CHAPTER VI

Legal Protection to Children: International and Domestic Law

Introduction

Binding and exclusive legal protection to children is unequivocally recognized in the UN Conventions for the Rights of the Child in 1989 (UNCRC). Until then, children have invariably been clubbed within the sub set of 'vulnerable persons' or the broad category of 'women and children' primarily because most of the other Statutes drafted focused on the purpose for which they were originally constituted and children were viewed as 'just one' of the categories of vulnerable people. For example, the four Geneva Conventions\(^{416}\) were drafted in the light of the upheavals witnessed during the particular period and was primarily influenced by the events of that period, namely, the need to protect civilians, mass deportations, starvations, reprisals, forced labour and grave crimes but with little direct reference to persons under the age of eighteen years.

Post the Second World War period marked the era of decolonization and the emergence of the third world order. The newly formed States were geographically aligned but ethnically diverse. This led to the meteoric rise in wars of national liberation, demand for secession and internal conflicts between the newly constituted State and the ethnically diverse communities. State response to quell the uprising led to the possibility of the newly independent State committing atrocities against its own citizens to the quell violence and, thus there was a need to regulate State response during peacetime. International concern to the situation led to the adoption of the International Covenant on Civil and Political Rights in 1966 which was primarily

\(^{416}\) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
drafted to limit the powers of the State against its own people and correspondingly impose a duty upon the State to ensure the enjoyment of human rights without discrimination amongst its people.

As discussed earlier, these violence threshold in these movements varied from its qualification as an internal armed conflict to a law and order situation. The reach of the Geneva Convention was limited to these situations. In 1977 the Additional Protocol II\(^{417}\) to the four Geneva Conventions expanded the international humanitarian law provisions to internal armed conflicts within States to regulate the means and methods of warfare.

However, both bodies of international law do not specifically refer to the rights of the child to be protected from the consequential fallouts of internal armed conflict/civil unrest. Children qualified within the category of 'persons' in the ICCPR but there is limited direct reference to children except in art 14 (equality before the law), art 18 (freedom of thought conscience and religion), art 23 (right to family), art 24 (birth registration, nationality), art. 10 (deprivation of liberty and segregation from adults). Similarly, children are primarily part of the general protection measures accorded to civilians in the Additional Protocol II (discussed later).

It was only in 1989 that the UNCRC formally recognized the rights of the child during times of armed conflict or any other contingencies of violence (internal armed conflict, internal disturbance, civil unrest, etc). The Convention, unlike the ICCPR does not contain an exception clause where certain rights can be derogated in times of national emergency with the operation of Art 4 of the ICCPR.\(^{418}\) As a result all rights

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\(^{417}\) 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.

\(^{418}\) Article 4 of the ICCPR:
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 I 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.
guaranteed in the Convention are applicable without exception during times of armed conflict along with the application of international humanitarian law during times of an armed conflict. However, norms of international humanitarian law take precedence over provisions of any other law including the Conventions on the Rights of the Child in the event of a conflict between the two laws.\textsuperscript{419} That is to say, any violation of rights would thus be decided by reference to the law applicable in armed conflict and not deduced from the terms of the covenant itself\textsuperscript{420}. For example, judicial guarantees under human rights law would be there for detention of persons during armed conflict and not for their acts relating to armed conflict.\textsuperscript{421}

Similarly, States witnessing protracted violence within their territories have primarily sought to quell uprisings through special laws justifying their actions to uphold the integrity of the State. State's attempts to assert control through special legislations has invariably led to greater victimization of children at the hands of the State's armed forces as well as the armed groups. The former makes little distinction between children and adults in the absence of any binding obligations while the latter continues to freely recruit them as part of the ongoing struggle as soldiers or any administrative duty.

**Legal Protection for Child Participants under International Law**

Legal protection for children in armed conflict is governed by two bodies of international law. These include international humanitarian law and international human rights law, which are legally binding on ratification. International humanitarian law seeks to regulate the methods and means of warfare, international human rights law seeks to regulate State’s jurisdiction upon people during times of peace. Despite limited direct protection to children both bodies of law follow the


\textsuperscript{420} Ibid.

\textsuperscript{421} See the Report on the Protection of War Victims” 1993, International Review of Red Cross, No. 296 at 422-424.
principle of complimentarity for the protection children, during times of armed conflict\textsuperscript{422}.

**International Humanitarian Law**

International humanitarian law also referred to as the Law of armed conflict sets out the legally permissible parameters during hostilities. While the principle of humanitarian law is also to regulate the methods and means of warfare, it also seeks to protect the ‘victims of war’ who find themselves in the hands of the party to the conflict. These include wounded and sick\textsuperscript{423}, sick and ship wrecked\textsuperscript{424}, prisoner of war\textsuperscript{425} and civilians\textsuperscript{426}. In particular, the Fourth Geneva Convention exclusively seeks to provide protection to civilian in times of war, occupation or internment.\textsuperscript{427} However, it does not seek to protect all civilians\textsuperscript{428}, but only to those who are in the hands of the opposing parties to the conflict.\textsuperscript{429} The Convention does not refer to the nationals of the State but primarily focuses on two categories of persons. First, enemy nationals living within the territory of a belligerent state. Second, the inhabitants of territories occupied by the enemy power.

The absence of any obligation of the state upon its own population is seen as a measure which does not seek to interfere with State action with its own nationals. Accordingly the wording of Art 14\textsuperscript{430} has been drafted. As Pictet notes, ‘the

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\textsuperscript{422} *Prosecutor v. Tadić*, “As a matter of customary law, fundamental human rights, as laid out in international instruments, apply fully in all situations of armed conflict.”, Case IT-94-1-AR72, Appeal on Jurisdiction (October 2, 1995), pp. 49-53. Also see GA Res 2675 (XXV) 1970.

\textsuperscript{423} Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

\textsuperscript{424} Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field of 12 August 1949.

\textsuperscript{425} Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949. at Sea of 12 August 1949.

\textsuperscript{426} See Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. 
http://www.icrc.org/ihl.nsf/385ec082b509e76e41256739003e636d/6756482d86146898c125641e004aa3e5

\textsuperscript{427} Ibid.

\textsuperscript{428} See Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

\textsuperscript{429} Ibid. Also as Pictet quotes, the main function of the Fourth Geneva Convention “is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to military operations themselves.”

\textsuperscript{430} Art 14 of the Fourth Geneva Conventions.

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones
Convention thus remains faithful to a recognized principle of international law: not to interfere in a State’s relations with its own nationals’.\textsuperscript{431}

The Convention does mark a breach of the above principle in Part II of the Geneva Convention when it applies to the whole of the populations of countries in conflict\textsuperscript{432} but it is only to the extent of binding states to certain general obligations in respect of categories of person (women, children, old people, sick and wounded) who by their nature, were seen as taking not part in hostilities\textsuperscript{433}. Pictet also notes in his Commentary, ‘These various categories (Art 14 of the GC IV) among the civilian population are bases on a very simple criterion: they are persons who are taking no part in hostilities and whose weakness makes them incapable of contributing to the war potential of their country’.\textsuperscript{434}

The Convention does not refer to the obligations of state in respect of its own nationals and is limited to the definition under Art 14 defining the scope of protected person.

Children under this definition are granted certain protections as subset of the general protection measures accorded to civilians in times of armed conflict and certain limited child specific protection guarantees. These include the allowing free passage and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven. Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary. The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.


\textsuperscript{432} Art 13 GC IV The provisions of Part II(Field of application) cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

\textsuperscript{433} Happold Mathew, Child Soldiers in International Law, Juris Publishing, Manchester University Press, 2005, pg 55-56


Art 14 of the Fourth Geneva Convention reads, ‘In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven…….”

The Art refers to wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.
of food, clothing and medicine intended for children\textsuperscript{435} and assisting those children who are separated or orphaned\textsuperscript{436} and obligation to establish hospitals and safety zones to protect children, among other vulnerable groups.\textsuperscript{437}

Section III of the GC IV is a general protection measure that refers to the question of forcible recruitment obligating upon the occupying forces not to compel protected persons to serve in its armed or auxiliary forces. It refers specifically refer to persons under the age of eighteen prohibiting the occupying powers to make them work.\textsuperscript{438}

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\textsuperscript{435} Art 23, Fourth Geneva Convention.

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) that the consignments may be diverted from their destination,
(b) that the control may not be effective, or
(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

\textsuperscript{436} Ibid art 24.

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

\textsuperscript{437} Art 14 (Hospital and safety zones and localities).

Other Articles which refer to child protection under the general category include: 16(Wounded and sick I. General protection), 38 (Non-repatriated persons I. General observations), 50 (Children), 51 and 68 (Penal legislation. V. Penalties. Death penalty) of the GC IV. Also see Happold Mathew, Child Soldiers in International Law, Juris Publishing, Manchester University Press, 2005, pg 56 and J Kuper, International Law Concerning Child civilians in Armed Conflict, Oxford University Press, 1997.

\textsuperscript{438} Art 51 (1), Fourth Geneva Convention

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work
However, children in particular have been granted protection from juvenile executions for those who fall within the category of protected person, compulsory recruitment into the armed forces and limited juvenile justice guarantees. However the essential shortfall of the convention is that it does not define the ‘child’ or ‘children’. In a number of articles the age limit of 15 is specified and the implication seems to be that for the purposes of the GC IV a child is a person under 15 years of age.\textsuperscript{439} 

The Convention follows a similar approach on prohibition of participation and recruitment of children as that recognized on the protection accorded to the category of civilians qualifying under art 14(1). It considers recruitment as an internal matter of the state wherein it is left to each state to determine the age from which it recruited its nationals into its armed forces.

Art 51 does refer that the occupying forces may not compel protected persons to serve in its armed or auxiliary forces or even put pressure or propaganda which aims at securing voluntary enlistment and that the occupying powers will not compel protected persons under the age of eighteen years to work. Though the provisions of article 51 is limited to protected person but it is argued that it cannot be seen solely concerned with individuals who are protected persons\textsuperscript{440}. It is also concerned with the duties that those individuals have to the States that those individuals have to the States to which they are national. As Pictet notes, ‘The prohibition in Paragraph 1 (of Art 51) is not new, since the basic principle, universally recognized in the law of war, which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

\textsuperscript{439} Happold Mathew, Child Soldiers in International Law, Juris Publishing, Manchester University Press, 2005, pg56.
\textsuperscript{440} Happold Mathew, Child Soldiers in International Law, Juris Publishing, Manchester University Press, 2005, pg 56.
strictly prohibits belligerents from forcing enemy subjects to take up arms against their own country.\textsuperscript{441}

Regulating the recruitment of children as child soldiers was not a priority at the time when the 1949 Diplomatic Conference was convened.\textsuperscript{442} The Conference was primarily influenced by the complex emergencies and situations that prevailed during the Second World War. These included the need to protect civilians from mass deportations, starvation, reprisals, forced labour and massacres.

