A Comparative Analysis of Sri Lanka, Nepal and Bangladesh 12 (The Royal Institute of International Affairs 2006).


310 In India, the situation in Jammu and Kashmir has existed since 1989, the situation in the Northeastern region since independence in 1947, and the most recent Naxalite problem in the Central region was officially recognized by the State in 2003. Similarly, the Maoists problem in Nepal erupted in 1990 after the restoration of parliamentary democracy where the Maoists sought establish a Maoist people’s democracy. Sri Lanka too was in the middle of such a confrontation with the LTTE demanding a separate Statehood since 1972. The LTTE problem began after the replacement of the independence Constitution with the Republican Constitution in 1972.
to address post-conflict truth-and-reconciliation mechanisms for effective reintegration of child soldiers.\textsuperscript{311} However, it was over-shadowed by the Machel Report, which did not create distinctions between conflicts, but rather labeled all conflicts as “armed conflicts.” Child protections thus became contingent on receiving a label of “armed conflict.” Because actions taken to “maintain public order” did not receive this classification, they did not trigger international child protections, thereby reducing the applicability of measures intended to protect children in localized conflicts.\textsuperscript{312} In 2002, the international community tried to institute child protections at the state level. The U.N. Commission on Human Rights called upon states to review any domestic laws under which children could be prosecuted (including national security and counter-terrorism laws), and to assess those laws for compatibility with applicable international human rights instruments\textsuperscript{313} and general provisions of international humanitarian law.\textsuperscript{314} In 2003 the European Union issued its Guidelines on Children and Armed Conflict, stating its objective to “influence third world countries and non-state actors to implement international human rights and standards ... and to take effective measures to protect children from the effects of armed conflict, to end the use of children in armies and armed groups, and to end impunity.”\textsuperscript{315}

Subsequent Security Council resolutions recognized child participation in localized situations.\textsuperscript{316} That recognition linked child participation with the existence of an armed conflict, thereby obliging states to comply with international humanitarian law and applicable human rights law when prosecuting children. But because labeling localized conflicts as armed conflicts imposes a duty on affected states to act in

\begin{itemize}
  \item \textsuperscript{311} S.C. Res. 1379, ¶¶ 8,12, U.N. Doc. S/RES/1379 (Nov. 20, 2001).
  \item \textsuperscript{312} Id.
  \item \textsuperscript{316} UNICEF refers to intrastate (internal) conflicts as low intensity conflicts and children are increasingly targeted to bear the brunt of consequences. The UNICEF defines low intensity conflict as those conflicts with fewer battle deaths and/or those wherein the parties to the conflict do not involve a State.
\end{itemize}
conformity with the norms of international legal conduct, states faced with secessionist movements have refused to refer to those movements as armed conflicts. Instead, the states view secession as merely an internal, illegal activity. Some governments are notoriously reluctant to accept the existence of an internal armed conflict, preferring instead to declare a state of emergency or to claim that they are engaged in police action against terrorism. Without the label of “armed conflict” attached to these movements, states are not required to abide by the international community’s resolutions and guidelines. Thus, international efforts to categorize secessionist movements as armed conflicts ultimately result in distancing states affected by localized conflicts from mechanisms that could protect children.

International advocacy on the issue of child soldiers usually focuses on states where the total collapse of the rule of law necessitates international intervention. While localized secessionist conflicts do not rise to the level of warranting international intervention, they do warrant international attention, especially on the issue of child soldiers. Rather than insisting on labeling these localized situations as armed conflicts, the international community should work within a local government’s framework and call on governments to both address the issue of child soldiers and provide for child protection.

This part examines as to whether recent efforts to enforce strict codes of conduct regarding child participation in conflicts have left behind the majority of children in localized conflicts. It includes the difficulty of defining and understanding child participation in democratic states with localized conflicts and various international organizations’ approaches to addressing child participation in armed conflicts, and the results of imposing those approaches to child participation in secessionist movements.

The Complexity of Defining Child Participation

The Grac’a Machel Report’s chilling revelations of the rampant use, exploitation, and abuse of children in conflict settings stunned the international community. At the time

---

317 See HUMAN RIGHTS WATCH, DANGEROUS DUTY: CHILDREN AND THE CHHATTISGARH CONFLICT (2008), available at http://www.hrw.org/sites/default/files/reports/naxalite0908web_0.pdf. (The report on India’s Chhattisgarh’s state, refers to the situation as a conflict and refers to Maoist rebels (Naxalites) and state-supported anti-Maoist vigilante groups as parties to the conflict resulting in a violation of the Paris Principles for the treatment of former child soldiers).

of the report’s publication in 1996, the problem was so prevalent in Africa that the report focused on Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya, and Mozambique (It also discussed non-African states including Bosnia and Herzegovina, Cambodia, Myanmar, Lebanon, and Colombia). The report classified all of these states as “States of Concern,” meaning that they merited international attention.

