CHAPTER VII

Child Associated with an Armed Force or Armed Groups Coming in Contact with the Legal System

There is no legal codification on the treatment of children involved in terrorist acts or as part of armed groups operating in the LWE or the Disturbed Areas under the AFSPA in India. The State denies their involvement and maintains that the situation interferes with their access to education, health and other basic services often creating fear and psychological problems. Notably, children affected by armed conflict or civil commotion are only mentioned in the in preamble of the JJ(C&P) Amendment Act 2006 as those in need of care and protection and their protection is couched in the national disaster relief plan. Unlike international treaties like the UN Convention on the Rights of the Child (UN CRC) and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP CRCAC) that specifically address the issue of children in armed conflict, there is no such legal codification in India. Chapter II of the JJ(C&P) Amendment Act 2006 deals with juveniles in conflict with law in terms with their conditions of detention, prosecution, penalty or sentence of imprisonment, etc but there is no specific reference on their treatment when apprehended for their alleged involvement in terrorist acts or grave crimes as part of armed groups.

The void is because the State maintains that there are no children associated with armed groups while child recruitment and military training by the armed groups is

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655 Para 87, CRC/C/93/Add.5 16 July 2003.
658 See India’s reply to the CRC on Children and Armed Conflict stating, ‘the possible impact of the conflict on children is that the prevailing situations sometimes disrupts normal life and interferes with children’s access to education, health and other basic services often creating fear and psychological problems’. India’s Second Periodic Report to the UN CRC, Paragraph 1085, pg 323.
well documented in the disturbed areas of Assam Nagaland and Manipur as well as in Maoists affected region of Chhattisgarh.

The Shillong Declaration on children in Armed Conflict (2002) in south Asia has called upon the Government of India towards a national policy to address the special needs of the children raising concerns on the safety of children in the light of special legislations like the Armed Forces (Special Powers) Act 1958. 659

State denial and the absence of any substantive guidelines put children at risk of being treated as captured militants/terrorists without any distinction of their age or vulnerable status. 660 Their apprehension is national security rhetoric where a child perpetrator is allegedly waging war against the state. 661

Treatment of such children is not comparable with other normal juveniles in any part of the State for a variety of reasons: conditions of abject poverty, breaking up of infrastructure, child’s physical and mental duress is integrally linked to the community’s collective grievances against the state and in turn their tacit approval for forced/voluntary conscription in the armed groups. The state is under greater obligation to rehabilitate and reintegrate them back into society given the collateral vulnerabilities of poor/negligible education and health infrastructure as a consequence of the unrest. 662

Children are at risk of ill treatment due to the lack of direction in the categorization of the apprehended child participant (child in need of care and protection or in conflict with the law), the lack legal restructuring on their treatment in the justice process, eventual rehabilitation and reintegration into society and law enforcement accountability. The Committee on the Rights of the Child has raised similar concerns on the treatment of children not only in India but other third world states witnessing

660 For example, on 09 July 2002, 14 year old Mayanti Raj Kumari, a student of Class VII was arrested for allegedly waging war against the State (under Sections 121 A and 122 of the Indian Penal Code) and POTA and was detained in Ranchi jail and not in a juvenile home as required under the law. http://www.unhchr.ch/indigenous/bp11.doc (04 January 2011).
661 Ibid.
662 For example, Manipur is 22% behind the national average for infrastructural development, and the entire North-Eastern region is 30% behind the rest of India. Available at http://www.hrdec.net/sahrdc/resources/armed_forces.htm . Last accessed on 10 February 2011.
The salient points include:

- Raising the minimum age of criminal responsibility.
- Deprivation of liberty as a measure of last resort, for the shortest possible time, and that appropriate conditions are provided.
- Alternative measures to deprivation of liberty.
- Children are separated from adults in all places of detention and have legal access to independent and effective complaint mechanism.
- Review and where necessary, amend all judicial, legal and protection procedures to ensure that children under 18 years who have broken the law are fully guaranteed the rights of fair trial and to legal assistance.
- No death penalty or life imprisonment without possibility of release.
- Training of judicial professionals, including in the area of rehabilitation and reintegration.

This dilemma of accountability versus a non-punitive approach is a complex question in India or any other State witnessing civil unrest. Making children account for their actions risks in alienating the aggrieved community if the state dispassionately treats all child participants as perpetrators. Conversely, purely a child victim centric approach raises serious concerns of discrimination against children who commit similar serious crimes in other parts of the country not witnessing unrest. The dilemma is whether these children are accountable for their participation or the State’s failure/inability to guarantee the child his basic rights in a weak and vulnerable socio-political structure automatically grants the child the right to be treated as a victim of the conflict irrespective the gravity of the offence committed. Two principles guide the approach. First, a purely rehabilitative approach does threaten to make the rule of law illusory negating to effectuate the principle of deterrence and retribution. Second, it should not threaten to discriminate children.

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664 Under deterrence theory, “punishing criminals is morally permissible because it both deters the punished criminals from further offenses (special deterrence) and deters other people from committing crimes (general deterrence).” David Dolinko, Three Mistakes of Retributivism, 39 U.C.L.A. L. REV. 1623, 1626 (1992).
based on geographical settings for the same crime committed in normal conditions as against those perpetrated in conflict settings. Child victimization is part of the national security rhetoric and is not just limited to India but other States too have shown a risk of deviation in the treatment of children in normal domestic settings as against those who are allegedly involved in anti national activities.

The discordant note between the internationally established principles of juvenile justice and treatment of child participants in domestic settings is lost amidst the national security rhetoric. The case of a Canadian citizen Omar Khadr apprehended in Afghanistan by the NATO forces in the USA’s war against terror and a law enforcement case involving murder in *Roper v. Simons* clearly show State’s indifference and intolerance towards child perpetrators allege to have committed crimes in terror related incidents as against similar offences committed in peacetime.

The United States detain children as juvenile enemy combatants at its facility on Guantanamo Bay, Cuba. The government first admitted "enemy juvenile combatants" at Guantanamo Bay on April 21, 2003 with ages varying from 10, 12, and 13 at the time of their detention maintaining such children were dangerous. Omar Khadr was fifteen years old (July 27, 2002) when he was charged with war crimes and was brought to Guantanamo Bay on October 30, 2002. Despite being a

665 Retributive theory posits, “punishment is just when it is deserved, and it is deserved by the commission of an offense. The offense committed is the sole ground of the state’s right and duty to punish. [J]ustice in these matters is to treat offenders according to their deserts, to give them what they deserve, not more, not less.” I. Prisomatz, Justifying Legal Punishment 147-48 (1989).

666 The United States also detain juveniles in other facilities, including those in Iraq. Neil MacKay, Iraq's Child Prisoners, Sunday Herald, Aug. 1, 2004; and Josh White & Thomas E. Ricks, Iraqi Teens Abused at Abu Ghraib, Report Finds, Wash. Post, Aug. 24, 2004, at A01. Though the analysis in this Article would apply to those children, the factual considerations are primarily limited to Guantanamo Bay. See Melissa A. Jamison, Detention Of Juvenile Enemy Combatants At Guantanamo Bay: The Special Concerns Of The Children, 9 U.C. Davis J. Juv. L. & Pol'y 127.

667 Michael McKenna, War on Terror: The Detainees: The Child Captives In Irons at Camp Cuba, The Advertiser, Apr. 22, 2003, at 10; and Guantanamo, ABC television broadcast, May 28, 2003. The US government later released the children after determining that they “no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the U.S. government for any crimes.” See Melissa A. Jamison, Detention Of Juvenile Enemy Combatants At Guantanamo Bay: The Special Concerns Of The Children, 9 U.C. Davis J. Juv. L. & Pol'y 127.

668 According to Maj. Gen. Geoffrey Miller, Commander of the Joint Task Force at Guantanamo, “I would say despite their age, these are very, very dangerous people . . . . Some have killed, some have stated they're going to kill again. So they may be juveniles, but they're not on a little league team anywhere. They're on a major league team and it's a terrorist team. And they're in Guantanamo for very good reason; for our safety, for your safety.” See Melissa A. Jamison, Detention Of Juvenile Enemy Combatants At Guantanamo Bay: The Special Concerns Of The Children, 9 U.C. Davis J. Juv. L. & Pol'y 127. Quoting their alleged involvement in acts of terror, the US detained juveniles.
minor he was classified as an enemy combatant by the combat status review committee till he was later classified as an unlawful enemy combatant in 2007. He was subject to two trials as an unprivileged belligerent (2005) and an unlawful enemy combatant (2007). His trial is still pending with the military tribunal (17 February 2011). However, juvenile accountability in domestic settings has received greater concern in the domestic settings in the *Roper v. Simons* (2003) during roughly the same period. The United States Supreme Court in the subject case examined juvenile accountability for murder by a 17 years old child and held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18. The court held that juveniles are more often immature and irresponsible, which can lead to “ill-considered actions and decisions.” and that their juvenile personalities are more malleable. The court further ruled that children respond readily “to negative influences and outside pressures, including peer pressure and their juvenile's character is less developed than an adult's. Irrespective of the heinous crime, the depravity of the act may not indicate a character incapable of reform, instead poor judgment and other inherent character flaws may be a reflection of the youth's unformed identity and inexperience which can be corrected as the youth matures into adulthood. For precisely these reasons, youth is considered a germane mitigating factor in the sentencing process. It is therefore unfair to treat the failings of a juvenile equally as those of an adult.