Despite the wide ratification of the Geneva Convention IV and its acceptance as part customary international law, limitations continue to exist when the Convention is examined in the light of affording protection to all children under the age of eighteen and its application in modern non international armed conflicts. This is with the exception of the Common Article 3, which does refer to internal conflict obligating state and non state actors to provide certain basic core fundamental guarantees. However, in the complexity of internal conflicts ranging from an armed rebellion to guerrilla warfare and insurgency, the provisions of this article were found to be inadequate.

**Additional Protocols to the Geneva Conventions**

This perceived shortcomings in the Geneva Conventions led to the adoption of the two additional Protocols to the Geneva Conventions in 1977.\textsuperscript{443} The aim towards drafting the drafting ‘was to strengthen humanitarian law in the light of the experience of the Vietnam war, the use of new weapons of war and the extensive suffering of civilians in contemporary armed conflict, particularly those fought in the name of

\textsuperscript{441} Ibid. Happold also notes that both articles 50 and 52 can be seen as a reaffirmation of the rule in the 1907 Hague Regulation forbidding to compel the inhabitants of the occupied territory to swear allegiance to the hostile power. [(Art 45) Regulations respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention IV respecting the Laws and customs of War on Land].

\textsuperscript{442} Happold Mathew, Child Soldiers in International Law, Juris Publishing, Manchester University Press, 2005, pg54.

\textsuperscript{443} These include:-
Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
self-determination. As Mathew Happold notes, ‘The impetus for their (the Protocols) negotiations arose out of two perceptions, not always very distinguished. First, that the four Geneva Conventions has a number of lacunae which required filling. Second, that international humanitarian law was in need of progressive development, either for specifically humanitarian reasons or because it was seen as the product of developed nations, favouring theirs interests over those of the developing nations and their allies, particularly “national liberation movements.”

The two Protocols were seen as an up gradation from the protection accorded in the Fourth Geneva Conventions primarily aimed at addressing the increasing vulnerability of civilians caught up in conflict situations but also the imperative need to guarantee human rights.

Protocol I extended protection to civilians caught up in international conflicts while Protocol II addressed the question of protection in non international armed conflicts.

**Additional Protocol I to the Geneva Conventions**

Art 77 recognizes children as ‘object of special protection and shall be accorded protection against any form of indecent assault’.

It also obligates upon state parties, ‘to take all feasible measures’ (emphasis added) in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.

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446 These include:-
Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
447 See art 77(1), Additional Protocol I.
1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
448 Ibid at art 77(2).
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
Alongside, it also examines the possibility of children under the age of fifteen years participating in conflict under art. 77(3) under exceptional circumstances.

Unlike the Fourth Geneva Convention, the reference to children in Art 77 is applicable to all children. The drafting of Art 68 which formed the basis of art 77 was intended, ‘for the benefit of all children who were in the territories of the parties to the conflict, whether the territory was occupied or not, and whether or not children fell within the definition of protected persons in Article 4 of the Fourth Geneva Convention of 1949’.

While the above provision is applicable to all children but there is no definition of the child in the article, like the Geneva Convention. ‘Protection of Children’ is referred to two age groups, 15 yrs and 18 yrs. In paragraph 77(2) and (3), the article referred to those children under the age of fifteen years. Art 77(2) noted, ‘The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.’ While in Art 77(3), ‘If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.’ However in paragraphs 77(2) and (5) reference was made to person under

449 Mr Surbeck, International Committee of the red Cross(ICRC), introducing draft article 68 to the Committee III of the Diplomatic Conference. ORXV, p68: CDDH/II/III/SR.45.
450 This was intentional. See Official records (OR) XV, p.465: CDDH/407/Rev.1, Para 63.
451 Art 77 of the Additional Protocol I:
1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
the age of 18 years. On the other hand Art 77(1) and (4) only refer to children without any reference to age. If we read the provisions along with the provisions of the GC IV, the age of fifteen seems consistent with reference to the age of the child.

**Additional Protocol II to the Geneva Conventions**

Protocol II is the first binding instrument which sought to solely address the conduct of parties to the conflict in non international armed conflicts if at all the conflict fulfilled the criteria laid out in art 1 of the Protocol II. However, the provisions in this Protocol are extremely restrictive and fewer and establishes itself as an extension of the guarantees enshrined in Common Art 3 by setting the minimum standards of conduct rather than laying down detailed regulations: it is prohibitive, rather than prescriptive.

By virtue of the Protocol as an extension of the Common Article 3, children are entitled to care and aid that they require. Child specific guarantees include, the right

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4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

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1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply 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.

2. This Protocol 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.

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452 See Art. 1. Material field of application.


454 Art 4(3).

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.
to education\textsuperscript{455}, the right to be reunited with their families where they have been temporarily separated\textsuperscript{456} and to be removed from conflict zone to safer areas in the country.\textsuperscript{457}

Art 4(3)\textsuperscript{458} refers to the question of participation in hostilities. The article imposes restriction on the children under the age of 15 years by the armed forces and the armed groups. Under art 4(3) (c), the Protocol II states, “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”.

Although art 4(3)(c) mirrors article 77(2) of the AP I since both the articles impose restrictions on the participation in hostilities of persons under the age of 15 years but the restrictions imposed in respect of the use of children in hostilities in internal armed conflict by Art 4(3)(c) are far broader than those imposed on the use of children in international armed conflicts by art 77(2).\textsuperscript{459} Mathew Happold refers to two cases in particular. Firstly, the absolute nature of obligation and the wider scope of the prohibition\textsuperscript{460}. The obligation is an absolute one.\textsuperscript{461} It is an obligation of result, not of means and is, consequently more onerous than that imposed by AP I.\textsuperscript{462} AP I prohibit the direct participation of children in hostilities while in AP II, and they are not to take part in hostilities at all\textsuperscript{463}

The common platform of the Fourth Geneva convention and both the Additional Protocols is silent on the question of juvenile executions. The GC IV prohibits the execution of persons for crimes committed under the age of eighteen, to the extent that the person is a protected person. That is, a civilian in an occupied territory during an international armed conflict. The commentary on art. 68(4) also attest the same. It states, ‘The clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of eighteen is not fully capable of sound judgment, does not always realize the

\textsuperscript{455} Ibid. Art 4(3)(a).
\textsuperscript{456} Ibid. Art 4(3)(b).
\textsuperscript{457} Ibid. Art 4(3)(e).
\textsuperscript{458} Ibid.
\textsuperscript{460} Ibid.
\textsuperscript{461} Ibid.
\textsuperscript{462} Ibid.
\textsuperscript{463} Ibid.
significance of his actions and often acts under the influence of others, if not under constraint’. 464

While the GV IV limited the punishment to protected persons, the Additional Protocol I broadened the scope of its application. Under art 77(5) of the Additional Protocol I death penalty for an offence related to armed conflict shall not be executed on person who had not attained the age of eighteen years at the time the offence was committed.

Protocol II also imposes limitations on juvenile executions. Under art. 6(4), ‘The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. Similar to the provisions mentioned in Protocol I, children shall not be awarded death penalty for criminal offences relating to armed conflict. 465

**International Human Rights Law**

The UN –CRC explicitly obligates ratifying states to develop legal framework for safeguarding children’s rights. It is also the most ratified human rights treaty466 which includes the entire spectrum of child rights under one umbrella without the provisions of derogations even at times of emergency/armed conflict. 467 These include civil and political rights as well as economical social and cultural rights addressing the specific needs of the children. In 2002, the CRC was also complemented by two additional Protocols, namely the Optional Protocol on the involvement of Children in Armed Conflict468 and the Optional Protocol on the sale of Children, Child Prostitution and Child Pornography. 469

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465 Art 6(4)
466 Till date 193 countries have ratified the Convention. With the exception of the USA and Somalia all other states have ratified the convention.
467 Unlike art 4 of the ICCPR, the UN CRC does not contain any limitation clause which allows State to derogate from certain provisions of the Convention at eh time public emergency which threatens the life of the nation.
Other international human rights instruments which obligate the protection of child rights include regional and international thematic treaties and conventions. These include, the International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{470}, the Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{471}, the African Charter on the Rights and Welfare of the Child\textsuperscript{472} and the International Labour Organization (ILO) Convention 182 on the Worst Forms of Child Labour\textsuperscript{473}. Conventions under human rights law not directly related to children but equally apply to them include the international Bill of rights\textsuperscript{474}, the African Charter on Human and Peoples’ Rights\textsuperscript{475}, the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{476}, and the Inter-American Convention on Human Rights\textsuperscript{477}.

**UN Convention of the Rights of the Child.** The adoption of the Declaration of the Rights of the Child in 1924\textsuperscript{478} during the fifth Assembly of the League of Nations was the first instrument adopted by any inter governmental organization. Revolving around the shared belief that, ‘mankind owes to the child the best it has to give’\textsuperscript{479} these commitments were reflected in the subsequent 1959 Declaration of the Rights of the Child\textsuperscript{480} and the 1989 UN Convention on the Rights of the Child.\textsuperscript{481} While the 1924 Declaration aimed at simplicity and was capable of being applied everywhere and all times, the 1959 Declaration was principally concerned with the provision of children’s economic, psychological and social needs. The Declaration was first to establish the principle of the ‘best interest of the child’\textsuperscript{482}. However, both the

\textsuperscript{470}Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969.
\textsuperscript{471}Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into force 3 September 1981
\textsuperscript{472}OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
\textsuperscript{473}Adopted by the conference at its eighty-seventh session, Geneva, 17 June 1999.
\textsuperscript{474}These include the International Covenant on Civil and Political Rights (General Assembly resolution 2200A (XXI) of 16 December 1966) and the International Covenant on Economic, Social and Cultural Rights, (General Assembly resolution 2200A (XXI) of 16 December 1966).
\textsuperscript{478}Records of the Fifth Assembly. Supplement no. 23 League of Nations Official Journal 1924.
\textsuperscript{480}General Assembly resolution 1386(XIV) of 20 November 1959.
\textsuperscript{481}Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990
\textsuperscript{482}Principle 2 and 7 of the Declaration. http://www.cirp.org/library/ethics/UN-declaration/
Declarations entitled the ‘Rights of the Child’, but were appropriate in the field of child welfare and remained silent on the question of civil and political rights. Children were perceived as the objects and not subjects of International law. Despite these limitations, the 1959 Declaration of the Rights of the Child, enshrined the principles that children are entitled to ‘special protection’ and that such special protection should be implemented by reference to the ‘best interests of the child’ which shall be paramount in consideration483.