Haunted by previous reports of the horrors of child soldiers, the international community attempted to apply the model used for child soldiers in failed states with armed conflicts to child participation in third-world states witnessing localized conflicts. The Machel Report focused on the failed state approach and examined the impact of armed conflict on children in states whose governments had collapsed sufficiently to warrant a Chapter VII intervention. However, the failed state approach to child soldiers did not translate to localized conflicts for a number of reasons. First, the nature and extent of child participation in localized conflicts is very different from child participation in failed states. Second, those who recruit child soldiers in localized conflicts have a different level of accountability. Third, localized conflicts do not reach a level of violence that warrants international intervention. Finally, the failed state approach has had a disproportionate impact on children affected by localized conflicts. The high international accountability standards of the failed state approach led states that had previously acknowledged the use of child soldiers to shift their focus and deny any evidence of child soldiers. Thus, despite the efforts of international and national NGOs to highlight the widespread use of children in localized conflicts, states have been reluctant to explicitly recognize the problem of child soldiers. For example, India maintains that localized conflicts only have a socio-economic impact on children, namely the lack of access to education, health, and other basic services brought on by conflict create psychological problems. Nepal has voiced concern about media reports on the Maoists’ use of children as


Id. at 12 (Three of the six regional consultations determined that 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).

Id.

See generally Grac’a Machel Report, supra note 10 (Listing these collapsed governments as Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya, and Mozambique); see also U.N. Charter ch. VII

messengers, sentries, and spies, but claims that official data is not available. Although the Nepalese government has recognized the need to protect children, it claims the conflict’s only repercussion for children is the limitation on access to education.

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.

The child soldier template for failed states in the 1990s is not relevant to child participation in the current localized conflicts. That template forces states to either recognize illegal secessionist groups as legitimate actors, which would afford rights to the secessionist groups under international law, or regard the conflict as an action to maintain public order. States are unwilling to define the situations as armed conflicts and are reluctant to refer to child participants as child soldiers. Instead, child participants are often referred to as terrorists or insurgents and are treated with little or no concern. State security forces that apprehend child soldiers have little concern for their age. The children are seen as enemies of the state who are waging war.

---

325 Id. at 302-303.
326 Id. at 302, 304.
327 See U.N. Committee on the Rights of the Child, Initial Report of States Parties Due in 1993: Sri Lanka, ¶ 1085, U.N. Doc. CRC/C/8/Add.13 (May 5, 1994) (In light of the escalating conflicts in the 1990s, and the LTTE’s increasing control in certain areas, Sri Lanka first recognized the LTTE’s use of child recruitment in the first State party report in 1994, wherein it was recognized that children younger than fifteen were involved in the guerrilla army). Norway’s later offer to play an intermediary in the peace process in 2000 further addressed the issue of child soldiering. This was followed in 2002 by a tripartite action plan between Sri Lanka, LTTE and UNICEF which included a commitment by the LTTE to stop child recruitment and established three transit centers for the rehabilitation of child soldiers. However, the LTTE refused to discuss child recruitment during the cease fire agreement talks held in Geneva in February 2006.
329 See, e.g., CHAKMA SUHAS, Representative Correspondence From Asian Centre for Human Rights, ACHR Index: IND/JH/03/03, http://www.achrweb.org/countries/india/jharkhand/POTA0303.htm (last visited Oct. 26, 2010) (noting in India, children as young as fourteen years old have been detained under the Prevention of Terrorism Act (POTA) and kept in jails for allegedly waging a war against the State. On July 9, 2002, fourteen year-old Mayanti Raj Kumari was arrested for allegedly waging war against the State under Sections 121 A (Conspiracy to commit offences punishable by sections 121 which includes Waging, or attempting to wage war, or abetting waging of war, against the Government of India) and 122 (Collecting arms, etc., with intention of waging war against the Government of India) of the Indian Penal Code and POTA. She was detained in Ranchi jail and not in a juvenile home as required under the law).
330 Id.
against the nation. In many instances, underage suspects never go to court. Government television news programs use nationalist rhetoric to announce the apprehension of child soldiers on a daily basis. Such announcements are met with public jubilation and disregard for the special status of the child soldiers. International safeguards are rarely implemented, and by the time these child “insurgents” appear in court, great harm has already occurred.