Similar digression is evidenced in the United Kingdom. The UK the courts have held a child of 15 years guilty of spreading terror. A child in Dewsbury, North England

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670 The trial was under the Guantanamo Military Commission which was termed as unconstitutional by the US Supreme court as lacking the power to proceed since the structures and procedures violate the Uniform military Code of Justice and the Geneva Conventions IV. See Hamdan v Rumsfield, 548 U.S. 557 (2006) at 61-73.

671 The trial did not proceed further after 2010. No sentencing was done by the tribunal constituted under the Military Commission Act 2006.

672 In 2007, a case was filed in the Supreme Court of Canada (Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44) claiming that the Canadian government acted illegally, sending its counsel and CSIS agents to Guantanamo Bay to interrogate Khadr knowing that he was under sleep deprivation and in turn sharing the finding with the U.S. authorities to help convict Khadr. The court held that Canada actively participated in a process contrary to its international human rights obligations and contributed to Khadr’s ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the Charter, not in accordance with the principles of fundamental justice. The court left the question of repatriation of Khadr to the Canadian government to decide in the lights of its responsibility over foreign affairs, and the Charter.

673 The 5-4 decision overruled the Court's prior ruling upholding such sentences on offenders above or at the age of 16, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), overturning statutes in 25 states that had the penalty set lower.

used internet to circulate material including technical documents on how to make napalm and homemade explosives. He was recruited at the age of 15 years and was found guilty of being part of a cell that spread extremist propaganda and provided practical guides on how to make poisons and suicide vest. The London’s Old Bailey court sentenced the boy to two years in a young offender’s institution. The court however ruled that he had been given a lighter sentence because he had fallen “under the spell of fanatical extremists” who took advantage of his naivety. But the judge also added, “There was no doubt you knew what you were doing”.675

Certain key issues require examination:-

- How to define the victim–perpetrator divide between child participants with particular reference to the State’s domestic settings?
- What is a prosecution threshold: What kinds of serious offences perpetrated by child participants invoke his status as a child in conflict with the law rather than one in need of care and protection?
- What acts committed a child should have legal intervention with resort to judicial proceedings676 while ensuring to ensuring that the child’s human rights and legal safeguards are fully respected and protected.

The chapter examines critical issues concerning child participants from the first point of contact with the law enforcement agencies (armed forces, paramilitary forces and the Police), the established procedures/actual practice followed while treating such children till he is finally brought in front of the Juvenile Justice Board (JJB). These include the initial assessment of the age of the child, deprivation of Liberty, arrest, detention or imprisonment677, and the procedural guarantees that can lead to abusive practices. Finally, the treatment of child perpetrators (children in conflict with the law) in the judicial process: minimum guarantees of fair trial678, right to privacy679, protection680, right to participation681, right to silence682.

675 See “UK Schoolboy Terrorist Jailed”, The Times of India, Mumbai, Saturday, September 20, 2008 at 16. The co accused, Aabid Hussain Khan who had also recruited him was jailed for 128.
676 UNCRC, article 40(3) and 40(4).
677 Ibid, article 37.
678 Ibid, article 40 (2) (iii).
679 Ibid, article 40 (2) (b)(vii).
Child Participants: Victims or Perpetrators?

Article 40(3) and (4) of the UN CRC obliges states to frame judicial procedures specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law. The procedures must ensure respect for human rights and legal safeguards but give weightage to non-punitive and restorative approach by asking state parties to exercise variety of dispositions proportionate to the circumstances of the offence without resort to judicial proceedings. These include care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care. Similarly, Beijing rules also ask states not to resort to a formal trial while dealing with juvenile offenders. Article 40 (2) of CRC contains an important list of rights and guarantees that are all meant to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and trial. Article 40(3) and 40(4) of the CRC mentions State parties to avoid using judicial proceedings and exercise the option of a variety of dispositions proportionate to the circumstances of the offence. Most of these guarantees can also be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee elaborated and commented on in its general comment No. 13 (1984) (Administration of justice). Judicial proceedings need not necessarily be seen as confinements and punishments but means to help in the realization of their self-guilt and in turn help in their physical and psychological recovery and social reintegration into an environment that fosters their health, self-respect and dignity.

The Machel Report first formally recognized juvenile culpability in intrastate conflicts acknowledging that children alleged as, accused of or recognized as having infringed penal law should be treated with dignity, given the opportunity to participate in

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680 Ibid, article 40(3)

681 Rule 8(1) and (2) of the Beijing Rules. The rights of participation in a judicial and administrative proceedings affecting the child directly or indirectly must be given due weight age in accordance his age and maturity.

682 UNCRC, article 40(2)(vii) and 40(2)(iv)).

proceedings affecting them benefit from legal counseling and enjoy due process of law.  

**Child Involvement in the Civil Unrest in India**

Children’s involvement pattern raises questions two important questions. First, what should be the prosecution threshold in terms of the nature of the crime committed by a child participant that warrants him/her to be treated as a perpetrator rather than a victim? Second, what should be the established age where such a clause requires to be invoked given that the child’s age of criminal responsibility in India is as low as 7 years?

**The Prosecution Threshold.**

The JJ(C&P) Amendment Act 2006(JJ(C&P) Act 2006) has settled a number of anomalies on which intense debate has pursued. These include, the date of commission offence which is now determined by the child’s age at the time of commission of the offence rather than their age at the time of being produced in front of the JJB. Substitution of the term ‘imprisonment’ for ‘life imprisonment’ remove doubts of possibility of imprisonment and irrevocably establishing the supremacy of the JJ(C&P) Act 2006 over any other law in force.

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Prosecution of child perpetrators is dictated by a number of social and environmental indicators, let alone the nature of the crime. Poor socio economic conditions and weak state infrastructure are conducive enough to expose children to risk and provide fertile ground for the armed groups to recruit them. Due regard has to be given to the environmental realities: protracted period of unrest, risk of recruitment/subsequent recycling of children, and the need to achieve peace through these capacity building efforts. Forced recruitment, weak and insecure socio political environment and the State’s inability to ensure the enjoyment of rights and the extent of participation are equally strong mitigating factors.

Individual culpability in such situations cannot be compared with any other normal settings. Conversely, it cannot be ignored that many post conflict societies reflect a strong desire for justice and accountability, regardless of the perpetrator’s young age (Sierra Leone). The nature of crime committed, the child’s age, the extent of coercion (forced/voluntary) and the community leaning/victim’s (the affected party as a consequence of the child’s actions) response towards such criminal activity will necessitate the need to account a child perpetrator.

The JJ(C&P) Amendment Act 2006 defines a juvenile in conflict with law as a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission. Delinquent crimes include murder; attempt to commit murder, culpable homicide not amounting to murder, rape, kidnapping and abduction, dacoity, preparation and assembly for dacoity, etc. Other common offences include theft, hurt, burglary riots, substance abuse, anti social behavior and status offences. Children alleged to have committed any of the above offences are placed in charge of a special juvenile police unit/officer who produces the juvenile in front of the JJB or to any of its member within 24 hours of the arrest. Simultaneously, the juvenile police officer informs the probation officer and parents/guardians.

687 Juvenile Justice (Care and Protection of Children) Amendment Act 2006 Para 1, Chapter 1 Preliminary.
The situation changes when reference is made to child perpetrators alleged to have committed offences relating to terrorism/as part of armed groups. The arrest is invariably by the armed forces/Police establishing the first point of contact. Apprehension are invariably part of combing operations, hard intelligence apprehension or during an operation/encounter. An apprehended child invariably invites immense hostility of the armed forces and their arrest lay the foundations of possible ill-treatment and violations from the first point of contact. Little regard is given to the child being a victim and serious charges such as waging a war against the state are leveled against the child. Irrespective, if is prudent to establish whether the child can really war a war against the state as a matter of individual culpability. Offences rarely measure to such a magnitude and are rather limited to minor offences to include children’s involvement in rioting, their involvement as messengers, administrative tasks in camps, sentries, and spies or major offences like killing, murder, rape, etc.