The UN-CRC strengthened the idea of welfare, but reflected a distinct departure by recognizing children as rights holders and conferred sufficient duties or powers to the State to help in the realization of their rights. With no permitted derogation in times of emergency, the Convention is not only concerned with the granting and implementation of rights in times of peace, but is also concerned with the regulation of armed conflicts as they affect civilians and combatants.484 These ‘best interest’ principle swept across the Convention with the four ‘Ps’, namely, the participation of children in decision affecting their own destiny; the protection of children against discrimination, and all forms of neglect and exploitation; the prevention of harm to children; and the provision of assistance for the basic needs.485

Despite the non derogable nature of the Convention, the provisions specifically refer to the protection of children in armed conflicts (art 37-40) obliging States to ensure no ill-treatment to children[37(1)], unlawfully or arbitrary deprivation of liberty [37(2)], respect and to ensure respect for rules of international humanitarian law applicable to children in armed conflicts which are relevant to the child[38(1), absolute prohibition on recruitment under the age of 15 years [38(2)], promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts (39) and emphasis on non punitive proceedings against the child.

485 Ibid 15.
While the Convention does refer to children in armed conflict but it is a weak obligation upon states to protect children in situations of armed conflict. As a result a preliminary draft of the Optional Protocol on the involvement of children caught up in armed conflicts was proposed during the World Conference on Human Rights held in Vienna in 1993. This led to the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts in 2000. While the Protocol urged States to take all feasible measure to ensure that children who have not attained the age of eighteen do not take direct part in hostilities, the Protocol prohibits the recruitment of children by armed groups under the age of eighteen years under any circumstances. In this manner the Protocol fell short of the Straight 18 principle, but made a committed endeavour to expand the protection for children by urging States parties to the Protocol to recognize the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development.

In addition to existing legal provisions there has been strong international advocacy that has sought to draw attention towards the plight of children affected by international and non international conflicts. These include the UN GA Declaration on the Protection of Women and Children in Emergency and Armed Conflicts, UN Standard Minimum Rules for the Administration of Juveniles Justice 1985 (Beijing Rules), UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (JDL).

The Beijing Rules mentions that capital punishment shall not be imposed for any crime committed by juveniles. This rule is seen in accordance with article 6, paragraph 5, of the International Covenant on Civil and Political Rights. The

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488 However, the African Charter on the Rights and welfare of the Child makes a specific and unequivocal to the ‘Straight Eighteen’ principle under Article 1 of the Charter.
489 Ibid , indent Para 3
490 RES. 3318(XXIX).
491 UN Resolution 40/33
492 UN Resolution 45/113 (1990)
494 Ibid Rule 17.1(c).
Standard Minimum Rules for the Treatment of Prisoners as a rule confers that young persons should not be sentenced to imprisonment\(^{494}\) while the United Nations Rules for the Protection of Juveniles Deprived of their Liberty notes that imprisonment should be used as a last resort\(^{495}\). Similarly, deprivation of liberty is to be accorded on after careful consideration\(^{496}\) and that it should only be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.\(^{497}\) The 59\(^{th}\) Session of the UN Commission on Human Rights, Human Rights Watch also called on the U.N. Commission on Human Rights to condemn the execution of juvenile offenders in those few states that retain the practice in an omnibus children's resolution, a resolution on extrajudicial, arbitrary and summary executions, and any resolution on the death penalty.\(^{498}\)

**Child Associated with an Armed Force or Armed Group and International Law**

Art 4(3)(c) of Protocol II, refers that children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to participate in hostilities. This was the first time when the age of recruitment of children was enshrined in the two Protocols to the Geneva Conventions and the issue of recruitment was specifically dealt in a binding instrument.\(^{499}\)

Similarly, art 38 (2) and (3) of the UN CRC\(^{500}\) also obligates state parties to take all feasible measures to ensure that persons who have not attained that age of fifteen

http://www.ohchr.org/english/law/treatmentprisoners.htm


\(^{497}\) Ibid Rule 17.1(c).

\(^{498}\) http://www.hrw.org/un/chr59/deathpenalty.htm#1

\(^{499}\) Ibid. p 27.

\(^{500}\) Art 38, UN CRC:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian
years do not take a direct part in hostilities. In particular, the CRC obligates states to *refrain* from recruiting persons under fifteen\(^{501}\) and when recruiting those between fifteen and eighteen years, endeavour shall be made to give priority to those who are oldest\(^{502}\). The Optional Protocol to the CRC on the involvement of Children in Armed Conflict 2000 imposed an absolute ban on the use and recruitment of children under the age of eighteen by non state armed forces\(^{503}\). However, the Optional Protocol allows voluntary recruitment by state forces after the age of fifteen\(^{504}\) and obligates upon states to ensure that person who have not attained the age of eighteen are not *compulsory* recruited into their armed forces\(^{505}\). While allowing recruitment by state forces above the age of fifteen, the Optional Protocol asks states not to expose persons under eighteen to take direct part in hostilities\(^{506}\).

The Optional Protocol lays an outright ban on the recruitment of children under the age of eighteen and has attempted the regulate the use of children under the age of eighteen years. It has attempted to raise the age of direct participation, and prohibits compulsory recruitment under eighteen years in the national armed forces. However, it fails to achieve the straight eighteen principle by allowing voluntary participation of persons under the age of eighteen\(^{507}\). The ILO (International Labour Organization) Convention 182, refers to the use of child soldiers (voluntary or forced) as the worst forms of child labour and calls for the prohibition and immediate action\(^{508}\).

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501 Ibid. Art 38(2), UN CRC.
502 Ibid. Art 32 (3), UN CRC.
503 Art 4(1), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000. Art 4(1) reads, Armed 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.
504 Ibid art. 4(1).
505 Ibid art. 2. States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.
506 Ibid art. 1. Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
507 Collect data from Coalition to Stop the Use of Child Soldiers.
Art 3(a) For the purposes of this Convention, the term the worst forms of child labour comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
State obligations under international law focus more on restorative justice keeping the best interest of the child in mind. It calls upon the child to participate in the judicial process by giving them the right to be heard and to participate in any judicial proceedings affecting the child, either directly, or through a representative. The UN CRC spells out juvenile justice guarantee and at the same time sets limits on the sentencing of child offenders. The UN CRC further spells out that reintegration of the child should be in an environment that fosters self respect and dignity of the child and return to a constructive role in society. Death penalty or life imprisonment without

509 See art. 12, UN CRC.
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
510 Ibid. Art. 39 and 40.

Article 39
States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40
1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.
the possibility of release must not be imposed on children\textsuperscript{511}, imprisonment should be used only as a last resort and for the shortest possible time\textsuperscript{512} and alternatives to institutional care should be sought such as counseling, probation, foster care, education and vocational training\textsuperscript{513}.

There is absolute prohibition on death penalty under humanitarian law for children under age of eighteen.

Grave breaches under humanitarian law do not include any child specific provisions but serious atrocities committed against children are covered by the general categories of grave breaches\textsuperscript{514}. Under the Rome Statute of the International Criminal Court (1 July 2002), the recruitment of children under the age of 15 years is a war crime\textsuperscript{515}. Neither the UN CRC or the Additional Protocols provide for compulsory penal sanctions regarding the participation of children in hostilities\textsuperscript{516}. Recommendation 190 of the ILO Convention on the Worst Forms of Child Labour also mentions that recruitment of children in such situations as a criminal offence\textsuperscript{517}. However, the most noteworthy rulings on the question of the perpetrators accountability for committing atrocities and recruiting children have been the rulings of the ICTY in the \textit{Prosecutor v. Kunarac (ICTY)} and the SCSL case of \textit{Prosecutor v. Norman}\textsuperscript{518}.

\textbf{3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.}

\textsuperscript{511} See art. 37(b) UN CRC.
\textsuperscript{512} Ibid art. 37(b).
\textsuperscript{513} Ibid art. 40(4).
\textsuperscript{514} International Legal Standards for the Protection of Children, No Peace without Justice, UNICEF Innocenti Research Centre, 2002 at 43.
\textsuperscript{515} Article 8(2)(xxvi). Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities
\textsuperscript{517} Para 12(a), R 190 Worst Forms of Child Labour Recommendation, 1999.
The kunarac case was the first of its kind in the history of international tribunals where aggravated sentences were handed down as a result of the fact that the crimes had targeted children. Kunarac case refers to the crimes committed Foca in a gender divided camp where a number of women and girls were repeatedly raped. Ages varied from twelve to twenty. The court described them as ‘very young’ and ‘relatively youthful’ respectively. The Trial Chamber found that, in addition to other factors, the age of these victims was an aggravating factor to be taken into account in sentencing. It also considered as the aggravating factors the length of time and that the rapes were repeated, the fact there were multiple perpetrators, and related to the age of the victims, that crimes were committed against particularly vulnerable and defenceless girls.

Similarly, in the Norman case the court ruled that the recruitment of children under the age of fifteen years into armed forces or using them to participate actively was prohibited by customary international law. It also amounted to individual criminal responsibility. It was argued that the under that Military Forces Act 1961 prohibited the recruitment of a child below the age of seventeen and a half unless the person’s parents or guardians or other competent authority gave consent and considering Para 4(c) of the Special Statute of Sierra Leone would violate the rule against retroactive criminal prosecution, (nullum crimen sine lege) under Art 11(2) of the Universal Declaration of Human Rights and art 15 of the ICCPR. It was then the question

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520 Ibid at 786.

521 Ibid at 874.

522 Section 16(12) of the Sierra Leone Military Forces Act 43 of 1961.

523 General Assembly resolution 217 A (III) of 10 December 1948. Article 11(2). No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

524 Art 15 of the ICCPR:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
as to whether Art 4(c) of the SCSL Statute was compatible with customary international law in effect at the relevant time of the indictment. Art 8(b)(xxvi) of the Rome Statute of the International Criminal Court and Art 4(c) of SCSL Statute are similar with the exception that the Rome Statute is applicable in international armed conflicts while the Statute of the SCSL was applicable in non international armed conflicts. The former refers to national armed forces while the latter referred to armed forces or groups. But according to the Secretary General of the United Nations in his report of SCSL statute, the Rome Statute had doubtful customary nature. The Court thus considered the status of the UNCRC to give out its ruling. With the exception of six states all states in the world had ratified the Convention by November 30, 1996. With art 38 of the UNCRC stipulating absolute prohibition on the recruitment under the age of fifteen in effect implied under fifteen recruitment had crystallized as customary international law.