Current localized conflicts also differ from the failed state conflicts of the 1990s in terms of the extent and type of child participation. In Sierra Leone (1991-99), Rwanda (1990-93), and the Democratic Republic of the Congo (DRC) (1998-2003), children were involved in heinous crimes that constituted grave breaches of the laws of war and triggered potential punishment under Common Article 3 of the Geneva Conventions. In localized conflicts, however, child participation is limited to assistance roles: children serve as messengers, take on administrative tasks in camps, or plant explosive devices against armed forces. The tacit approval of these acts in communities supporting secessionist movements leads children to believe they are behaving heroically. Compared to the type of acts children performed in the more violent conflicts in failed states, these less egregious acts of children in localized

---

331 Id.; See also Ramachandran Sudha, Delhi Targets Rebels With a Cause, ASIA TIMES (June 8, 2010), available at http://rememberjenkinsear.blogspot.com/2010/01/status-of-anti-maoist-war-in-orissa.html
332 See Brett, supra note 20, at 33 (quoting RACHEL BRETT AND MARGARET MCCALLIN, CHILDREN: THE INVISIBLE SOLDIERS (2nd ed. 1998)).
333 Id.
336 See Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Aug. 12, 1949)(“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat ’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violation of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment”).
conflicts merit rehabilitation rather than punishment. However, states are likely to punish apprehended children because it is easy to establish that they participated in the secessionist movements. In many developing states, children as young as seven can be held criminally accountable, which allows states to detain children before sending them to observation homes or treatment centers specifically created to treat at-risk youth.\textsuperscript{338}

Both \textit{Prosecutor v. Lubanga Dyilo}\textsuperscript{339} and \textit{Prosecutor v. Norman}\textsuperscript{340} established that the recruitment of children younger than fifteen is a war crime. In addition, the Optional Protocol to the Convention on the Rights of the Child absolutely prohibits armed groups from recruiting children under the age of eighteen. However, because only a limited number of states have ratified the Optional Protocol,\textsuperscript{341} and because many states have no domestic legislation prohibiting child recruitment, armed groups enjoy \textit{de facto} impunity.\textsuperscript{342}

Further, peace negotiations rarely address accountability for those who recruit and use child soldiers. Eager to establish peace, states make an uneasy, but realistic tradeoff, granting amnesty to commanders who possibly bear the greatest responsibility for child soldier recruitment. In Sri Lanka, neither the Ceasefire Agreement of February

\begin{flushleft}338 U.N. \textit{CHILDREN’S FUND, SOUTH ASIA AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY,} at 6, Table 2, \textit{available at} http://www.unicef.org/osa/Criminal_Responsibility_08July_05%28final_copy%29.pdf. \textit{Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges,} at 153-157 (Jan. 29, 2007), \textit{available at} http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF. (Thomas Lubanga Dyilo is accused of committing the following crimes from July 1, 2002 to Dec. 31, 2003: enlisting or conscripting children into the FPLC (the military wing of the \textit{Union des Patriotes Congolais}) and using these children to participate actively in hostilities).\textit{Prosecutor v. Norman, Case No. SCSL-03-14-I, Indictment} (Mar. 7, 2003). \textit{India ratified the Optional Protocol on Nov. 30, 2005 (Entry into force on Dec. 30, 2005), Nepal on Jan. 30, 2007 (Entry into force on Feb. 3, 2007) and Sri Lanka on Sept. 8, 2000 (Entry into force on Feb. 12, 2002).} \textit{There was no legal provision criminalizing the recruitment of children in India or Nepal. The Juvenile Justice (Care and Protection) Act makes no reference to criminalization of child recruitment although Article 24 of the Indian Constitution. The Juvenile Justice (Care and Protection) Act, 2000, No.56, Act of Parliament, 2006 (India); \textit{INDIA CONST.} art 24, \textit{available at} http://india.gov.in/govt/documents/english/coi_part_full.pdf (referring to rights against exploitation, and prohibits the employment of children below the age of fourteen in any factory or mine or other hazardous employment). \textit{See also COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIER REPORT 2008} (2008), \textit{available at} http://www.child-soldiers.org/home (noting that Nepal has no domestic legislation that criminalizes recruitment of children. In the Comprehensive Peace Agreement (CPA), finalized in November 2006, the parties agreed not to use or enlist children in any military force and to rescue and rehabilitate such children immediately. In contrast, Sri Lanka’s Penal Code was amended in 2006 to make “engaging/recruiting children for use in armed conflict” a crime punishable by twenty years in prison. Thus far, despite these provisions, no member of the LTTE or Karuna group has been arrested for child recruitment). \end{flushleft}
2002\textsuperscript{343} nor the 2003 Action Plan for Children Affected by War between Sri Lanka and the LTTE\textsuperscript{344} make any mention of a perpetrator’s accountability for child recruitment. Understandably, armed groups do not want to address the issue. States also seek to avoid the issue because addressing the grave offense of child recruitment could potentially derail the entire peace process. Unless a state is a failed or nearly failed state, such that international intervention is mandated, it is difficult to enforce international law pertaining to child soldiers in the absence of its incorporation into domestic law.