Prosecution threshold therefore has to clearly lay down the limits of executive action in terms of framing charges and their conduct against the alleged perpetrator. This will reduce the chances of abuse at the point of contact. Offences like waging a war against the state cannot be leveled upon the child till such time he has an established hierarchy in the organization or shoulders such great responsibility for the alleged act that he has the complete capacity to control. Serious charges are a mere national rhetoric capturing headlines.

Offences inviting punishment till seven years of imprisonment as mentioned in Chapter VI (pertaining to offence against the State), chapter XVI (offences human 17 body) or chapter XVII (offences against property) of the Indian Penal Code (1860) are also too broad to interpret a child’s culpability. Serious offences like rape, murder, kidnapping and mutilation should only label a child as a juvenile in conflict with the

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691 On 9 July 2002, 14 year old Mayanti Raj Kumari, a student of Class VII was arrested for allegedly waging war against the State (under Sections 121 A and 122 of the Indian Penal Code) and POTA and was detained in Ranchi jail and not in a juvenile home as required under the law. http://www.unhchr.ch/indigenous/bp11.doc (04 August 2004).

692 UN Document, General Comment 10, Children’s Right in Juvenile Justice, CRC/C/GC/10 25 April 2007, Para. 24 at 9, ‘According to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.’
law in such situations brushing aside acts like serving as a messenger, an informer or merely carrying out military duties (except active combat) where the child is irrevocably treated as one in need of care and protection. Offences relating to terrorist acts as defined in the Unlawful Activities (Prevention) Amendment Act 2004\textsuperscript{693} (UAPA) include harbouring, conspiracy, raising funds for terrorist acts, member of terrorist gang or organization, holding proceeds of terrorism or threatening witness should not be leveled against children but with the exception of causing death.\textsuperscript{694}

Terrorist act as defined in the UAPA includes:

\begin{quote}
[T]errorist Act.-Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act with the intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or
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\textsuperscript{693} Act No. 29 OF 2004. [29th December, 2004.]

\textsuperscript{694} Ibid. A parallel can be drawn from section 27 of the CrPC (1973) which limits the jurisdiction of the court to offences punishable with death or imprisonment for life for juvenile above the age of 16 years. (This provision is not presently in line with the JJ(C&P)Amendment Act 2006.)
injure such person in order to compel the Government in India or the Government
of a foreign country or any other person to do or abstain from doing any act,
commits a terrorist act.  

Simply being a member of an armed group or an unlawful association should not
invoke culpability issues. Personal jurisdiction should only extend to those
responsible for rape, murder, kidnapping, mutilation or having committed grave
crimes violating the laws and customs of war, like crimes against humanity, genocide
or war crimes as part of armed groups. The only exception being that at the time of
sentencing, the age, vulnerability, and defence as duress and mens rea will be taken
into account as mitigating factors.

Unambiguous categorization of juveniles for commencement of judicial proceedings
will not only limit ill treatment at the point of contact but also expands the idea of
restorative justice. By no means should the state grant blanket immunity to children
for a grave criminal conduct and promote a belief that such accountability measures
merely serve as an opportunity to reintegrate back without even the admission of
guilt, leave alone punishment. At the same time, the competent authority should
continuously explore the possibilities of alternatives to a court conviction.

The Cognizable Age of a Child Perpetrator.

The age of criminal responsibility in India is seven years. Doli Incapax (incapable
of doing harm) and its rebuttable presumption of innocence is 7-12 years. Till the
age of 12 years (age between 7 and 12 years) children as assumed to be free from
criminal responsibility till evidence so proves that the child is mature enough under
the nature and consequences of his act and can be held culpable. Between 12 and
18 years children can be held criminally responsible.
International law is silent on establishing the exact age of criminal responsibility. It is left to the national legislation to define the age by obliging states parties to establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe penal law.’ The General Comment 10 is not specific on defining the age of criminal responsibility but only qualifies that the minimum age of criminal responsibility at below 12 years is not internationally acceptable.

Article 10(2)(b) of the ICCPR also leaves it to the respective State to decide the juvenile age keeping in mind the relevant social, cultural and other conditions.

Beijing Rules adds to the UN CRC principle in noting that that the beginning of that age shall not be fixed too low an age level bearing in mind the facts of emotional, mental and intellectual maturity and defines a juvenile as a child or a young person who under the respective legal system may be dealt with for an offence in a manner which is different form an adult. The Rules leave the discretion upon the respective national legislations to define the minimum age at which a child can be considered as a juvenile.

The Riyadh guidelines on the Rules for the Protection of Juveniles Deprived of their Liberty further expand the definition of juvenile by referring to a person under the age of 18 years but are not binding.

The capacity to infringe penal law indicates two approaches of the Convention. First, the convention has left it to the concerned states to decide on the age of criminal responsibility recognizing the centrality of history and culture of each state. Second, the convention has lent enough margin to the respective domestic legislation to be respected.

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701 Similar provisions exist in Bangladesh, Pakistan and Sri Lanka with the minor exception of age. South Asia and the Minimum Age of Criminal responsibility, UNICEF, South Asia, at 4-5.
702 UNCRC, Art. 40(3)(a)
704 Rules like Maldives and Pakistan in South Asia too have th Minimum Age of Criminal Responsibility as 7. Sri Lanka has 8 years, Bangladesh (9 years), Bhutan and Nepal (10 years) while Afghanistan has 12 years.
705 Ibid, rule 4.1.
706 Ibid, rule 2(2)(a).
707 Rule 11(a).
708 UNCRC, supra n. 84.
discern the acceptable anti social behaviour vis-a-vis the child’s social responsibility and maturity that would invite culpability.

South Asian States have an extremely low age of criminal responsibility. The Committee on the Rights of the Child has raised serious concerns in concluding observations in respect to each of the states.\textsuperscript{707} States like Maldives and Pakistan in South Asia have the Minimum Age of Criminal Responsibility as 7. Sri Lanka (8), Bangladesh (9), Bhutan and Nepal (10) and Afghanistan (12). In Bangladesh, Nepal and Sri Lanka children between the age of 16 to 18 years are jointly charged with adults can be tried by an adult court.\textsuperscript{708} Children above the age of 16 can be given life imprisonment and even death penalty in Bangladesh.\textsuperscript{709}

There are provisions for diversion in many of these States but it does not include serious offences committed by children. There are no provisions limiting the powers of the Police to arrest or search in Bhutan but the Royal Bhutan Police reportedly does not take the child in custody for petty offences. On the other side, the Police issue a warning or counsel the child for the first offence. For second offence, the child is again warned and the issue is discussed with his/her parents and if he continues to commit such offences he is then arrested. Similarly in Maldives, the police and the prosecutors are given discretionary powers to divert the children in conflict with the law from the formal justice system but this is not applicable for serious offences like manslaughter, murder, robbery or other serious offences. Sri Lanka does not have a formal diverting process but the Police refers minor offences to the before formal proceeding can be initiated.

Child recruitment is limited to fifteen years and above for the state armed forces while it is illegal for armed groups to recruit children.\textsuperscript{710} International humanitarian law

\textsuperscript{708} See Improving Protection of Children in Conflict with Law in South Asia, A Regional Parliamentary Guide on Juvenile Justice, at 12.
\textsuperscript{709} Id.
\textsuperscript{710} UN Doc. E/CN.4/1998/102 and Lisa Carlson et.al. Children in Extreme Situations Proceedings from the 1998 Alistair Berkley Memorial Lecture as part of Working Paper Series (LSE Development Studies Institute, London School of Economics and Political Science, No.00-05, 2000 at 41). There was an initial recommendation of increasing the age of participation in conflict (as part of armed groups or government) to 18 years in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC) but state consensus could not be reached. Many governments and NGOs argued for an age limit of 18 for all activities of child combatants. However, a
addresses the legally acceptable age of participation in hostilities as above the age of fifteen years while making no reference to the age of criminal responsibility.\textsuperscript{711} Conscription or enlistment of children under the age of 15 into armed forces, or to use them to participate actively in hostilities is a war crime under the International Criminal Court Statute.\textsuperscript{712} Under Article 7 of the statute of the Special Court of Sierra Leone the age of juvenile accountability for young persons above the age of fifteen years with the injunction that only those who were most responsible. The Special Court of Sierra Leone has held that only those with the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law\textsuperscript{713} and, crimes as part of a widespread or systematic attack against any civilian population\textsuperscript{714} fall within the jurisdiction of the Special Court. However, these phrases do not establish tests or thresholds that must be reached before prosecution can proceed\textsuperscript{715}. They are, rather, guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.\textsuperscript{716} Many commentators have argued that this injunction make the clause redundant for children since it is most unlikely that any child can be held most responsible.\textsuperscript{717}