Protecting Child Rights

None of the two bodies of international law has, as yet been able to reduce the suffering involvement of children in armed conflict. International humanitarian law per se does not deal with the question of children from the standpoint of child rights. The principle aim of humanitarian law is to regulate the methods and means of

525 Statute of the Special Court For Sierra Leone (SCSL), Established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Art 4 of the SCSL: Other serious violations of international humanitarian law
The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscription or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

526 Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 and entered into force on 1 July 2002. Art 8(b)(xxvi): Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.


529 Ibid note 77. Schabas
warfare and the treatment of people in times of war, who are not, or no longer participating in hostilities. However, there are primarily two reasons for this shortfall. Firstly, international law is not wholly adequate or relevant in the complex dynamic of the present ongoing conflicts. Not only so, with the exception of the UNCRC, drafters of the international humanitarian law have not sought to interface the notion of ‘children rights’ while dealing with situations of armed conflicts. Therefore, the obligation to protect and to ensure the enjoyment of rights by children in such conflict situations are weakly defined. Secondly, owing to the complex nature of the ongoing conflicts ranging from what can be referred to as an insurgency, an armed rebellion, terrorism or even insurgency, states too have been reluctant to recognize a conflict threshold of the problem. As a result the application of international humanitarian law is largely not applied to except through customary international law.

With the exception of the limited provision directly referring to children, children continued to be protected with the provisions generally applicable to civilians under humanitarian law and a few providing special protection only to a specific category of children. In fact children are barely recognized as a separate group.

The other anomaly refers to the definition of the ‘child’. A Child is defined as any person under the age of eighteen. However, in the Fourth Geneva Convention do

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530 As Carolyn Hamilton and Tabatha Abu El-Haj mention, “.. most wars in the last decade there has been an outright abandonment of any semblance of compliance with even the most basic provision of humanitarian law, the prohibition on indiscriminate attacks. Second, in recent decades most armed conflicts have been civil wars of one kind of another. Rather than set-piece battles between contending armies, recent conflicts have been complex affairs, fought in the streets of populated villages and cities where combatants, children and other civilians mingle, and the distinction between combatant and non combatant is ignored. The failure, on the part of the parties to a conflict, to distinguish between civilian and combatant and the tendency to treat whole neighbourhoods and hamlets as military objectives has lead to higher child casualties. Third, the 1990’s have also seen a rise in ‘ethnic cleansing’ as in Bosnia and Rwanda. In such conflicts children are directly targeted as the future generations of the enemy. Thus, the major problem for children in situations of armed conflict is one of survival itself. See Carolyn Hamilton and Tabatha Abu El-Haj, Armed Conflict: the Protection of children Under International Law, International Journal of Children’s Rights, 4, 1-46, 1997 at 3.

531 Although according to the ICTY, ‘ an armed conflict exists wherever there is a resort to armed force between the States or protracted armed violence between governmental authorities an organized armed groups or between such groups within the State’. See ICTY Appeals Chamber, Prosecutor v. Dusko Tadic, 02 October 1995, Para 20. The court does refer to issue of protracted armed violence but when we assess the qualifying threshold of an armed conflict though the Additional Protocols Protocols to the Geneva Convention, the term is difficult to define.

532 Even when refer to the Fourth Geneva Convention, the word ‘civilians’ has not been mentioned to include all civilians but the Convention largely refers to a very specific group of civilians.

533 UN CRC
not as a whole extend to persons above the age of fifteen\textsuperscript{534}. For example, Article 14 also refers to orphaned children under the age of fifteen. The ‘over fifteen’ protection for children is provided art 51 and 68 of the Fourth Geneva Convention asking states as occupying powers not to compel children under the age of eighteen\textsuperscript{535} to work and similarly award death penalty for an offence committed under the age of eighteen\textsuperscript{536}. Art 24 of the fourth Geneva Convention also applies only to children up to the age of 15 years. The article obligates state parties, “to ensure that children under fifteen, who are orphaned or are separated from their families as a result of war are not left to their own resources….”. Many scholars have also argued that the construction of art 24 reflects expression of parental or family rights and states concern in retaining their children.\textsuperscript{537}

The notion of ‘protection’ offered to children as part of the general category of protected persons or as children under the humanitarian law is adequate enough to give them the basic protection guarantees but not particularly powerful\textsuperscript{538}. Art 14,17,23, and 24 of the Fourth Geneva Convention refer to question of children rights. Each of these art. Commence with the statement, “Parties..may…establish”\textsuperscript{539}, “The Parties shall endeavour… to conclude.”\textsuperscript{540}, “Each Party shall likewise permit…..”\textsuperscript{541} or “ The Parties … shall take necessary….measures”.\textsuperscript{542} Even if it is felt that fourth Geneva Convention can have a limited application in non-international conflicts because of the obligations under Common art 3, it still does not accord enough protection to children. Wherever children find a mention, the Convention covers only a very limited group of the child population. For example art 24 applies only to those children up to the age of 15 yrs who have been separated from their parents as a result of war.

\textsuperscript{534} As Pictet explains that this age was considered since “from that age onwards a child’s faculties have generally reached a stage of development at which there is no longer the same necessity for special measures” (Pictet: (1958) p. 186).
\textsuperscript{535} Art. 51
\textsuperscript{536} Art 68.
\textsuperscript{539} Art 14, Fourth Geneva Convention.
\textsuperscript{540} Ibid, art 17
\textsuperscript{541} Ibid, art. 23.
\textsuperscript{542} Ibid art. 24.
Art 23-26 primarily relating to the provision of medical supplies and facilities are equally applicable to children as much as the child protection provisions mentioned in the additional Protocol II to the Four Geneva Conventions. Not only so, the special protection accorded to children under the humanitarian law are now considered (at least in part) to be customary international law. Even if we refer to the report of the Secretary General and the establishment of the International Criminal Tribunal for Yugoslavia, pursuant to para 2 of the Resolution 808 (1993), the Secretary General too stated that is law enshrined in the four Geneva Conventions had become party of customary international law.

The UN GA Declaration on the Protection of Women and Children in Emergency and Armed Conflict preceded the adoption of the Additional Protocols but substantive protections guarantees still did not find a place in the Additional Protocols. Although, article 6 of the Declaration did make an explicit recognition that children shall not be denied any of their inalienable rights in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence. However, the Protocols still remained ambiguous in reference to child rights.

Article 77 of the Protocol I too failed to define the age of childhood. Under art 77(b), parties to the conflict were under obligation that children who have not attained the age of fifteen years do not take direct part in hostilities and states should refrain from recruiting them in to their national armed forces. As Prof Francoise notes, ‘The Article is replete with exhortatory, rather than mandatory, language. It also fails to address a variety of issues. What constitutes taking "a direct part in hostilities"? It clearly includes fighting but it is not clear whether a messenger, cook or deliverer of ammunition would be included. The Article refers to recruitment. It is not clear whether, as a matter of law that covers every means by which a person may join

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543 Ibid art 14.
544 S/25104 and Add 1.
545 Declaration on the Protection of Women and Children in Emergency and Armed Conflict. Proclaimed by General Assembly resolution 3318(XXIX) of 14 December 1974.
546 Ibid. Article 6 reads, ‘Women and children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence, or who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights, in accordance with the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.”
armed forces. In particular, where a child is kidnapped and compelled to join or, at the other extreme, where a child simply joins a group of soldiers without going through any formal procedure, it is open to question whether recruitment in any meaningful sense has taken place. As a matter of policy, it may be desirable to give the term as wide a meaning as possible, so as to include any process as a result of which a child joins armed forces.  

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Those children who participated in the conflict and were under the age of fifteen would continue to enjoy special protection. Not only so, art 77(2) also refers to the term person rather than child where referring to those between the age of fifteen and eighteen years. However, the Protocol II did accord children under the age of eighteen protections from the pronouncement of death penalty  

548 and on the compulsion to work by the occupying power. Thus, with the exception of Para 1 of Art 77 where ‘children’ were accorded protection, all other articles dealt with specific issues. These included participation in armed conflict, evacuation of children, arrest and detention, treatment when apprehended, sentencing, arrest and detention.

In Protocol I, the principle of proportionality and military necessity are the bedrock of the law of armed conflict when accessing the legality of military action. Therefore, indiscriminate attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

While apparently, civilians may be protected but since the legality is guided by the customarily principle of necessity and proportionality, the law give leverage to accept the possibility of proportionate civilian collateral damage in military operations. It definitely forbids intentional attacks on civilians. “Protection” accorded to civilians is thus a trade off with military necessity and proportionality. As Louise Doswald-Beck points out:

“Those which expect to find civilians virtually immune from hostilities ... will therefore be disappointed. ... [the Protocols are an attempt] to limit the use of military

548 Art 6(4).
capabilities whilst preserving a combatant’s ability to win within these rules which is essential for the Protocols’ survival.”

Analyses of the provisions of international humanitarian law most assertively reflect that most primary consideration of the best interest of the child is wholly inadequate. Children are provided minimum protection and those too violate the non-discrimination principle enshrined under art 2 of the UN CRC.

International Human rights law too has not been able to accord adequate protection to children from the standpoint of their vulnerability, participation, rehabilitation and accountability of those who are responsible for recruiting them. There is also no protection accorded to children from the conduct of hostilities (death disability, emotional stress) as well as other adversities of war (including starvation, malnutrition, displacement, poverty, educational disruption, community breakdown – including that of communal values, and separation from family). For example, art 38 of the UNCRC referring to children in armed conflicts too does not provide full protection to children. The article throws up an anomaly. Under the Convention children are defined as under the age of 18, children aged 15 years and above are not protected by its deployment and recruitment provisions.