**Child Participation and International Advocacy**

Immediately following the publication of the Graca Machel Report, the U.N. General Assembly called for the appointment of a Special Representative on the Impact of Armed Conflict on Children.\textsuperscript{345} The U.N. Security Council condemned “the targeting of children in armed conflicts, including their humiliation, brutalization, sexual abuse, abduction and forced displacements, as well as their recruitment and use in hostilities in violation of international law,” and “called upon all parties concerned to put an end to such activities.”\textsuperscript{346} Olara Otunnu, the U.N. Special Representative for Children in Armed Conflict, presented the Security Council with information and statistics on the use of child soldiers.\textsuperscript{347} At that time, “over 250,000 children under the age of eighteen were serving in government military forces or with armed rebel groups.”\textsuperscript{348}

\begin{itemize}
  \item \textsuperscript{344} The 2003 Action Plan for Children Affected by War was the first (and to date the only) human rights agreement formally entered into between the Sri Lankan government and the LTTE. It included a pledge by the LTTE to end all recruitment of children and to release children from its forces, both directly to the children’s families as well as to new transit centres that were constructed specifically for this purpose. CHARU LATA HOGG, THE LIBERATION TIGERS OF TAMIL EELAM (LTTE) AND CHILD RECRUITMENT; Coalition to Stop the Use of Child Soldiers 2006 14, available at http://www.child-soldiers.org/childsoldiers/CSC_AG_Forum_case_study_June_2006_Sri_Lanka_LTTE.pdf.
  \item \textsuperscript{348} Id.
\end{itemize}
fifty countries, children served as cooks, spies, messengers, “comfort women,” and soldiers in armed conflicts.\textsuperscript{349}

The grim reality of the exploitation and vulnerability of children immersed in conflict led the Security Council to pass six important resolutions pertaining to child soldiers and the general effects of armed conflict on children. In 1999, the Security Council passed Resolution 1261, noting that international law prohibits the forced or voluntary recruitment of children as soldiers, and stating that it is a war crime to conscript or enlist children under the age of fifteen into national armed forces or to allow them to participate in hostilities.\textsuperscript{350} The resolution called upon states to comply strictly with their obligations under international law and to “ensure that the protection, welfare, and rights of children are taken into account during peace negotiations.”\textsuperscript{351} It also called upon states to undertake feasible measures to protect and minimize the harm children suffer during armed conflict.\textsuperscript{352}

In 2000, the Security Council passed Resolution 1314, 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{353} 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{354} The means of enforcement available under Chapter VII (including complete or partial interruption of economic relations, severance of diplomatic relations,\textsuperscript{355} demonstrations, blockades, and other operations by air, sea, or land necessary for the purpose of maintaining international peace and security)\textsuperscript{356} were also reflected in the subsequent country-specific resolutions. For example, Resolution 1332, pertaining to armed conflict in the DRC, called upon “armed forces and groups to immediately cease all campaigns for the

\textsuperscript{349} \textit{Id.}


\textsuperscript{351} Id. ¶ 3, 7.

\textsuperscript{352} Id. ¶ 9.


\textsuperscript{354} \textit{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 \textit{reaffirms} its readiness to consider such situations and, where necessary to adopt appropriate steps.”

\textsuperscript{355} U.N. Charter art. 41.

\textsuperscript{356} \textit{Id.} art. 43.
recruitment, abduction, cross-border deportation and use of children,” and demanded “immediate steps for the demobilization, disarmament, return and rehabilitation of all such children.” As a result of this resolution, 165 Congolese children were returned to UNICEF from a training camp in Uganda. In accordance with Article 99 of the Charter of the United Nations the Security Council issued Resolution 1379, requesting that the Secretary General provide a list of every party to an armed conflict that recruits or uses children, and calling on member states to “[p]ut an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children ... and ensure that post-conflict truth-and-reconciliation processes address serious abuses involving children.”

In 2003, the Security Council recognized that the “conscription or enlistment of children under the age of fifteen into the national armed forces or using them to participate actively in hostilities is classified as a war crime as mentioned in the Rome Statute of the International Criminal Court,” and called “for ‘an era of application’ of international norms and standards for the protection of children affected by armed conflict.” Further emphasizing its concern over the continued recruitment of child soldiers in violation of international law, the Security Council adopted Resolution 1539 in 2004, reminding states that the Optional Protocol to the Convention on the Rights of the Child requires states to set a minimum age of eighteen for compulsory recruitment of children for armed conflict and takes measures to ensure children under