Prosecution threshold therefore gives a margin between the ages of 12 to 18 years for child perpetrators to be held criminal liable.\textsuperscript{718} It is difficult to argue that a 12 years old child can be equally held liable as 16 years old. Their capacity to understand the crime and its consequences greatly vary. Young children are more immature and irresponsible so as to consciously respond to informed choices and that they are more malleable and readily influenced by outside factors (including peer pressure). Developmental changes are more likely to dictate the child’s ability to understand the distinction of right and wrong and the gravity of the offence committed. Behavioral changes reflect the child’s capacity to feel accountable and under the impact of his actions on others which includes his ability to understand reasons of the act allegedly

\textsuperscript{711} See Art. 77(2) 1977 Geneva Protocol I; Art. 4(3)(c) 1977 Geneva Protocol II.  
\textsuperscript{712} Art. 8(2)(b)(xxvi) and Art. 8(2)(e)(vii))  
\textsuperscript{713} Court Statute, art. 1,  
\textsuperscript{714} Ibid, art.2 .  
\textsuperscript{715} Ilene Cohn, The Protection of Children and the Quest for Truth and Justice in Sierra Leone, Journal of International Affairs, Fall 2001, 17.  
\textsuperscript{716} Letter dated 31 Jan 2001 from the President of the Security Council addressed to the Secretary General, UN Doc. S/2000/915 (31 Jan 2001), Para 1.  
\textsuperscript{717} See supra n. 69.
committed. International humanitarian law and the OP-0CRC also establish the age of acceptable participation as 16 years (as part of government forces). Similarly, the Special statute of Sierra Leone examines culpability issues of persons between the above the age of 15 years.

Prosecution threshold in terms of crimes committed and the age of criminal responsibility should be affixed at 16 years. A view equally shared during the discussions in the upper house of the Parliament in India (Rajya Sabha) on the Children Bill 59 when a member noted sixteen years to be a notable age when children can be exploited for terrorism. While the age of 12 years would be too low an age, the age group between 16 -18 years should invoke the culpability clause. The reasons include:-

Adolescents who commit capital crimes before the age of 16 exhibit disabilities in areas of reasoning, judgment and control of their impulses and do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

Legally defined age in the UN CRC and the Option Protocol II to the Four Geneva Conventions also set the age for recruitment above fifteen.

The special Statute of Sierra Leone also includes persons above the age of fifteen years with its jurisdiction. (article 7)

The International Criminal Court makes conscription or recruitment of children under the age of 15 into armed force as a war crime. (article. 8(2)(b)(xxvi) and art. 8(2)(e)(vii) ).

The juvenile offender considered for trial is alleged to have been charged with serious crimes and the judicial process is in fact a last resort. However, judicial proceedings need not necessary be seen as confinement or punishment but a process of realization of self guilt amongst the child perpetrators to help their physical and psychological recovery and social integration into an environment that fosters their health, self respect and dignity. The process also helps in determining the

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721 See infra, Prosecution threshold.
722 UNCRC, art.39.
psychological assessment of the child to determine the level of risk he/she poses to the community. Merely making procedures for rehabilitation for child perpetrators alleged to have committed serious offences will not be too beneficial. Psychological recovery will wane away with the admission of guilt and afford him a fair trial affording a successful rehabilitation cum reintegration.

**Juvenile Status Determination.**

Child apprehension in terrorist acts or as part of armed groups invokes an inherent hostility of the armed forces/Police. Inaccurate estimation of age risks the child being treated as an adult, deprivation of liberty, detention and risk of ill treatment. Incommunicado detention is likely since majority of engagements take place away from populated areas or away from the accused (child’s) home. Weak social structure and limited presence of NGOs risks the child being booked under special legislations with sweeping powers to the Police to detain giving rise to ill-treatment and by the time the child is produced in front of the Board enough harm would have already been done to the child. The first onus to establish the age of the juvenile rests on the police before the individual is produced thereby leaving it to the court to carry out a status determination. Age determination is extremely important between the ages of 16 - 18 years since child-adult distinction begins to blur on physical characteristics and these children are equally suited to form part of terrorist organization/armed groups. In the case of *Gopinath Ghosh v State of West Bengal*, instructed magistrate to investigate the age of the accused if it appears to be less than 21 years. Similarly, it has been advocated that if the police is not able to justify the age of the accused, the court should consider a medical examination in the absence of any documentary evidence.

Segregation from adults is the foremost concern at this comes with the correct assessment of age. Inaccurate estimation of the age risks the child being put through the criminal justice till his/her age assessment is challenged in the court. Till then much harm has already been done. Most of the children involved in such crimes come

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723 Example of the UAPA of confession.
from very modest background. Their capacity is represent is limited and often left at the mercy of the Police. Rarely do NGOs involve themselves and the parents/guardians have extremely limited socio economic capacity to confront the coercive powers of the Police. Although the JJ(C&P) Act 2000 does make provisions obligating Police Stations to have a special juvenile Police Unit to care over the charge of the child but the system rarely succeeds in practice. Most Police stations do not have any such provision like a Juvenile Police. It is usually a table and a desk for a Juvenile Police unit/officer within the same office space. In effect, it is the same Police officer sitting on a different table.

High accountability guidelines need to be issued on the assessment of age. Accountability assumes importance because Police will like to retain custody and extract intelligence by establishing a higher age than to lose control over the individual by sending him to an observation home and risks creating an intelligence vacuum. Juvenile plea should be allowed during any stage to include at the time of apprehension, recording of statement by the magistrate, at the beginning of the trial, after conviction, or at the time of the appeal. The best practice is to oblige the Police/armed forces to ascertain the age as 21 years as against 18 years for initial segregation from adults till the courts establish the exact age of the accused.

This is also in line with international case law and in the best interest of the child. 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

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727 Analysing the economic background of these juveniles, the report found that maximum around 68.4 percent belonged to poor families whose annual income was below Rs.25,000. Available at http://www.thaindian.com/newsportal/uncategorized/crime-by-juveniles-on-rise-in-india_100133904.html. Last accessed on 10 February 2011.
728 (1976) 3UP CrC 16 as digested in Quinquennial Digest 1976-80.
733 Ibid at 786.
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 defenseless girls. Trial Chamber considered the youth of several of the victims as aggravating factors and included 19 years as an aggravating factor by reason of its closeness to the protected age of special vulnerability as ‘relatively youthful.’

Legal Issues.

Treatment of Children from the Point of Contact.

A child participant enters the justice process as a result of apprehension by the armed forces/Police, surrender or as part a rehabilitation scheme. Segregation of children from adult must grant benefit to all appearing to be 21 years until proved otherwise by production of documentary evidence except through affidavit and only on charges of commission of grave crimes. With the exception of the above classification all other children must immediately sent to the children home as notified by the Government. The juvenile Police officer must immediately take charge of the child perpetrator giving him full protection and support without admonishment of his crime or its consequence. While these juveniles are culpable for their criminal acts they should not be penalized for such actions: instead the aim is to persuade them away from the enticement of crime.

The juvenile police have to produce the juvenile before the juvenile justice board within 24 hours submitting the report citing the juvenile’s name age and address, the circumstances of apprehension. The juvenile police officer has to also submit that the juvenile was lodged in a Police lockup, the juvenile’s parent or guardians and they have been informed about the juvenile’s arrest. The reasons for delay if the juvenile is produced after 24 hours of apprehension.

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734 Ibid at 874.
735 See supra, prosecution threshold.
737 Children and the Juvenile Justice System, supra n. 118 at 40.
The prosecution at this stage must treat the protection of children as paramount, including the risk of further trauma and victimization. It should also make an early assessment of the ability of children to give evidence and form an appreciation of their developmental level—a process that should include consultation with experts and specialists, where necessary.\(^\text{738}\) By making the decision about children's suitability to testify at the earliest opportunity, the prosecution will ensure that the VWU has sufficient time to put in place appropriate support measures for them.

Pending the inquiry the juvenile has to be kept in an observation home or be granted bail following which the juvenile Police will not be given custody of the child.\(^\text{739}\) The complete inquiry is to be completed within four months and subsequent extension is through a reasoned order.\(^\text{740}\) The trial commences with the production of the juvenile before the Bd, when the charge-sheet is filed or when the juvenile plea is recorded.\(^\text{741}\) The Supreme Court has also held that the case against the juvenile will be closed if he has committed an offence punishable with less than seven years of imprisonment and his inquiry has not been completed within three months from the filing of the charge-sheet.\(^\text{742}\) Following the charge-sheet the probationary officer is to submit a social investigation report (SIR) highlighting the background of the juvenile, parent’s suitability to take over the child and the juvenile’s subsequent rehabilitation. The SIR assumes importance since the JJB takes proper cognizance of the report before passing an order with regard to the rehabilitation of the juvenile. The juvenile’s plea is recorded after he/she having been duly informed about the prosecution case. The juvenile’s admission calls for the passing of the order under Section 15 of the Act. The bd has the discretion to continue with the inquiry despite the juvenile’s admission of guilt if it is not in the interest of the juvenile or there are reasons to believe that it is due to coercion. While on the other hand the juvenile is allowed to alter his/her plea.