When we refer to the to UN CRC, it is the one of the only human rights treaty which is not derogable in times of emergency. In all other treaties, there are certain guarantees which can be suspended in times of public emergency which threaten the life of the nation. The UN CRC has no such derogation clause and therefore none of the provisions guaranteed can be derogated during times of emergency. Although, it is also felt that art 38 of the UN CRC obligating states to respect and to ensure respect for rules of international humanitarian law applicable to them (children) in armed conflict are relevant to the child in effect implies that the derogable provisions as mentioned under art 4 of the ICCPR can be suspended during times of

550 See Art 3 of the UN CRC.
553 Art 38(1).
emergency/armed conflict. The clause ‘all feasible’ as mentioned in art 38(2) is a tremendously weak obligation imposed upon states.\textsuperscript{554} In fact, even the ICRC\textsuperscript{555}, Radda Barnen\textsuperscript{556} and the UNICEF\textsuperscript{557} mentioned that the article offers lesser protection to children than contained in the Fourth Geneva Convention. It does not impose an absolute obligation upon the states to protection children in such situations. It also remains unclear on the status of the Convention during an intra state conflict\textsuperscript{558}.

Most importantly, even if the applicability of the UN CRC in situations of armed conflict is accepted in its totality. The monitoring mechanism of the CRC, the Committee on the Rights of the Child, is not able to respond in situations of emergency, cannot make \textit{ad hoc} recommendations or comment on situations in countries outside its concluding comments on state reports, cannot hear individual complaints, impose sanctions on offenders or order compensation.\textsuperscript{559} However, the moral and political obligation to implement the CRC does definitely stem from the concluding observations of the Committee. Substantial monitoring mechanism in such situations is a definite shortfall.\textsuperscript{560} In the similar vein the monitoring committee of the Committee on the Rights of the Child constituted under Art 43 of the Convention to examine the progress made by states and the realization of the obligations undertaken in the convention is a weak undertaking. Nowhere does it hold states responsible for failure to implement the children’s rights which ratifying states have accepted it as an

\textsuperscript{554} Also see Ang Fiona, Article 38 : Children in Armed Conflicts, martinus Nijoff, Leiden, Boston 2005 at 44 to 46.

\textsuperscript{555} E/CN.4/1987/WG.1/WP.4. Also see Articles 2-3 of the Resolution No IX of the International Conference of the Red Cross, reprinted in International Review of the Red Cross, No 256, 1986, p 340.

\textsuperscript{556} E/CN.4/1987/WG.1/WP.3.

\textsuperscript{557} E/CN.4/1989/WG.1/CRP.1.

\textsuperscript{558} However Thomas Hammarberg, member of the Committee on the Rights of the Child during the keynote speech in Aldrich in 1994, ‘Children as a Zone of Peace – What needs to be done’ and van Baarda (eds.) (1994), ‘Conference on the Rhigts of Children in Armed Conflict’, said, ‘Article 38 specifically addresses the situation of children in armed conflicts….however all other articles of the Convention are relevant. In fact there is no derogation clause in this Convention, it applies in its entirety also in times of war or emergency. The child has a right to a family environment, to go to school, to play, to get health care and adequate nutrition – also during the armed conflict. The principles of the Convention are valid as well: that all children without discrimination should enjoy their rights, that the best interests of the child be a primary consideration in decisions, that the right to life, survival and development be protected.’


\textsuperscript{560} There have been references where the CRC Committee has actually called upon states to end the armed conflict as seen in the case of Myanmar. CRC Committee Concluding Observations : Myanmar. UN Doc. CRC/C/15/Add.237, 2004) Para 67.
obligation. In fact, the clause “Appropriate measures” in Article 2, 18, 22, 27, 28, 33 and 39 is a vague expression on which no such state responsibility can be fixed.\(^{561}\)

The Protocol to the UNCRC laid an absolute ban on the recruitment of children under the age of eighteen into armed groups, it was not able to do so for the national armed forces. The was imposed an absolute ban on conscription of children under the age of eighteen by the State but voluntary recruitment of children above the age of fifteen was allowed. The Protocol was not able to achieve an absolute minimum age of eighteen years. However the ILO convention strengthened protection for children by calling for immediate elimination of the worst forms of child labour for all children under the age of eighteen years. This included voluntary or forced recruitment of children for use in armed conflicts.

Similar to the UNCRC, the Op Protocol too imposes a weak obligation upon states. Art 1 prohibiting the deployment of children (under 18) to take direct part in hostilities requires states to take ‘all feasible measures’ rather than their obligation not to deployment of children. Both the provisions remain silent on the status of child between 15 to 18 years of age.\(^{562}\) It could be presumed that that child soldiers would be treated as same as adult or else they continue to benefit from the provisions generally applicable to children under the age of fifteen years.

The term “Child Associated with an Armed Force or Armed Group” also presents a radical dilemma. When states are not willing to recognize the conflict threshold, they would definitely not accept the presence of child soldiers. Unwilling to accept the presence of child soldiers, children who are involved in act of terrorism as child terrorists or in insurgency as child insurgents easily qualify as a terrorist or an insurgent. One such example is of a 15 years old Canadian citizen, Omar Ahmed Khadr. Omar was apprehended by the US armed forces when he threw a bomb at the

\(^{561}\) D Venkateswara Rao, Child Rights: A Perspective on International and National Law, Manak, Delhi, 2002 at 102.

\(^{562}\) The CRC Committee has in fact adopted a straight principle while reviewing State Party reports. For example in the case of Burundi, CRC Committee has raised concerns on the participation of children either as soldiers, or as helpers in camps or in obtaining of information. UN Doc. CRC/C/15/Add.133,2000, Para 71. Similarly, in the case of Sierra Leone the Committee mentions on the participation of children, ‘either as combatants or in other roles’. UN Doc. CRC/C/15/Add.116,2000, Para 26. In the General Recommendations on Children and Armed Conflict adopted by the CRC Committee, the Committee has again referred to raising the age of recruitment till 18 years and the prohibition of children in their involvement in hostilities. See CRC/C/80. 19th Session September 1998.
US forces in Afghanistan. One US soldier was killed and three injured. The juvenile was detained at Guantanamo Bay for five years without fair trial, treated just like any other adult and kept in solitary confinement too. His trial was also referred to the military tribunal. International NGOs like Amnesty International and Human Rights Watch said that Khadr should be treated as a child soldier, not an adult enemy combatant. In response, a spokesman for the Department of Defense told ABCNews.com that age is not a factor when determining detention. "We detain enemy combatants who engaged in armed conflict against our forces or provided support to those fighting against us. The fact that juveniles have been used as enemy combatants is an unfortunate reality in many parts of the world."

**LEGAL PROTECTION TO CHILDREN IN INDIA**

**Status of International Law in India.**

**International Treaty Obligations.**

India has ratified/ signed the following international Conventions.\(^{563}\)

- **International Covenant on Civil and Political Rights,** \(^{564}\) (*ICCPR*). Ratified on 10 Apr 1979 and entered into force on 10 Jul 1979.
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** \(^{566}\), (*UN-CAT*). **Ratified** on 14 Oct 97.

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\(^{563}\) Conventions relevant to this paper have only been mentioned.
Reference to the text of all the Human Rights Treaties and conventions has been taken from Brownlie and Goodwin Gill, Basic Documents on Human Rights. Oxford: Oxford University Press, 2002.


\(^{567}\) GA res. 54/263 of 25 May 2000, entry into force 12 February 2002.

Relevant to this study, India has made declaration under Article 9 of the ICCPR.569 According to the Government of India, ‘the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India’.570 Further under the Indian Legal System, there is no

569 Art 9 of the ICCPR:
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
570 Article 22 of the Constitution of India:
22. Protection against arrest and detention in certain cases
(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate
(3) Nothing in clauses ( 1 ) and ( 2 ) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention
(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention;
(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order
(6) Nothing in clause ( 5 ) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose
(7) Parliament may by law prescribe
(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause ( 4 );
enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State’. However, in reference to the latter part of the declaration, the courts have awarded compensation in the subsequent years. The first case was in 1983 between Rudul Shah v. State of Bihar571 on the question of the violation of the right to life. The court concluded that the right to life would be denuded of its significant content unless those who violated it were compelled to pay compensation. In 1993, the Court reiterated that the right to receive compensation for the unlawful deprivation of Article 21572 was a fundamental right of every citizen573. In the case of People’s Union for Civil Liberties v. Union of India574, the court held that the government must pay compensation to the families who had been arrested on suspicion of involvement in terrorist activity and had then been shot dead by the Police while in custody575.

It would also be relevant to mention that, while choosing the word ‘declaration’ instead of ‘reservation’, India’s ratification was preceded by a number of major reservations. These included, provisions relating to the liberty and security of the person (Article 9), freedom of movement (Article 12), freedom of expression (Article 19), freedom of assembly (Article 21) and freedom of association (Article 22), all of which were made subject to the relevant provisions in the Indian constitution. Many commentators have argued that these reservations are in fact, incompatible with the

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572 Art 21 of the Constitution of India. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law
574 2 LRC 1, 1999. In this case the court rejected police evidence that the deaths had occurred in cross fire between the police and the terrorists.
575 During the Summary record of the 1603rd meeting while considering India’s (CCPR/C/76/Add.6), the Indian Representative also noted, ‘...the right to compensation had been strengthened by recent case law. Although, as reflected in India’s declaration relating to article 9, there was no statutory right to compensation for unlawful detention, the courts did award compensation for violation of a constitutional right. And a bill currently under study by a parliamentary committee would provide for compensation to victims of unlawful arrest and detention’, 12.
object and purpose of the treaty. Making a declaration in reference to the UN-CRC, India referred to the need of international cooperation in developing countries for the progressive realization of certain rights, namely those pertaining to the economic, social and cultural rights and gave justification to the different ages of a child where he is entitled to work.

**International Treaty Obligations.**

In India, treaties and covenants are not self-executing. They require enabling legislations to incorporate the provisions of the treaties/covenants in domestic law. Article 253 of the Indian Constitution empowers the Indian Parliament to enact any law in order to implement any treaty or agreement to which India is a party.

The requirement of such enabling legislations arises when the existing provisions of law or the Constitution are not in consonance or adequate with the obligations arising from the Treaty or Covenant. However, the justifiability of the Bill of Rights is granted through any one of the three categories, the Constitution of India (fundamental rights (arts. 12-35)), State legislations like the Indian Penal Code and Criminal Procedure Code (CrPC), and their judicial interpretation.