359 U.N. Charter art. 99 (permitting the Secretary General to “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.”).
360 The listing of offending parties in the Secretary-General’s annual reports to the Security Council, which gives this report a unique saliency and impact, has evolved in three stages. First, the Security Council in S/RES/ 1379 (2001) requested a “list of parties to armed conflict that recruit or use children...in situations that are on the Security Council’s agenda”. S.C. Res. 1379, U.N. Doc., S/RES/1379 (Nov. 20, 2001). This provided the basis for the listing practice. Second, in 2003, the Security Council added a new provision in the context of listing, i.e. “taking into account the parties to other armed conflicts that recruit or use children which are mentioned in the report.” S.C. Res. 1460, U.N. Doc. S/RES/1460 (Jan. 30, 2003). This provided the basis for the second list, contained in Annex II since 2003. Finally, in 2004, the Security Council added another provision in the context of listing, i.e. “bearing in mind all other violations and abuses committed against children affected by armed conflict.” S.C. Res. 1539, U.N. Doc. S/RES/1539 (Apr. 22, 2004). This provided the basis for recording other grave abuses under the lists.
eighteen years of age do not directly take part in hostilities. Finally, in 2005, the Security Council called upon the Secretary General to work with national governments, relevant United Nations agencies, and national and international civil society groups to implement monitoring and reporting mechanisms on children and armed conflict for six egregious violations of children’s rights during armed conflicts.

The combination of Security Council resolutions, the Convention on the Rights of the Child (CRC), and the Rome Statute, along with the general call for an era of application of international law, served to solidify the recruitment of child soldiers as a crime under international law. These various instruments also helped the Office of the Special Representative of the Secretary General for Children and Armed Conflict (SRSG/CAAC), UNICEF, and several NGOs to raise advocacy and awareness, strengthen international standards and norms, and increase monitoring and reporting. Although the CRC Optional Protocol on children in armed conflict encourages states to ensure that no child under the age of eighteen participates in hostilities, international law does not prohibit the voluntary participation in hostilities by children over fifteen. The Optional Protocol does, however, impose an absolute prohibition on the recruitment of children under the age of eighteen by armed groups.

---

364 Id.
367 Children and Armed Conflict, supra note 88.
368 In 1996, Ms. Graça Machel, an independent expert appointed by the Secretary-General, submitted her report to the General Assembly entitled Impact of Armed Conflict on Children. The report led to the adoption by the General Assembly of resolution 51/77 of 12 December 1996, establishing the mandate of the Special Representative of the Secretary-General for Children and Armed Conflict for a period of three years. The Assembly has since extended this mandate four times and most recently by its resolution A/RES/63/241 of 13 March 2009. The Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UNITED NATIONS, available at http://www.un.org/children/conflict/english/theoffice.html.
370 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, art. 4(1), U.N. Doc. A/RES/54/263 (“[A]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”).
The development of the Statute of the Special Court of Sierra Leone\textsuperscript{371} ("the Special Court") and the Sierra Leone Law,\textsuperscript{372} adopted after that country's 1991 conflict,\textsuperscript{373} added a layer of accountability for child soldiers between the ages of fifteen and eighteen.\textsuperscript{374} Although many children were conscripted into combat in the conflict, a significant number of children voluntarily participated in the brutalities.\textsuperscript{375} Children were involved in some of the most heinous crimes committed in violation of the laws and customs of war: for example, the RUF forces in Sierra Leone (30\% of whom were child soldiers) implemented a war operation known to RUF commanders as

---


\textsuperscript{372} Id. See also Agreement between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137, 147 [hereinafter Sierra Leone].

\textsuperscript{373} 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.

\textsuperscript{374} See Sierra Leone, supra note 102, art. 7, which states:

Jurisdiction over persons of 15 years of age:

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall 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, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Also, at the time when the statute came into effect the age of criminal responsibility in Sierra Leone was 10 years which has now been raised to 14 years by the Sierra Leonean Parliament in 2007 in the Child Rights Bill. See e.g., Juvenile Justice Panel, General Comment No. 10 Children’s Rights in Juvenile Justice: Fact sheet #4, available at http://www.juvenilejusticepanel.org/resource/items/D/DI_GC10FactSheet4_EnsureAppropriateAgeOfCR08_EN.pdf (Last visited Oct. 20, 2010).


\textsuperscript{376} See also Michael A. Correro, 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) (These juvenile soldiers earned a reputation throughout the region as fearless and blood-thirsty killers).
“Operation No Living Thing,” in which rebel forces ripped through the capital city of Freetown, raping thousands of women, killing innocent civilians, and destroying the capital city. These brutal operations gave juvenile soldiers the reputation of being cruel combatants. Many child combatants were also victims themselves: abducted by rebels under the effects of drugs, coercion and threats, these children were manipulated into maiming their countrymen.

During the post-conflict negotiations in Sierra Leone, the government did not spare juvenile soldiers, demanding punishment (including the death penalty) for all culpable parties. The SRSG supported the Special Court’s jurisdiction to prosecute children over the age of fifteen who “bear the greatest responsibility” for the atrocities. The SRSG also recommended that the penalty be limited to imprisonment as a matter of last resort, subject to judicial reviews, and only if the child’s family was able to have close and frequent contact. The Special Court’s founding statute allows for consideration of counseling, foster care, educational programs, and reintegration programs, but not imprisonment.