Prosecution witness are summoned when the juvenile pleads not guilty but is not accepted by the JJB while the JJB follows the procedure laid down in the CrPC for


Note 101.

\(^{739}\) JJ(C&P) Amendment Act 2006, Section 14(1)


\(^{741}\) Ibid
trials in summon cases. Witnesses are examined by the prosecution and cross examined by the juvenile lawyer. Balliable/non balliable warrants are issued by the JJB if the prosecution witnesses do not report, or else the prosecution is asked to close the case. Similarly, the defense witnesses are examined. On closure of the case, the juvenile’s statement is recorded and also explains any portion of the evidence that incriminates. The recording is not under oath nor is he liable to for punishment for giving a false answer.

The right to participation and the right to be heard are well established in the JJ(C&P) Act 2000. The Act gives the juvenile the opportunity to lead defense if he so desires and gives out his statement. Similarly, article 12(2) of the UN CRC equally affirms the opportunity to the child to be heard in any judicial or 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. The right to participation expands to the comprehension of charges, possible consequences and penalties and the freedom to provide account of events and appropriately make decision about evidence testimony and the measure(s) to be imposed. Additionally, participation also includes the right to the child to have examined the witnesses and express his view which have to be given due regard as per child’s age and maturity. Participation However, child’s right to examine

The right to a legal counsel is not mandated in the JJ(C&P) Act 2000 but has been duly recognized by Indian courts. There is no explicit mention in the UN CRC but article 14(b)(3) of the ICCPR obliges state parties to ensure that the child and his/her

743 JJ(C&P) Amendment Act 2006, section 54

744 Also see Beijing Rules, Rule 14, which provide that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely.

745 UN CRC article 40(b)(ii). Also see General Comment 10 on the subject article where the committee notes, ‘The guarantee in article 40 (2) (b) (iv) of CRC underscores that the principle of equality of arms (i.e. under conditions of equality or parity between defence and prosecution) should be observed in the administration of juvenile justice. The term “to examine or to have examined” refers to the fact that there are distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials. In the latter, the defendant is often allowed to examine witnesses although he/she rarely uses this right, leaving examination of the witnesses to the lawyer or, in the case of children, to another appropriate body. However, it remains important that the lawyer or other representative informs the child of the possibility to examine witnesses and to allow him/her to express his/her views in that regard, views which should be given due weight in accordance with the age and maturity of the child (art. 12)."
assistant must have adequate time and facilities for the preparation of his/her defence.\textsuperscript{747}

**Treatment Concerns: Child Perpetrators**

The Juvenile Justice Board in the JJ(C&P) Act 2000 consists of a Metropolitan Magistrate or a Judicial Magistrate of the first class and two social workers. One of the social workers shall be a woman and the Magistrate should have training in child psychology\textsuperscript{748}. The distinct feature of the adjudicating authority is that it is now a Bench. The primary inquiry of whether the child did commit the offence as mandated by a magistrate’s training could now be displaced by a social workers inquiry, which could focus in on why the child committed the offence, and how does one redress the same\textsuperscript{749}. Such an approach would help remove the criminal mindset of the inquiry and the social worker’s approach can also help in projecting a more humane approach by giving considerable weightage to the mitigating circumstances in the administration of juvenile justice. In reference to the composition of the Juvenile Justice Board in the JJ(C&P) Act 2000, it is adequate.

The composition of the JJ Bd\textsuperscript{750} stems from a strong socio legal approach. Equal importance has been Magistrate and the social workers who jointly constitute the competent authority. Unlike the JJ Act 1986 the decision the decision of the majority

\textsuperscript{747} The Committee on the right of the child has clarified in the General Comment 10 that 40 (2) (b) (ii) of CRC does not grant a right to a legal counsel. The Committee has noted, ‘States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.’

\textsuperscript{748} The States in the formulation of their rules have refereed to the mandatory requirement of this qualification. For example, Andhra Pradesh J J (Care and Protection of Children) Rules 2003 refers that Magistrates should have necessary aptitude and special knowledge/training in child psychology…

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\textsuperscript{750} The JJ Bd consists of a Metropolitan Magistrate or a Judicial Magistrate of the first class in a non-metropolitan area, and two social workers on of whom at least is a woman(Section 4(2)). The magistrate is mandated to have special knowledge or training in child psychology or child welfare while the social worker must have at least seven years experience in health, education or welfare activities pertaining to children(Section 4(3)).
prevails.\textsuperscript{751} When there is no such majority, the decision of the principal Magistrate prevails.\textsuperscript{752} The social investigation report is a strong child friendly tool to help the bd to rely on the socio-economic circumstances that forced the juvenile to perpetrate such crimes and help sentence the child towards an alternative system of justice and accountability through diversion and restorative justice with preference towards community based rehabilitation.\textsuperscript{753} Despite the approach there are concerns on the treatment of children from the point of contact till the juvenile is produced before the JJB. These include:-

\textbf{Deprivation of Liberty, Arrest and Treatment.}

Deprivation of liberty means the placement in any kind of establishment – penal correctional, educational or protective- from which a child cannot leave at will.\textsuperscript{754} The JJ(C&P) Amendment Act 2006, obliges the juvenile police unit to produce the juvenile before the bd without any loss of time but within a period of 24 hours of the apprehension excluding the time necessary for the journey from the place the juvenile was apprehended.\textsuperscript{755} The Act unequivocally notes that the juvenile in conflict with law shall not be placed in a police lockup or lodged up in a jail.\textsuperscript{756} The UNCRC puts three binding obligations upon state party. First, no unlawful or arbitrary detention and that arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.\textsuperscript{757} Second, humane treatment and respect for the inherent dignity of the human person taking into account the needs and age of the person. Third, separation of children with adults and the right to maintain contact with family.

The obligation upon the juvenile police unit to produce the juvenile in front of the JJB within 24 hours and not to put the child in a lockup or in a jail are the only two substantive provisions in the JJ(C&P) Act 2000 towards child treatment. The Act puts

\textsuperscript{751} JJ(C&P)Amendment Act 2006, sec 5(3).
\textsuperscript{752} Ibid
\textsuperscript{753} UNICEF ROSA, Improving the Protection of Children in conflict with Law in Sought Asia 2006 at 1, ‘Research indicated that imprisoning children for minor crimes decreases their chances to become productive, contributing adults; it also shows that youthful offenders sent to prison have higher rates of recidivism than those given alternate sanctions.’
\textsuperscript{754} Improving the Protection of Children in Conflict with Law in South Asia, A regional Parliamentary Guide on Juvenile Justice, at 12.
\textsuperscript{755} JJ(C&P) Amendment Act 2006, Amendment section 10.
\textsuperscript{756} JJ(C&P) Amendment Act 2006, Amendment section 10.
\textsuperscript{757} UNCRC, article 37(b).
no obligation upon the police to ascertain the age of the child, ensure that the detention or arrest is not unlawful or arbitrary or a binding obligation to treat the child humanely. The absence of such obligations manifestly increases the chances of ill treatment, incommunicado detention and institutionalization. With no legal obligation to ascertain the age of the apprehended person, there are little chances that juveniles at a marginal age (16-18 years) are likely to be categorized as juveniles.

Lawful apprehension is most critical since the conditions are hostile and there is risk of the child being treated ill treated given the perception of the police and the armed forces. Unlike normal situations of law and order, children apprehended/arrested in these high security situations rarely get support from NGOs or the locals fearing national security issues. Parents often being poor rarely rally behind their children but are at the mercy of the police. Unlike the provisions of the JJ Act 1986 wherein there was prohibition of keeping children in the police station under any circumstances, the JJ(C&P) Act 2000 substitutes the clause obligating that the children will not be kept in police lock up or prisons. This provision does not prevent children from being detained in the Police station and thus raises serious questions on their treatment. The absence of any kind of clear directions on the treatment of children in such acts of terrorism/insurgency simply gives enough powers to the security forces at the behest of national security concerns. Even the established procedure begins to fail in practice. The absence to juvenile police units, the lack of familiarity of the Police and the uniformed forces on the treatment of the juveniles leads to children being held in Police custody for arbitrarily long periods. No all Districts have a Police Station with a separate juvenile facility.