Human rights are buttressed by judicial review too. There are substantive provisions of the India Constitution dealing with civil and political rights as well as economic social and political rights. Part III of the Constitution deals with Civil and Political Rights and are justiciable while Part IV dealing with Directive Principles of State

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576 Summary record of the 1604th meeting, Sixtieth session in consideration of India’s third periodic report of India (CCPR/C/76/Add.6) by the HRC. See UN Doc. CCPR/C/SR.1604 dated 7 Nov 1997, para 34, Mr Prado Vallejo. Similarly, Professor Rosalyn Higgins mentioned that the suggestion that far from Indian law being interpreted in accordance with the Covenant it is the Covenant that is to be interpreted in accordance with the Indian law…..The effect of this is really to say that the Covenant in certain circumstances will not be in effect in the country concerned. (Remarks of Prof Rosalyn Higgins, cited in Amnesty International, India: Examination of the Second Periodic Report by the Human Rights Committee, London, Mar 1993, AI Index: ASA 20/05/93 at 5.

577 http://www.bayefsky.com/./html/india_t2_crc.php

578 Indian Const. art. 253. Legislation for giving effect to international agreements. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

579 Third periodic report submitted by India to the HRC under article 40 of the covenant. CCPR/C/76/Add.6. 17 July 1996.Para 8.
Policy are non justiciable dealing with Economic Social and Cultural Rights.\textsuperscript{580} In the *Kesavananda Bharti* case too the court opined that Parts III and IV essentially form a basic element of the Constitution without which its identity will completely change. A number of provisions in Part III and IV are fashioned on the U. N. Declaration of Human Rights.\textsuperscript{581}

Accordingly, Article 51(c) of the Indian constitution\textsuperscript{582} also directs the state to, ‘foster respect for international law and treaty obligations arising out of organized people with one another’. The provisions of this article are refereed to as the Directive Principle of State Policy. It therefore indicates a ‘directive’ nature upon the State and does not call upon the obligation for enforcement of international law.\textsuperscript{583} Thus, the Directive under the present Article exhorts the Government and the Legislature in India to implement the obligations under international law and treaties, but no municipal court can compel them to do so.\textsuperscript{584} Therefore, a treaty to which India has ratified does not *ipso facto* become part the municipal law of India. Commenting on Article 51, the Supreme Court of India in the case of *ADM Jabalpur v. S Shukla*\textsuperscript{585} ruled that, ‘the court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. The Court further ruled that, ‘..if there be a conflict between municipal law on one side and international law or the provisions of any treaty obligations on the other, the Court will give effect to the municipal law. If however, the two constructions of the municipal law are possible, the Court would

\textsuperscript{580} Although the Directive Principles may not be justiciable but under Art 37 of the Indian Constitution it is the duty of the State to apply these principles in making laws. Art 37 states, ‘The provisions in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws’. \\

\textsuperscript{582} Indian Const. art.51. Promotion of international peace and security

The State shall endeavour to -
(a) promote international peace and security;
(b) maintain just and honorable relations between nations;
(c) foster respect for international law and treaty obligations in the dealings of organized people with one another; and (d) encourage settlement of international disputes by arbitration.

Under Article 32(2) of the Indian, the Supreme Court of India has been empowered to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of the guaranteed rights.

\textsuperscript{583} The Constitution has no supremacy clause as that in art VI (2) of the American Constitution.

\textsuperscript{584} See Basu at 26.

\textsuperscript{585} A.I.R. 1976 SC 1207.
lean in favour of adopting such construction as would make the provisions of the municipal law to be harmony with international law on treaty obligations.’

While the domestic legislations reign primacy, the international treaty obligations are seen as an inspiration for liberal interpretation, in infusing, as much as possible, the salutary safeguards for human rights contained in those Charters and Covenants.\(^586\)

There are two reasons for such a construction. Firstly, the period of the drafting of the Indian Constitution was marked by the influence international developments during that time in the field of human rights. It was the time when the international community adopted the Universal Declaration of Human Rights 1948. Such an influence of human rights on the Indian Constitution was recognized in the Meneka Gandhi case where the court ruled that it is legitimate for the court to refer to the comparable provisions of the Universal Declaration in construing the intent and scope of the relevant text of Part III of the Constitution.\(^587\) The other reason was as regards those Covenants to which India is a party or which it has ratified. The State has an international obligation to implement them by appropriate legislation. In the absence of a contrary legislation, municipal courts in India would respect rules of international law.\(^588\) If the legislation is in place, the Court would be justified in interpreting the terms of the Constitution in the light of those Covenants, if possible that is, so far as the language of the Constitution can be stretched without doing violence.\(^589\) If however, there was an express domestic legislation contrary to international law; Indian Courts are bound to give effect to India Law.\(^590\)

Notwithstanding the above modalities of the application of international law, the Supreme Court has upheld international Conventions/ Covenants in cases involving violation of fundamental rights.\(^591\) For example, in the People’s Union of Civil Liberties v. Union of India\(^592\), it is observed that Article 17 of the ICCPR does not go contrary to Article 21 of the Indian Constitution and, therefore be interpreted in

 conformity with the international law\textsuperscript{593}. Further, in the case of \textit{Prem Shankar v. Delhi Administration}\textsuperscript{594}, the court ruled that the freedom from undue restraint and handcuffing fell within the wide ambit of Article 21 of the Constitution. The court emphasized, ‘that it would not forget the "core principle[s]" found in Article 5 of the Universal Declaration of Human Rights and Article 10 of the ICCPR’.

\textbf{Status of International Case Law.}

Foreign Court decisions are not binding on the Indian courts but have persuasive value. They can be justified when there is no precedence set in Indian courts.

In the case of \textit{General Electric Company v Renusagar Power Co.}\textsuperscript{595}, the court ruled that that such persuasive value was justified when the field is barren of any of any precedent from the Indian courts. The frequency of foreign courts decision should not be so elevated to the level of binding precedents. Similarly, in the case of \textit{M.P.V. Sunderramaia v. State of Andhra Pradesh}\textsuperscript{596}, the Supreme Court Observed. ‘The threads of our Constitution were no doubt taken form the other Federal Constitutions but when they were woven into the fabric of our constitution their reach and their complexion under went changes…… We must not forget that it is our constitution and that we are to interpret……’\textsuperscript{597}

On the other hand the Supreme Court in the case of Atibari\textsuperscript{598}, while interpreting the word ‘free’ in Article 301\textsuperscript{599} of the Indian Constitution adopted the test of direct and immediate restriction from the Australian decision\textsuperscript{600}. Ruling that, ‘free’ cannot mean an absolute freedom or that in each or every restriction on trade and commerce is invalid, the Court stated, ‘ when you are dealing with the problems of construction of a constitutional provision which is none to clear or lucid you feel inclined to inquire.

\textsuperscript{593} D.J. De, \textit{Interpretation and Enforcement of Fundamental Rights} (2000), 39.
\textsuperscript{594} A.I.R. 1980 S.C. 1535. Also see Sheela Barse v. Secretary, Children's Aid Society (A.I.R. 1987 S.C. 656, 658), a case involving child abuse. The court reminded the Indian government that as a signatory it has an obligation to implement the ICCPR provisions, at 1537. The court cited Article 24 of the ICCPR.
\textsuperscript{595} 1987(4) S.C.C.137.
\textsuperscript{596} A.I.R. 1958 SC 468.
\textsuperscript{598} AIR 1961 SC 232.
\textsuperscript{599} Indian Const art.301. Freedom of trade, commerce and intercourse. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.
\textsuperscript{600} Commonwealth of Australia v Bank of New South Wales 1950 AC 235.
how other judicial minds have responded to the challenges presented by similar provisions in other sister constitutions.

The courts have rarely resorted to using the principles of customary international law. For example, on the important question of torture and prisoner rights, the court in the case of *Sunil Batra v. Delhi Admin*[^1] made no mention on the violations arising out of Article 7 of the ICCPR[^2]. Rather, the Court has explicitly stated that torture or cruelty is repugnant to the principles of non-arbitrariness, reasonableness, and fair procedure implicit in Articles 14, 19, and 21, respectively, of the Indian Constitution[^3]. However, it cannot be said that natural justice has no place in the domestic law. The scope and application of the principles of natural justice are vital to the rule of law through Article 14 of the Indian Constitution. While they inject a sense of fair play and prevent arbitrariness in decision making, the principle of natural justice has a universal application[^4]. In a case involving pollution caused by sulfuric acid plants[^5], the court premising that sustainable development has become an accepted part of customary international law[^6] has held that, "a rule of customary international law that is not contrary to domestic law may be deemed to have been incorporated therein."

While the study would refer to domestic case law, international jurisprudence would also be cited primarily for two important reasons. Firstly, the paper address India’s state party obligation in the realm of international law. Secondly, the ‘persuasive’ value of international case laws, the reference to the decisions of the HRC, the European court/ Commission would be relevant. Furthermore, these decisions cannot be ignored since they strongly indicative of the evolving concept of human rights across the world.

[^2]: ICCPR, Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
[^6]: Id. at 399-400.
Juvenile Justice laws in India

Development of Law and Policy

The conceptual development of the juvenile justice system in India was largely witnessed since the early beginning of the nineteenth century. It was influenced by the dynamic changes that were taking place around the world as well as the jail reforms activism witnessed during that period when the West was getting engulfed in the all round reform movement, colonial exploitation had eased out the indigenous rural economy forcing many a class of people to slum in the suburbs.

The first such policy mainstreaming through legislative reform was seen with the enactment of the Apprentices Act 1850. The enactment was an initiative as a result of the establishment of the first ‘ragged school’ in 1843 which aimed at the reformation of juveniles offenders arrested by the Police and the encouragement of the Apprenticeship among them. The Act was aimed for ‘better enabling children, and especially orphans and poor children brought up by public charity, to learn trade, crafts, or employment by which they come to full age, they may gain a livelihood.’

While juveniles under the age of 15 years were bound by the magistrate and learn such skills rather than sending them to the prison for minor offences it was also the first enactment which sought to keep juveniles out of jails. This was guided by two basic principles. Firstly, children could not be treated the same as adult because they were less responsible for their criminal acts. Secondly, the need for diversion of

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607 As per Prof Ved Kumari, the history of the Juvenile Justice System can be divided into five periods be reference to the legislative or other landmark developments, namely, (a) Prior to 1773; (b) 1773-1850;(c) 1850-1918;(d) 1919-1950;(e) Post 1950. See Ved at 56.
608 See Ved at 59.
609 Ibid.
611 Original Legislative Consultations (Manuscript) Legislative No 8,9,08 January 1848. The enactment of the Apprentices Act 1850 gave impulse for a number of other enactments. These included the Female Infanticide Act 1870, the Vaccination Act 1880, seeking to secure life and health of infants, the Guardianship and Wards Act 1890 for their continued care and protection and the Indian Penal Code 1860.
juveniles away from the state criminal justice system and the need to pay attention to their moral and intellectual development. Concurrently, the prison reform reports too began to highlight the need of such a policy shift for the treatment of juveniles. This was primarily guided by the appalling conditions of children in jails. Although, the Indian Penal Code 1860 declared the age of criminal responsibility as 7 years defining it a doli incapax and the age between 7-12 years could be rebutted with the presumption of mens rea but it was only with the enactment of the Reformatories Schools Act 1876 that brought out the need of segregation of juveniles from adult offenders. It was felt that juvenile offenders were actually growing up in vice and ignorance. Initially, the Bill was proposed to be applied to delinquent juveniles and other non delinquent juveniles. However when the Bill was passed, the scope of the Act was limited to include on delinquent juveniles permitting those under the age of 15 to be sent to reformatory schools for crimes which otherwise would have resulted in imprisonment.