The issue of accountability for children in Sierra Leone sparked a debate in the international community. The SRSG and organizations including Amnesty International and the International League for Human Rights (ILHR) supported juvenile accountability. The SRSG felt that child soldiers could “benefit from participation in a process that ensures accountability for one’s actions, respects the procedural guarantees appropriate in the administration of juvenile justice, and considers ... the child’s reintegration into society.” The ILHR insisted that a process that tries juveniles but does not impose punitive prison sentences can simultaneously provide some compensation for the victims and encourage communities to re integrate.

376 See Joshua A. Romero, The Special Court For Sierra Leone And The Juvenile Soldier Dilemma, 2 NW. U. J. INT’L HUM. RTS. 8, 9 ¶ 20 (2004). (During the conflict, an estimated five thousand juvenile soldiers committed widespread and systematic atrocities in defiance of international conventions, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II.). See also Zarifis, supra note 105.
379 Ilene Cohn, supra note 104.
381 Id.
children who had victimized those communities during the conflict.\textsuperscript{382} Amnesty International supported the argument that failure to hold children accountable would create a climate of impunity and lead to the denial of justice for the victims, but noted that the child’s age should be a mitigating factor in a process of accountability.\textsuperscript{383}

The Coalition to Stop the Use of Child Soldiers also supported the prosecution of any juvenile under the age of eighteen, but argued that such action should be in line with international principles of juvenile justice,\textsuperscript{384} and that the child should be guaranteed rehabilitation rather than punishment.\textsuperscript{385} Others felt that judgment by the Truth and Reconciliation Commission (TRC) was sufficient “punishment” for juvenile soldiers, and that prosecution would only weaken rehabilitative efforts.\textsuperscript{386} Providing supervised access to rehabilitation for the most recalcitrant and feared young offenders, would ensure individual reintegration, social reconciliation, and ultimately a more solid basis for lasting peace.\textsuperscript{387}

Several organizations, including UNICEF, Cause Canada, the International Rescue Committee, Save the Children (UK), and a representative of the National Child Letter from Ms. Kakuna Kerina, African Program Director, International League for Human Rights to the U.N. Security Council Delegation in Sierra Leone (Oct. 6, 2000).

\textsuperscript{382}Amnesty Int’l, Sierra Leone: Recommendations on the draft Statute of the Special Court, Nov. 14, 2000, available at http://www.essex.ac.uk/armedcon/story_id/000143.html (suggesting that few children would have voluntarily committed serious crimes and noting that “in cases where a person under 18 did act entirely voluntarily, and was in control of his or her actions, … they should be held to account for those actions in an appropriate setting, with due weight given to their age and other mitigating factors. … Where an individual can be held responsible for his or her actions, failure to bring them to justice will perpetuate impunity and lead to a denial of justice to the victims.”).

\textsuperscript{383}The Coalition also argued that the court should prioritize prosecution of the adults responsible for recruiting the child soldiers, noting the limited resources and capacity of Sierra Leone’s court. See generally, Letter from Letter from Judit Arenas, Coalition to Stop the Use of Child Soldiers (Nov. 7, 2000) and Letter from Joe Becker, Steering Committee of the Coalition to Stop the Use of Child Soldiers, to Ambassador Richard Holbrooke, USA Mission to the U.N. (Oct. 12, 2000). See also Letter from Human Rights Watch, Justice and the Special Court for Sierra Leone to United Nations Security Council (Nov. 1, 2000), available at http://www.hrwhr.org/press/2000/11/sl-ltr.htm (expressing the view that “Although we believe that children should be accountable for their offenses, in light of their inherent immaturity as well as the subjection of many child combatants to forcible abduction, brutalization and other forms of coercion, we recommend that the Special Court’s limited resources would be far better used in pursuit of justice for adult offenders, rather than children.”).

\textsuperscript{384}See Diane M. Amann, Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone, 29 PEPP. L. REV. 167, 177 (2001).

Protection Committee in Freetown, have expressed concerns regarding the prosecution of child soldiers. These organizations believe that such measures undermine efforts at rehabilitation, stigmatize children, and place them at risk of re-recruitment. The 2001 adoption of the Optional Protocol to the CRC on the involvement of children in armed conflicts reflects this preference for rehabilitation rather than prosecution. It requires that state parties submit to the CRC information on “the criminal liability of children for crimes they may have committed during their stay with armed forces or groups and the judicial procedure applicable, as well as safeguards to ensure that the rights of the child are respected.”

The international response toward children caught in localized conflicts is limited due to the dilemma of “legally reconcil[ing] respect for the preeminent principle of state sovereignty with the critical human rights necessity.” In all of the UN’s Chapter VII interventions, with the exception of Burundi, the parties to the conflicts at issue engaged in child recruitment. But, as discussed above, permitting Chapter VII intervention dangerously limits the implementation of child protection mechanisms in localized conflicts within democratic states. Thus, because rule of law and democratic governance prevail in these states, the possibility of intervention in these states is less likely; indeed, intervention in democratic states contradicts well-established principles of state sovereignty under Article 2(1) of the U.N. Charter.