The absence of obligation for the police to reasonably establish the age of the young person risks the apprehended child at a marginal age (16-18 years) to be treated as an adult thus exposing him/her to questionable methods permitting indefinite detention under anti terror legislations, coercive interrogation and ill treatment from the point of contact. The absence/negligible involvement of the NGOs further precipitate abuse to traumatization.

Although, procedure followed for investigation, enquiry or trial of any offence under Section 4 of the CrPC is not applicable under the JJ(C&P) Act 2000 since it is deemed
as a special law. It is in fact seen as a human rights legislation which seeks to establish procedures for investigation, enquiry or trial of an offence relating to children with the principle aim of their reformation and social rehabilitation.\footnote{Criminal Law Journal, Journal Section 174.}

However, there are no substantive obligations within the JJ(C&P) Act 2000 obligating the Police forces to ensure no violations of human rights on grounds of deprivation of liberty, arrest, detention or imprisonment. The interpretation of these terms comes into effect when these rights are examined through the preambular note of the JJ(C&P) Act 2000 which refers to the adherence to the UN CRC\footnote{The reference to the UNCRC is also there in the Statement of Object and Reasons.} in securing the best interest of the child in addition, the preamble the JJ(C&P) Act 2000 also refers to the Beijing Rules, the United Nations Rules for the Protection of Juvenile Deprived of their Liberty and all other international instruments.\footnote{The inclusion of these international Conventions and other principles was to bring the operation of this act in conformity with international agreements, decision and ratified treaties by the State under Article 353 of the Indian Constitution.}

There is no inclusion of these substantive rights within the body of the Act which leaves much to be desired toward the fulfillment of these important rights. Although the preamble is the key to interpretation of the provisions of the Act, but the intention of the legislature is not necessarily to be gathered from the preamble taken in itself, but to be gathered from the provisions of the Act.\footnote{See Ramashraya v. District Panchayat Raj Officer, AIR 1998 All 87 at 91.} If however, the language of the Act is clear, the preamble cannot be a guide, but where the object or meaning of the provisions of the Act is not clear then an aid from the preamble can be taken into consideration.\footnote{Id.} Similarly in the case of\footnote{Kisan Govindrao Walke v. State of Maharashtra, 1984 Mah LJ 162, (Bom).} Kisan Govindrao Walke v. State of Maharashtra,\footnote{Kisan Govindrao Walke v. State of Maharashtra, 1984 Mah LJ 162, (Bom).} the court ruled that if the language of the statutory provision is clear and unambiguous, the Statement of Objects and Reasons cannot be utilized for interpreting the provisions.

**Safeguard from Disappearances.**

Disappearances of persons after apprehension by State Forces are very serious but common violations. In most cases it a form of reprisal or a procedural time lag that conveniently increases chances of disappearances. Paragraph 13 of the Juvenile Justice (Care & Protection of Children) Act, 2000 (Information to parent, guardian or probation officer) and Article 9(4) of the UN-CRC aims at preventing this abuse. The
information to the parent or the guardian in the Juvenile Justice (Care & Protection of Children) Act, 2000 is merely a procedural response obliging the Police to inform them ‘as soon as may be after the arrest’ but only ‘if he can be found.’ There is no direct obligation upon the state to inform under any circumstances with a stipulated time. Similarly, the is a time lag between the apprehension and informing the parent/guardian the operation of Article 9(4) and Article 40(2)(b)(ii). There is no doubt that there will be a time lag and it is compounded due to the lack of resources but this makes a child susceptible to abuse in the absence of the statutory obligations to inform within a specified time. For example, Georgia changes its law which used to create 2 hours vacuum during which torture could take place.

The risk of disappearance is further amplified when apprehension are made by the armed forces as part of combat operations where the armed forces hand over the juvenile to the Police. The Supreme Court of India in the Nagaland People’s Movement for Human Rights versus the Union of India ruled that the period of custody to 12 hours excluding the traveling time. This is not included in the 24 hours period within which the Police has to produce the juvenile in front of the JJB. Such arrests not only results in the deprivation of liberty, but manifestly increases the chances of disappearances. The issue is well amplified in the case habeas corpus case of Luithukla v. Rishang Keishing, in which the party sought to ascertain the whereabouts of a man who had been arrested five years previously by the army. The court found that the man had been detained by the army and that the forces had mistaken their role of "aiding civil power".

**Right to Silence and the Presumption of Innocence.**

The right to silence at the time of apprehension finds no mention in the JJ (C&P) Act 2000 or the UN CRC. Although the UN CRC legally binds states to ensure that a child is not compelled to give testimony or to confess guilt and clarifies that is included the right to remain silent in the General Comment 10 while amplifying

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766 Ibid, section 13(a)
767 UN Document, Violence Against Children in Conflict with the Law, (Thematic report, UN Secretary General’s study on violence against children, Geneva 2005) at 8.
768 (1988) 2 G.L.R. 159
article 12 of the UN CRC. The effective recognition and practice of the principle of the right to silence and innocence is the key to ensuring fair treatment during the pretrial stages. It also reduces the chances of compelling a child to give testimony/confession or acknowledge guilt or extract information through coercion or ill treatment. Compelling is not only limited to the use of physical force but means of mental coercion tantamount considering the age of the child, duration and extent of the interrogation and the reminding fear of imprisonment or ill treatment. Conversely, coercion also includes luring the child with incentives of a less punishment or release without filing a case/charge-sheet. Both these forms of coercion have a deep psychological impact on the child without the guarantee of an independent aide in terms of parents, guardians, social workers or probation officers. The absence of such a right increases chances of a child’s vulnerability towards coercive interrogation techniques. (Legal counsel)

The violation of this right and non compliance of the obligation to inform the parents/guardians manifestly exposes the child to ill treatment (physical and mental), intimidation and humiliation. Simple police questioning becomes coercive for the lone child in the presence of adults (police/armed forces) and has a harmful impact on the child.

**Speedy Trial.**

No time stipulation has been affixed on the filing of the charge-sheet in the JJ(C&P) Amendment Act 2006 which manifestly affects the child’s right to a speedy trial. The CrPC also does not lay down any time specification but states that an individual be released on bail if the charge-sheet is not filed within 90 days (for offences relating to death, life imprisonment or for offences inviting a term of ten years imprisonment) or 60 days (for any other offences) of the arrest, the individual will be released on bail. Although, Section 14(2) of the JJ(C&P) Amendment Act 2006 has put an obligation on the Chief Metropolitan Magistrate to review pendency of cases every six months and invested the powers to increase the frequency of sittings of the bd. Article 37 (d) of CRC obliges states to ensure where the child deprived of liberty has

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769 UN Document, UN Committee on the Right of the Child, General Comment 10(2007), CRC/C/GC/10, 23(e), Para. 43 at 14.
770 UNCRC, article 37(a) and UNCAT, article 15.
771 See CrPC, section 167.
the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. The term “prompt” is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term “without delay” (art. 40 (2) (b) (iii) of CRC), which is stronger than the term “without undue delay” of article 14 (3) (c) of ICCPR. The Committee recommends specified time limits should be set commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body but without compromise of human rights and legal safeguards during the entire legal process. Similarly, rule 20 of the Beijing Rules recommend that each case from the outset be handled, expeditiously without any delay.

**Right to be Informed.**

There is no direct legal obligation to inform juvenile offender the charges leveled against him/her. Section 13 of the Act only refers to informing the parent/guardian if can be found and the probation officer. The UN CRC obliges to inform promptly and directly to the juvenile, and if appropriate, through his or her parents or legal guardians. The convention further calls for legal or other appropriate assistance in the preparation and presentation of the case. The clause, ‘directly and promptly’ refers to making the child understand the charges and its consequences. This has to be amplified through an oral explanation rather than handing over the document and the responsibility rests on the police, prosecutor or the judge. The authorities cannot leave it to the parents, the legal guardians, the child’s legal counsel or any other assistance and that they cannot serve as alternate to communicating the information to the child.

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772 UN Document, UN Committee on the Right of the Child, General Comment 10(2007), CRC/C/GC/10, Para 51 at 15-16.  
773 Beijing Rules, rule 20.  
774 UN CRC, art 40(2)(b)(ii). Also see UN Document, UN Committee on the Right of the Child, General Comment 10(2007), CRC/C/GC/10, 23(e) at 12. ‘Prompt and direct means as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. But also when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charges(s) that may justify this approach.’  
775 Ibid.  
776 Ibid.  
777 Ibid.  
778 Ibid.
Surety.