In 1889, the Report of the Indian Jail Committee again noted serious concern on many issues regarding children. These included the need for segregation and classification of offenders according to their age and duration of sentence. It also emphasized habitual juvenile offenders should not be sent to reformatories as they take with them to the schools the worst traditions and practices of the convict

613 Similar developments witnessed seen around the world too. The first law separating juvenile and adult offenders was passed in 1863 in America while the Swiss law in 1872 restricted publicity when courts were dealing with juveniles. O. Nyquist, Juvenile Justice, A Comparative Study with Special Reference to the Swedish Child Welfare Board and the California Juvenile Court System., 1960, p 141. The England’s Children Act 1908 was also guided under similar lines that children were less responsible for their actions than adults and juveniles treated with adult offenders were likely to be contaminated in some way, so the two groups should be treated separately. D.P. Farrington, ‘England and Wales’, in M W Klein (ed.), Western Systems of Juvenile Justice, 1984, p.73.
615 Sir Richard Temple, the then Lt Governor of Bengal (1874). See Legislative Department, A Proceeding. Mar 1876, Nos. 23-4, quoted in G Chatterjee, ‘The Reformation of Neglected and Delinquent Children in British Raj : A Historical Overview’, p. 5.
618 The report also noted that following the Constitution of the Indian Jail Committee in 1864, the segregation of juveniles from adult offenders was secured within prisons the modifications in the prison codes of Madras, Bombay, North West Provinces and Bengal. See Report of the Indian Jail Committee, 1889, April 1889, p.20.
prisons’. However, it was only after the Report of the Indian Jail Committee in 1919-20 that led to the complete segregation of children from the criminal justice system and the first state enactment, the Madras Children Act 1920. The Committee felt that these reformatories schools were not appropriate institutions since they could not reproduce the features of home life, the number of boys in these institutions were too large as compared to the available staff and the absence of an all female institution was a marked defect. The Committee also noted with concern that the reformatory schools were apt to approximate to juvenile jails rather than schools.

Pursuant to the Indian Jail Committee Report in 1919-20 and the for enactment of the first Children Act, the Madras Children Act 1920, Bombay and Bengal too followed immediate suit with the enactment in 1922 and 1924 respectively. In the subsequent years, more states enacted the legislation. These included the Delhi Children Act 1941, the Mysore Children Act 1943, the Travancore Children Act 1945, the Cochin Children Act 1946, and the East Bengal Punjab Children Act 1949. All these enactments bore certain guiding principles that were highlighted in the 1919-20 Jail Committee Report. These included the segregation of juveniles from adults, the handling of neglected and delinquent juveniles by the juvenile court and to be kept in remand homes and certified schools.

It was only in 1960 that there was a central legislation passed, namely the Children Act 1960 following the 1958 UN Declaration on the Rights of the Child. The Act was applicable only to the Union Territories but it was enacted as a model to be followed by the other States in the enactment of their respective acts. The Children Act 1960 was of particular importance because for the first time there was a legislative prohibition on the imprisonment of children under any circumstances. The Act also introduced the system of observation homes for receiving children during pendency of their proceedings, a children home for housing neglected juveniles and a special school for delinquent children. The subsequent amendment of the Children Act 1960 led to the Children (Amendment) Act 1978, which permitted lawyers in courts and made inter transfer of cases between child court and child welfare board. The

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619 Ibid at p. 71
621 Ibid.
622 Ibid at 201-3.
subsequent years reflected variations in the State Acts and even where the Children Act 1960 was enforced, the specialized machinery had either not been constituted at all, or not constituted in the prescribed manner.

By 1984-85, the Children Acts, though enacted were not enforced at all in Sikkim, Tripura, Auranachal Pradesh, Chandigarh and Lakswadeep. For example, a delinquent child of seventeen years was entitled to all the benefits of the Children Act in Gujarat or west Bengal but if she belonged to Maharashtra or was transferred there, she would have been treated as an adult offender and might have ended up in its jails.

In 1986, the Committee on Subordinate Legislation in its 69th Report and the adoption of the Beijing Rules in 1985, led to the enactment of the Juvenile Justice Act 1986 and it came into force in 1987 in all the State in the Union of India except Jammu and Kashmir. The JJ Act, for the first time, brought about a uniform system of juvenile justice in the entire country. The JJ Act provided for prohibition of confinement of children in police lockups or jail, separate institutions for the processing, treatment and rehabilitation of the neglected and delinquent children, a wide range of dispositions alternatives, to family community - based placement, and a vigorous involvement of agencies at various stages of the juvenile justice process.

The JJ Act was handicapped due to the lack of institutional mechanisms like the juvenile justice boards, juvenile courts, observation homes, juvenile homes special. India’s ratification of the UN-CRC, the question of the discriminatory age between the boys and the girl children became a major anomaly of the JJ Act. As per the JJ Act, a girl under the age of 18 years was considered as a child and a boy under the age of sixteen years was considered a child. However, in 2001, the Juvenile Justice (Care and Protection of Children) Act 2000 came into effect which brought uniformity on the question of age. Any person below the age of eighteen years was considered as a child, irrespective of gender. The Act has been discussed in details in the subsequent paragraphs.

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623 Statistical Survey Children Homes/Fit Institutions 1984-85, 96, Social Defence, 43 Table 1, April 1989, pp 44-5.
626 Ibid at 86.
During this period between the Children Act 1960 and the JJ(C&P) Act 2000, the developing jurisprudence also reflected considerable commitment keeping the best interest of the child in mind. Important focal issues like children should not be kept in jails\(^\text{627}\), care should be taken to ensure that there is no scope for their meeting or being kept with hardened criminals\(^\text{628}\) the supremacy of the JJ Act \(^\text{629}\) and children below 18 years should not be sent to jails\(^\text{630}\) paved way for a more concerted effort towards a child centred approach. There was a also a recognition that special juvenile courts should deal with neglected and delinquent juveniles and that such children should be kept in specialized institutions like the observation homes instead of keeping them in jails.

After the establishment of the Planning Commission in 1951, the subsequent five year plans did indicate an intended focus of the national planners towards the interests of the child.\(^\text{631}\) However, there was a short fall. There was no specific head under which for the implementation of juvenile justice services. It was possibly because there was no central juvenile justice legislation and it was largely left to the states to implement the juvenile justice system. It was only a decade later that a working Group on Welfare of Children was commissioned to help formulate the Eighth Five Year Plan (1990-95); and separation of child care from women and children slot.\(^\text{632}\)

The Eight Five Year Plan recognized ‘Human Development’ as the core of all development indicators. Child survival received high priority. The ‘Girl Child’ was recognized as the main target group renewed focus was taken to universalize elementary education and child Care. The latter was primarily in consonance to the

\(^{627}\) Sheela Barse v. Union of India, AIR 1986 SC 1773.


\(^{629}\) The application of Prevention of Terrorism Act (POTA) against two minors - Prabhakaran and Bhagat Singh - was reversed on an intervention by the Madras High Court, but the provisions of the Juvenile Justice Act were applied in its place.


\(^{630}\) A neglected delinquent child arrested could be sent to a police station or jail in the juvenile Justice act 1986 but in the Juvenile Justice (Care and Protection of children) Act 2000, even if the board is satisfied that the offence committed is of so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.

http://socialwelfare.delhigovt.nic.in/juvenilejustice2.htm  (02 September 2004).

\(^{631}\) The Government did mention that in the strategy of planned national development, India focused its foremost interest in the young child. UNICEF, Les Carnels de L’Enfance. No 24 January/March 1975.

\(^{632}\) See T.A. Baig, ‘We are Still far From True Investment in the Child’, The Times of India, 22 September 1988, Sec 2, p.3.
National Policy on Education 1986 and the National Programme of Action 1992. The National Programme of Action 1992 strongly echoed very rights based approach as a follow up of the World Declaration on the Survival, Protection, and Development of Children. The World Declaration and the National Programme of Action 1992 of India can be rightfully seen in the backdrop of the UN CRC coming in to effect in 1991 and India ratifying the same in 1992. The Programme of Action sought to recognize the inalienability and indivisibility of the Civil and Political Rights and Economical Social and Cultural rights of children strongly echoing the central idea of the UN CRC. The Programme of Action noted, ‘The goals set for the 1990s represent the inherent, inter related rights, such as the right to life, to health, to education, to protection and to participation as well as an environment of life and standard of living adequate for his/her basic all round development.’

There was a continued focus in the Ninth five Year Plan too. This was in line to the SAARC decade of the Girl Child (1990-2000). However, there was also a shift towards the development of suitable services under the juvenile justice. The Plan reinforced the need to further the existing state and central level monitoring systems of the JJ Act 1986 and ensure its effective implementation.

In the Tenth Five Year Plan there was once again the recognition that economic, social, cultural, civil and political are inalienable from human rights and are achievable within the normative and ethical framework provided by the UN Convention on the Rights of the Child (1992). The Plan specifically illustrated the need of the Right to Development as a right based process. The National Plan of Action for Children 2005 too stressed that the UN-CRC shall be the guiding instrument for implementing all rights for all children up to the age of 18 years and the rights of the child as articulated in the Constitution of India and the CRC should work in synchrony to ensure all rights to all children. The main target groups of its programme were children without familial support, children with families in crisis, abused children, children with special needs, children of commercial sex workers, children in conflict with the law, and children affected by disaster or conflict.

633 National Programme of Action on Children India, p.3.
634 Ninth Five Year Plan, Para 3.10.32.
637 See Ved at 73.
Implementation strategies included active participation and partnerships with NGOs at the central and state level and district level.