Asymmetric warfare and the complexity of intrastate conflicts is a new phenomenon within contemporary conflicts. In the future, Article 2(7) protections of the U.N. Charter, which limit the UN’s ability to intervene in matters under domestic jurisdiction, will undermine U.N. Chapter VII intervention. Moreover, it will be

---

388 See generally, id.
389 Id.
394 United Nations, Charter of the United Nations, art. 2 ¶ 1 (Oct. 24, 1945) (the Organization is based on the principle of the sovereign equality of all its Members).
difficult to argue that democratic states forfeit their right to non-intervention due to either their unlawful practices or their evident inability to protect human rights in such deteriorating localized situations.\(^\text{395}\) To remedy the potential limitations of U.N. intervention, many commentators have proposed imposing an international “conservatorship” involving a loss of sovereignty to the affected state,\(^\text{396}\) or utilizing sanctions as a quick, flexible tool to promote democracy and help restore a failed state.\(^\text{397}\)

The international community’s failure to intervene in democratic states also stems from the failure to address secessionist issues on two axes: human rights and state sovereignty. The UN’s use of humanitarian intervention peaked in the 1990s when there was a global ideological shift in favor of human rights protections. From its creation in 1945 until the early 1990s, the U.N. launched fourteen humanitarian missions. In contrast, during the 1990s there were thirty-five U.N. missions, sixteen of which took place under a Chapter VII mandate\(^\text{398}\) and nine of which are on-going.\(^\text{399}\) Fifty-six of the fifty-nine world conflicts that occurred between 1990 and 2000 were intrastate.\(^\text{400}\) International legal conduct in these intrastate conflicts was limited to the imposition of international sanctions either under Chapter VI and VII of the U.N. Charter or under triangular agreements between the ICRC, the state, and the armed groups, in which the parties agreed to abide by the principles or the provisions of the Geneva Conventions.\(^\text{401}\) From 2000 to 2005, the U.N. has launched sixteen additional missions, only six of which were mandated. The sharp decline in humanitarian missions is indicative of the shift toward the idea of states’ sovereign primacy. An


\(^{397}\) Id. at n.19.


\(^{399}\) Id.

\(^{400}\) The three interstate conflicts during this period were: Iraq-Kuwait, India-Pakistan, and Eritrea-Ethiopia. *Stockholm International Peace Research Institute (SIPRI) Yearbook, Armaments, Disarmaments and Internal Security* (Oxford University Press 2001).

emphasis on sovereignty does not necessarily mitigate the complex humanitarian problems states face. States strongly advocate that localized conflicts are internal matters, and have dealt with such conflicts by declaring states of emergency or reinforcing domestic laws with special legislation.\footnote{402} State action with regard to localized conflicts does not protect children. The international community therefore needs to assist states in understanding the complex realities of intrastate warfare. Only then can states develop and implement effective measures to protect children. Without action, international law is at risk of being perceived as largely irrelevant to the modern reality of child soldiers.\footnote{403}

In 2000, at the start of Asia’s first conference on child soldiers, the Coalition to Stop the Use of Child Soldiers announced that Asia ranked second only to Africa in the use of child soldiers.\footnote{404} This announcement came a week before the release of UNICEF’s

\footnote{402} For example, India’s Armed Forces (Special Powers) Act (AFSPA) permits deployment of troops in violent areas without any special invocation. The AFSPA has been applied in violent regions (including Kashmir and the northeastern part of the country) where secessionist forces have fought for self-determination. Since self-determination as a right is not recognized by the State, the state has declared the areas to be disturbed areas fulfilling the precondition for the deployment of the armed forces in these areas. The Act grants powers to the armed forces to fire upon or otherwise use force, including lethal force, against any person who acts in contravention of any law or order against civilians without warning (Section 4(a)), to destroy shelters from which armed attacks are made or likely to be made (Section 4(b)), or enter and search or arrest without warrant ‘any person who has committed or is about to commit a cognizable offence’ (Section 4(c&d)). It also requires government permission to initiate proceedings against, ‘any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act’ (Section 6). India came under scrutiny after the submission of the State’s first report to the Human Rights Committee (HRC) pursuant to Article 41 of the International Covenant of Civil and Political Rights (U.N. Doc. CCPR/C/10/Add.8 (13 July 1983)). 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 (U.N. Doc. CCPR/C/SR.493 (Sir Vincent Evans)) The HRC raised concerns about 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 (U.N. Doc. CCPR/C/SR.1041, Prof Rosalyn Higgins; and U.N. Doc. CCPR/C/SR.1042, ¶ 16). The HRC 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 present Act now extends to the whole of Manipur, 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 in the Northeast India. In Jammu and Kashmir, “the Districts of Jammu, Kathua, Udhampur, Poonch, Rajouri, Doda, Srinagar, Budgam, Anantnag, Pulwama, Baramulla & Kupwara” In effect, the Act is in force in the entire state of Jammu and Kashmir and nearly the entire North-eastern region of India with the same substantive provisions.