The situations leading to the arrest or apprehension of such children would be different and therefore, is the procedure of bail for non bailable offences as mentioned in Para 12 of the Juvenile Justice (Care & Protection Of Children) Act, 2000. correct and in the best interest of the child in question since there are greater chances of the child in question again coming in contact with the armed opposition groups or for the rest of the children in the community where he will stay or the child in question would again come in contact with the armed opposition group.

Trial Stage.

Right to Privacy.

The child’s right to privacy is protected in the JJ(C&P) Amendment Act 2006. The section prohibition of name, address, school or any other particulars or details (child and juvenile) in newspapers, magazines, news sheets or visual media of any inquiry provided there are good reasons to be recorded in writing if the competent feels that it is in the interest of the juvenile. Article 16 and 40 (2) (b) (vii))The UN CRC further amplifies the right to privacy by including it in all stages of the proceedings: the initial contact with law enforcement up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty.  

The Committee further expands the view recommending states parties to introduce rules which would allow for automatic removal of the child’s name from the records upon reaching the age of 18 years, or for certain limited, serious offences where removal is possible at the request of the child. Similarly, the Beijing Rules expand article 40 of the UNCRC by noting that the child’s right to privacy shall be respected all stages. The aim is to prevent harm to the juvenile by undue publicity, its effects of stigmatization and its subsequent impact on the child’s capacity building in terms of education, work, health, etc.

The right to privacy in respect of child perpetrator requires an exception to be created as deemed fit by the competent authority. This refers during the trial/sentencing stage.

779 UN Document, UN Committee on the Right of the Child, General Comment 10(2007), CRC/C/GC/10, 23(e) , Para. 64-67 at 18-19.
780 Ibid.
781 Beijing Rules, Rule 8(1)and (2).
where the child statement or his admission of guilt in front of the community (including the victim/victimized community) as a procedure for truth and reconciliation and is served as a sentence against the juvenile before he is sent for rehabilitation and reintegration. Since the age of child perpetrators is above the age of 15 years, they are more likely to be aware and conscious and such an admission.

**Individual Culpability**

Juvenile delinquency cannot be compared to adult criminal trials in many respects. The juvenile proceedings address the acts from the perspective of rehabilitation as against being punitive in nature. On the other hand the procedures of arrest, the procedures adopted by the police in first getting the child to the Police Station, the charges being read out to the child and the he/she entering the plea of "guilty" or "not guilty" are parallel to the conforming standards adopted when adults are involved. The child at this stage also exercises the right to a counsel as an adult.

The Juvenile Justice Board has the powers conferred by the CrPC 1973(2 of 1974) and has the exclusive jurisdiction to deal with juvenile offenders with a wide spectrum of powers ranging from care and protection, rehabilitation to the possibility of imprisonment. However, the disposition proceedings focus on the needs or the best interest of the child where the hearing allows the court to determine what is best for the child: whether he can be rehabilitated adequately or institutionalization is needed. Sentencing therefore replaces alternate forms of non punitive actions within the ambit of the mitigating factors which influenced the child’s conduct with strong inclination towards his/her defense as duress and mens rea. This includes the mens rea to join a warring faction and the mens rea to commit the crime.\(^782\) The JJB disposing the case against the juvenile that no such order is passed in which the juvenile’s human rights and legal safeguards are violated, particularly article 37 of the UNCRC. Notwithstanding, due regards must be given to issues relating to deprivation of liberty through institution care vis-à-vis creating conducive condition of his recycling and the limited capacity of the parents/guardians and a week security environment after securing the juvenile’s release. The disposition options include:-

\(^782\) Joshua A. Romero, The Special Court For Sierra Leone And The Juvenile Soldier Dilemma, Para 40 at 16.
• Release after advice or admonition after counseling to parent/guardian/child.
• Participation in group counseling.
• Perform community service.
• Pay fine (if above 14 years).
• Release on probation under the care parent/guardian /fit person executing a bond.
• Release on probation under care of a fit institution.
• In case of 4, 5, 6, in addition place under the supervision of a probation officer.
• Send to a special home for minimum of two years in case of a juvenile above 17 years but below 18 years (no maximum age limit prescribed) or in cases till he ceases to be a juvenile.  

Rehabilitation and Reintegration.

Rehabilitation and reintegration back into society is the central idea of the juvenile justice process and both are concurrent. Restoration is not an immediate solution given the circumstances of child perpetrators and the weak social environment. Adoption, foster sponsorship or after care with parental control involve security to the child and/or increases chances of recycling of the child in a weak social environment.

Institutional care deprives the child of his liberty and social confinement negatively affects their ability to reintegrate into their community. The JJ(C&P) Act 2000 provides for a period not less than two years with respect to the child who is over 17 years and below 18 years while in other cases till he/she ceases to be juveniles.

- Minimizing criminal contact in a weak public safety environment is the key to institutionalization but has to be carefully balanced against fears of isolation and stigmatization from the very society he/she is to be integrated.
- Capacity building and mainstreaming. Education, health and skill development –financial capacity building.

785 Ibid, ‘Research indicates that imprisoning children for minor crimes decreases their chances of to become productive contributing adults; it also shows that youthful offenders sent to prison have higher rates of recidivism than those given alternate care’
Integration of government sponsored programmes.
Empowerment initiatives like in the case of surrendered militants.
Progressive integration.
Monitoring and evaluation post integration.

**Recommendations.**

The first time the question to bring the perpetrators to justice for recruiting children for acts of terrorism came up in the Parliament was during the tabling of the Children’s Bill 59 which called for severe punishments for adults who were responsible misuse of children in acts of terrorism. However, without any specific reference to the adult involvement in such heinous acts, the JJ(C&P) Act 2000 provided that all offences against children were cognizable offences under the JJ(C&P) Act 2000.787

The spirit of treatment of children in the juvenile justice process revolves around three fundamental issues: child’s sense of dignity and worth, child’s respect for the human rights and fundamental freedoms of others, age of the child to promote the child’s reintegration and assuming a constructive role in society and, prohibition, prevention and protection from all kinds of violence. However, treatment of the child from the point of contact till his/her production in front of the JJB is the most critical period where the child is subjected to abuse. The Act fails to prevent the possibility of abuse from the point of contact against children by remaining vague on the direct statutory responsibility of law enforcement agencies towards children in terms of age assessment, the obligation to inform (parents/guardians) or immediate categorization of children (children in need of care and protection or in conflict with law) take immediate measures for the treatment of the child without resorting to judicial proceedings or measures in the context of judicial proceedings thereby preventing violation like the deprivation of liberty or deprivation only as a matter of last resort.

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786 See Ved Kumari, The Juvenile Justice System in India, from Welfare to Rights, 2004, Oxford University Press at 115. The Children’s Bill 59 extended only to Union Territories orities
787 See Ved Kumari, The Juvenile Justice System in India, from Welfare to Rights, 2004, Oxford University Press at 116. Maneka Gandhi while supporting the idea of more serious punishments for offences against children in principle, did not accept any suggestion for increased punishment in the proposed legislation (JJ(C&P) Act 2000). She said that the making of all offences against children as cognizable was the first step taken under the JJ(C&P)B in this direction.
National Policy Guidelines.

The recent Protocol for Police and Armed Forces in Contact with Children in Areas of Civil Unrest and NCPCR document on the protection of Children's Rights in Areas of Civil Unrest are some of the key documents issued by the State on the protection and victimization of children. There is now a need for framing statutory rules and regulations affixing responsibility of law enforcement officials towards children.

A child centered approach based on restorative justice, diversion needs to be implemented which include guidelines for all actors in the juvenile justice process. The policy should include:

- Treatment of children from the point of contact till the production of the child in front of the JJB.
- Model rules for the law enforcement agencies including accountability guidelines (age determination, prohibition of ill treatment, no interrogation, no detention in Police station, explicit restrictions on the use of force, onus to inform the parents/guardians, etc). These guidelines should requires the Police to attest compliance of these rules at the time of producing the child before the JJB.
- Guidelines for compulsory information and explanation to be given to the child on his/her rights, and on procedures and rules at each stage of the process.
- Alternates to institutional care.
- Distinct categorization of a child in conflict with the law from those in need of care protection.
- Mandatory birth registration.
- Rehabilitation and reintegrati5on through financial empowerment.
- Powers to divert and examine traditional dispute resolution mechanisms to include panchayats, school teachers, peer educators etc.789

789 UN document, Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law (UNICEF,ROSA, 2006) at 19. In Maldives, "the police and prosecutors are given discretionary powers to divert majority of the children in conflict with the law from the formal justice system. Formal investigation and court proceedings should only be used for children who commit serious offences (murder, manslaughter, armed robbery or other serious violent crimes) or who are repeat offenders or who do not admit the offence or where previous diversion attempts have been unsuccessful. All other children should be dealt with informally through police cautioning or referral to
- Good practices guidelines and partnership building initiatives for law enforcement agencies, judiciary, NGOs, village panchayats, teachers and care givers.
- Functioning guidelines to JJB to reduce formality in procedures.
- Coordinated reform strategies to include organization set up, functioning of JJB, juvenile police unit, financial capacity building initiatives closely integrated to rehabilitation and reintegration, monitoring and evaluation post release in such a manner that they are housed in once centre.
- Capacity building initiatives to include advocacy, community sensitiveness and peer education through dialogue with media and civil society.
- Guidelines for improvement in living conditions and maintenance of minimum standards of healthy living for all round development.