It was also the first time when there was particular reference to children affected by/in armed conflict was made as part of policy making and the recognition that . The Plan of action plan stressed on the survival, development, protection and participation rights of children in difficult circumstances to include children by/in armed conflict. While the Action Plan stressed the need to meet the needs of children in difficult circumstances, it also sought to give priority to non institutional services for the rehabilitation of children giving primary consideration to the best interest of the child. Further, the Action Plan stressed the need to ensure that children are not used in armed conflict and those affected by armed conflict receive timely and effective humanitarian assistance through a commitment to improved contingency planning and emergency preparedness, and that they are given all possible assistance and protection to help them resume a normal life as soon as possible. The Action Plan also addresses the issue of children who come in conflict with law. The report recognized the need to promote and protect the rights of children in conflict with law through preventive, protective, reformative and rehabilitative policies, laws, plans, strategies, programmes and interventions.

The Eleventh Five Year Plan Eleventh Plan stressed upon childhood education, girl child and child protection. This was aimed to be institutionalized through four key areas: ICDS (expansions of the ICDS services and reiteration of major concerns about infrastructure), Early Childhood Education, Girl child and Child Protection. Early childhood education was stressed through improvement in access, day care services, infrastructure, training, minimum standards and regulatory mechanisms, and revamping curriculum. The eleventh plan recognized the need for Child protection programmes and initiatives. Similarly, targets for elementary education included, universal enrolment of 6–14 age group children including the hard to reach segment, substantial improvement in quality and standards with the ultimate objective to achieve standards of Kendriya Vidyalayas (KVs) under the Central Board of

639 Ibid at 11.2.3,4 and 5.
640 Ibid at 12.1.2.
Secondary Education (CBSE) pattern, all gender, social, and regional gaps in enrolments to be eliminated by 2011–12, one year pre-school education (PSE) for children entering primary school, dropout at primary level to be eliminated and the dropout rate at the elementary level to be reduced from over 50% to 20% by 2011–12, universalized MDMS at elementary level by 2008–09, universal coverage of ICT at UPS by 2011–12, significant improvement in learning conditions with emphasis on learning basic skills, verbal and quantitative, conversion of all EGS centres into regular primary schools and strengthened BRCs/CRCs: 1 CRC for every 10 schools and 5 resource teachers per block.\textsuperscript{642}


The National Commission for Protection of Child Rights (NCPCR) was set up in March 2007 under the Commission for Protection of Child Rights Act, 2005, an Act of Parliament (December 2005). The Commission's Mandate is to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and also the UN Convention on the Rights of the Child. The Child is defined as a person in the 0 to 18 years age group. The Commission visualises a rights-based perspective flowing into National Policies and Programmes, along with nuanced responses at the State, District and Block levels, taking care of specificities and strengths of each region. In order to touch every child, it seeks a deeper penetration to communities and households and expects that the ground experiences gathered at the field are taken into consideration by all the authorities at the higher level. Thus the Commission sees an indispensable role for the State, sound institution-building processes, respect for decentralization at the local bodies and community level and larger societal concern for children and their well-being.\textsuperscript{643}

In 2012, the NCPCR issued 'Protocol for Police and Armed Forces in Contact With Children in Areas of Civil Unrest' which laid down detailed guidelines, in the form of Standing Operating Procedures, for the law enforcement agencies, to deal with children, with whom they may come in contact, in areas of civil strife and unrest. The

\textsuperscript{642} Planning Commission, Government of India, Eleventh Five Year Plan (2007–2012), Social Sector Vol. II
\textsuperscript{643} http://ncpcr.gov.in/
strongly advocates that all children caught in civil unrest situations should be treated as children in need of care and protection.

**Juvenile Justice and Domestic legislations**

The special status of children has been duly recognized in the Indian Constitution through the fundamental rights and the directive principles of state policy. In addition to the Constitutional guarantees children the other important legal provisions include the JJ(C&P) Act 2000 and its legal interpretation in the courts.

*Constitution of India*. Children have been accorded special status in the constitution through Articles 15(3), 24, 39(e) and (f) and 45. In pursuance to the spirit of the Constitution the state’s first National policy for Children adopted in 1974, also declared children as the supremely important asset. However, many other important and relevant constitutional provisions are also dedicated to children, viz:-

Article 14—The State shall not deny to any person equality before the law or the equal protection of laws with in the territory of India.

Article 15—The State shall not discriminate against any citizen……Nothing in this Article shall prevent the State from making any special provisions for women and children.

Article 21 —No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21 A —The State shall provide free and compulsory education to all children of the age of 6-14 years in such manner as the State may, by law, determine.

Article 23 —Traffic in human beings and beggar and other forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.

Article 24 —No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Article 39 (e) and (f).

Article 45 — The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 243G read with Schedule 11 – provide for institutionalization of child care by seeking to entrust programmes of Women and Child Development to Panchayat (Item 25 of Schedule 11), apart from education (item 17), family welfare (item 25), health and sanitation (item 23) and other items with a bearing on the welfare of children.

The provisions in the Constitution primarily addressed the issues of all round development of children to include health, education, work and the overall welfare of the children. While children also constitutional rights and guarantees along with adults, child specific rights were effectuated through the provisions provided for free and compulsory education for children between the age of 6-14 and the guarantee not to be employed to work under hazardous conditions below the age of 14 years. Furthermore, if an employment interferes with the education of children or exposes him/her to exploitation, the Constitution obligated upon the State to protect against such a moral and material abandonment.

However, one of the important turning point towards the welfare of children was the transfer of education and juvenile justice to the concurrent list following the 42nd Amendment in 1976. The amendment brought important subjects like education and juvenile justice which otherwise left to the states under the uniform umbrella of social planning. Pursuant to the amendment and the subsequent developments central legislations like the JJ Act 1986 and the present JJ(C&P) Act 2000 came into effect in the whole of India except Jammu and Kashmir.

*The Juvenile Justice (Care and Protection of Children) Act 2000* In exercise of the powers vested under Art 253 of the Indian Constitution obligates upon the state to enact law on any subject for implementing a decision at any international conference, association or other body, the State enacted the adopted the Juvenile Justice (Care and Protection of Children) Act of 2000 (JJ Act)645. This was one of the concrete measures since the consideration of the initial report by the Committee on the Rights of the Child in January 2000 firmly aligned towards the State’s international obligations.

The Act obligated upon the State to adhere the standards the set forth in the UN-CRC in securing the best interest of the child and to re-enact the existing law relating to juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and all other relevant international instruments. Enshrined to meet the needs of the 400 million children of the country, the Act embodied care and protection keeping the best interest of the child in mind by emphasizing social integration of child victims without resorting to judicial proceedings.

The Act does seem apparently new but is an expansion of the Juvenile Justice Act 1986 with 28 additional provisions in the new enactment. However, the major inclusion in the new Act is the universal recognition of the age of the boy and the girl child as 18 years. In the previous JJ Act 1986 the age of the boy child was 16 years as against the 18 years age threshold of the girl child. The principle object and reasons of the new enactment addresses the issue is easy accessibility to the child, the Police, voluntary organizations, social workers and parents/guardians, the creation of adequate infrastructure and encouraging greater involvement of informal systems like the family, voluntary organizations and the community.

The JJ(C&P) Act 2000 consists of seventy sections contained in five chapters. Chapter one deals with preliminary matters of title, extent, commencement, definitions and so on. Chapter two makes provision for children in conflict with law. Chapter three provides for children in need of care and protection. Chapter four lays down various measures for their rehabilitation and social reintegration. Chapter five contains all miscellaneous matters. While the JJ(C&P) Act 2000 now regulates for all children under the age of eighteen, the country has also notified certain model rules that would apply till the States make their own rules. These include the principle of right of innocence, principle of best interest, principle of no harm, no maltreatment,

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646 Committee On The Rights Of The Child Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention. CRC/C/93/Add.5 16 July 2003. India has 400 million children below the age of eighteen years, the largest child population in the world.
647 Ibid Note 1, Preamble paragraph and Article 3 of the Convention of the right of the Child
principle of family cushion and the principle of non stigmatizing semantics, decisions and actions.

The adjudicatory body to deal with children in conflict with the law under the JJ(C&P) Act 2000 is the juvenile justice board while for children in need of care and protection is the child welfare committee. The Board consists of a magistrate and two social workers, one of whom is a woman with each of the board member have special knowledge of child psychology and child welfare. The presence of the magistrate is imperative but the decision is to be decided by a simple vote of majority. Thus, if both the members concur a decision the same prevails.

The child welfare committee on the other hand constitute of five members. One of whom is a woman and another an expert on matters concerning children. The members of the committee function as a bench of magistrates with powers conferred by the Code of Criminal Procedure on a metropolitan or a principal magistrate. Thus the Act authorizes a number of agencies to address issues concerning children. These include the Police, public servants, non governmental agencies, authorized civilians and children themselves. The Act has also sought to moderate the coercive face of the Police by obligating upon the State to constitute a police officer specially trained to deal with children in conflict with law as well as those in need of care and protection. These officers are to constitute the special juvenile Police Unit.

The JJ(C&P) Act 2000 provides for special residential for the two categories of children. While parents/guardians, shelter homes foster care and adoption remain common for both the categories, residential options for juveniles include an observation home during pendency of inquiry, a place of safety, special home after disposal a fit and a person/fit institution. The residential option for children in need of care and protection include a children’s home during pendency as well as after disposal of inquiry.

The apprehending agencies in case of juveniles include the Police or any other person or authorized organization. While the responsibility of production of children in need of care and protection include the Police officer, Special Juvenile Police Unit, a
designated Police Officer, a public servant, child line, other recognized voluntary organizations, social workers, spirited public worker or a child.\textsuperscript{650}

The Act specifies the time limit of an inquiry as 4 months and spells out conditions that bail will only be denied if the release is against the interest of the juvenile or will defeat the ends of justice. It has given away with the distinction between bailable and non bailable offences maintained by the CrPC for the purpose of granting bail.\textsuperscript{651} The possible orders that can be passed include release after admonition or advice, group counseling, performance of community service, release on probation under the care of a fit institution or can be send to a juvenile home for a minimum of two years in case of a juvenile above the age of 17 but below the age of 18 years while in other case till he ceases to be a juvenile. The Act specifically mentions that no death penalty, life imprisonment, committed to prison in default of payment of fine or furnishing of surety. Counseling of the children and their parents/guardians has been made integral to an order of release after advice or admonition.\textsuperscript{652}

\textsuperscript{650} See Ved Kumari, The Juvenile Justice System in India, From Welfare to Rights, 2004, Oxford at 141, Table 4.2.