first report on child soldiers in East Asia and the Pacific region. The UNICEF report found that of the 300,000 child soldiers worldwide, one-fourth were in East Asian countries (including Myanmar, Indonesia, East Timor, Cambodia, Philippines and Papua New Guinea). When the Security Council published Resolution 1379, there were concerns that it was too Africa-centric. The resolution and its progeny resolutions included a list of states parties that recruit and use child soldiers. This group of resolutions recognized twenty-three armed groups involved in recruiting child soldiers for conflict situations in five states: of those five, four were African states (the sole outlier was Afghanistan). Subsequent reports emphasized the list of states mentioned in the Machel Report, leading to progress toward ending the recruitment and use of children in armed conflict. While emphasis on these states was an important aspect of the reports, the reports lacked a more in depth analysis of the underlying problems in other affected states. For example, some Asian countries, including Myanmar, Nepal and Sri Lanka, are consistently mentioned as “States of Concern” but are not on the Security Council’s agenda. Because these states represent areas with complex problems very different from those in failed states, they demand urgent international attention. However, international NGOs have attempted to table issues relating to child soldiers in states other than Africa, choosing to instead focus efforts on the States of Concern.

406 Id.
409 The Secretary-General, Report of the Secretary-General on Children and Armed Conflict, delivered to the Security Council, U.N. Doc. S/2002/1299; see also Thalif Deen, supra note 137.
410 These include Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya, and Mozambique, Bosnia and Herzegovina, Cambodia, Myanmar, Lebanon, and Columbia. Supra Part I.
412 See supra Part I (listing “States of Concern”).
413 It is estimated that 75,000 child soldiers participate in rebel groups in Myanmar In Nepal, child recruits have been used in armed conflicts since the Secretary General’s first report. Nepal has no commitment or action plan to halt the recruitment and use of children, induce child disarmament, or create demobilization and reintegration programs.
Although the recruitment occurring in other countries needs to be addressed, Africa is still the continent that recruits the most children. For example, the 1999 background document to the African Conference on the Use of Children as Soldiers estimated that more than 120,000 children under eighteen years of age are currently participating in armed conflicts across Africa.\(^{414}\) In mid-2004, the Coalition to Stop the Use of Child Soldiers stated that Africa has the largest number of child soldiers, with up to 100,000 children believed to be involved in armed conflicts in Burundi, Côte d’Ivoire, Democratic Republic of Congo, Rwanda, Somalia, Sudan, and Uganda.\(^{415}\)

Because the problem of child participation is country specific, the international community cannot create a general template to deal with the issue. Instead, the answer to the problem of child participation in localized secessionist movements lies in states’ recognition of the problem of child participation and commitment to meeting their obligations under international law to protect children during conflicts. National juvenile justice mechanisms are best suited to address the needs of children in conflict situations. Domestic legal structures, including the judiciary, and national armed forces, including the police, play a fundamental role in protecting children. Unless national legislatures are willing to implement domestic measures to address the issue of child soldiers, children will continue to suffer. International safeguards will only serve to protect children when states reflect a will to abide by them and incorporate international standards into domestic law.

The complex linkages between internal conflict, secession and self determination risks internationalization and thus impinge upon State sovereignty. However, State's domestic response to the situation has to remain under international scrutiny and aligned to the State's international treaty obligations. There are competing tradeoffs between security of the State viz. a viz. liberty and democracy with each of them having their cost (abuse) and benefits (effectiveness, desirability of social good for democracy).

Similarly States’ reluctance to recognize the international legal consequences of internal strife is based on their misunderstanding of the principles of sovereignty and


non-interference. That misunderstanding, in turn, makes it virtually impossible for the international community to implement international humanitarian and human rights law.

The problem of child participation in localized conflicts illustrates how important it is to address this issue. In today’s world, there are rarely instances of failed states or civil wars leading to the total collapse of the rule of law such that full-scale international intervention is warranted. Instead, intrastate conflicts in the modern world occur in states with a well-established rule of law. States have invariably perceived the problem as one of merely law and order, and therefore have either not recognized the conflict or the participation of children, or have done too little to protect child participants.

The association of the term ‘child soldier/child associated with an armed groups’ with an armed conflict has led states to avoid recognition of the problem when it occurs within domestic borders. The international community ushered in a climate of change by encouraging states to address the issue of child participation through incorporation into domestic laws of well-established principles of international law on the administration of juvenile justice. This comprehensive approach will enable states to increase domestic capacity to meaningfully address the issue of child soldiers while respecting each state’s unique geographical, linguistic, and cultural diversity.