Training and Accountability of Key Personnel.

Children are most vulnerable to armed forces/Police apathy. Despite these legal protections and a strengthening consensus of states around the world, children continue to remain as the principal victims of war\textsuperscript{790} conflict. Be it as a consequence of their vulnerability as victims or as alleged perpetrators as part of armed groups. An estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict\textsuperscript{791}. At any one time over 300,000 child soldiers, some as young as eight, are exploited in armed conflicts in over 30 countries around the world\textsuperscript{792}. The Graca Machel Report on the Impact of Armed Conflict and Children also estimated that civilians made up for 90\% of the war causalities and the largest portion of these victims was women and children. A century earlier this figure had been just 5\%.\textsuperscript{793} Ironically, even while instituting accountability mechanisms in post

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\textsuperscript{792} Ibid.

\textsuperscript{793} Rachel Harvey, Children and Armed Conflict, A guide to International Humanitarian and Human Rights Law, Children and Armed
conflict societies, atrocities against children and their recruitment have merely formed part of the crimes committed against civilian populations in general.

Training of key personnel involved in the juvenile justice process is the key for effective implementation. Police/armed forces, prosecutors, legal and other representatives of the child, judges, probation officers, social workers, peer educators and parent/guardians are important stake holders towards an effective juvenile justice mechanism.

Accountability of the law enforcement agencies at the point of contact till the juvenile is produced in from of the JJB is most critical. Model rules towards accountability must enumerate the under mentioned issues:-

- Caution at the point of arrest or apprehension with the onus to ensure subsequent detention is not arbitrary or illegal.
- Age determination as a burden of proof on the Police/armed forces to establish that the individual is above the age of 21 years.
- Direct obligation to inform the parents/guardians as soon as possible but not more than six hours.
- Children not to be detained in police station under any circumstances. There will be a local elder/NGO representative or any responsible citizen like village panchayat, teachers, etc, during the time period when the juvenile is apprehended and is sent to an observation home.
- Under no circumstances will the juvenile be ill treated, the onus of which is not limited to the juvenile police officer but to all personnel in the juvenile justice process.
- The Police may dispose off the case against the juvenile without resort to judicial proceedings.
- No interrogation, extraction of information, confessions/statements to be taken by the Police.

**Procedural Rights.**

The absence of procedural rights in the JJ(C&P) Act 2000 clearly shows the lack of a comprehensive policy towards dealing with child perpetrators. It is also important to

Compatibility and Contradictions: The UN CRC and the JJ(C&P) Act 2000

The preambular paragraph of the JJ(C&P) Act 2000 refers to India’s treaty obligations obliging the state to re enact existing law relating to juveniles bearing in mind the prescribed international legal standards. These include 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 Juvenile Deprived of their Liberty (1990), and all other relevant international instruments. However, the substantive guarantees of the UN CRC are not contained in the JJ(C&P) 2000 as statutory rights of children. These include:

- Article 38 of the UN-CRC specifically refers to the rights for the Protection of Children affected by armed Conflict. The Convention Article obligates State parties to ‘respect and ensure’ respect for the rules of international humanitarian law applicable to children in armed conflict and to take all feasible measures to ensure protection and care of children. While the convention makes no reference children to child participants in conflict alleged to have, or accused of or recognized as having committed grave acts but imposes limits upon state towards ill treatment, recognize the child’s inherent right to life, unlawful/ arbitrary arrest or deprivation of liberty and the right to prompt access. The Convention also limits the age of direct participation in hostilities as above the age of fifteen.

- The JJ(C&P) Act 2000, on the other side has no specific section dealing with children affected by armed conflict or on the question of their accountability. The only mention of children affected by armed conflict is in the preambular paragraph of the JJ(C&P) Act 2000 under the category of Children in need of

Care and Protection. No substantive guarantees mentioned in the Act in terms Article 37 to 40 of the UN-CRC are in the JJ(C&P) Act 2000. The risk of coercion, ill treatment and the absence of substantive right and corresponding duties upon the law enforcement agencies manifestly risks the chances of abuse.

- The UN-CRC obligates upon States that the deprivation of liberty will not be arbitrary, would be in conformity with the law and used as a matter of last resort for the shortest period of time. The child shall be treated with humanity and respect for the inherent dignity of the human person.

- As per the JJ(C&P) Act 2000, a juvenile on apprehension shall be placed under the charge of the special juvenile police unit or the designated police officer who shall immediately report the matter to a member of the Juvenile Justice Board. The handling of the juvenile by the juvenile police unit in effect grants the custodian rights to the Police which manifestly dilutes the notion of the right not to be subjected to unlawful arrest and arbitrary deprivation of liberty. Section 11 of the JJ(C&P) Act, any person in whose charge a juvenile has been placed has the control over the juvenile ‘as if he were his parents.’ When such custodian rights are seen in the light of the section 13 of the JJ(C&P) Act, such a provision also denies a child the right to his family. The Police station or the juvenile police unit is obliged, as soon as may be after the arrest inform the parent or the guardian ‘if he can be found’. Without referring to the possibilities of arbitrary arrest or deprivation of liberty, once the children have been placed under custody, he is produced before the Juvenile Justice Board and during the pendency period he is kept in the Special Home.

- Under Article 37(d) of the UN-CRC, the child has the right to prompt legal access and other appropriate assistance and, the right to challenge the legality of the deprivation of his or her liberty before the court or the other competent,

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796 In the concluding observations by the CRC on India’s initial report the CRC while referring to the JJ Act 1986 recommended the State party review its laws in the administration of juvenile justice should ensure that they are in accordance with the Convention, especially articles 37, 40 and 39, and other relevant international standards.

797 See UN-CRC art. 37.

independent and impartial authority. No such guarantees exist in the JJ(C&P) Act 2000, although the right to a legal counsel as to be represented in the court have been granted to the by the courts.

- The right of the child not to be subjected to torture or other cruel, inhuman or degrading treatment or punished has been granted through Article37(a) of the UN-CRC. There is no explicit guarantee in the JJ(C&P) Act 2000. Section 23 of the JJ(C&P) Act 2000 limits accountability upon the custodian having actual charge or control over the juvenile prohibiting any form of cruelty against the minor with punishment of a max of six months imprisonment, or fine or both. The absolute prohibition and sweeping state accountability prohibiting ill treatment, cruel inhuman degrading treatment is not there in the Act.

- Administration of juvenile justice enshrined under Article 40 of the UN-CRC obligates upon State parties to ensure certain minimum guarantees like the presumption of innocence until proved guilty, to be promptly informed of the charges against him or her, the right to legal assistance for the preparation of defence, and the right not to be compelled to give testimony or confess guilt. It also obligates upon States to, wherever appropriate and desirable deal with children without resort to judicial proceedings and promote his/her effective rehabilitation into society through variety of dispositions. The JJ(C&P) Act 2000, on the other hand, addresses this issue in Chapter II while dealing with ‘Children in Conflict with the Law’. The right to be presumed as innocent is guaranteed in the JJ(C&P) Act 2000799. The recourse to non judicial proceedings is also enshrined in the JJ (C&P) Act 2000, but there are no guarantees for the child in the preparation of his defence in front of the Juvenile Justice Board. However, once it is proved that the child has committed an offence, the Act gives out a variety of options. These include that a child can go home after advice or admonition with counseling to parent/guardian, kept under protective custody if above the age of sixteen years, sent to special home, can be made to do community service, or group counseling.

799 See the model rules as mentioned above in part 5.2.2.
Treatment from Point of Contact.

These conditions not only raise legal issues but raise substantive doubts on the treatment of children. Most importantly, it raises the question of illegal detention and arbitrary arrest of the child. Secondly, it manifestly increases the chances of disappearance. Thirdly, in the absence of an obligation upon the Police to ascertain the age of the child to grant him juvenile status the child manifestly suffers the risk of being treated as an adult till such time this clause is invoked. Fourthly, the absence of producing the child immediately in front of the Juvenile Justice Board give the Police a wide margin of discretion to produce the child. Finally, fluctuating judgments of granting precedence to special legislations against the JJ(C&P) Act 2000 grossly increases the chances of abuse by the Police.