5.1. Introduction

It was not until the late nineteenth century that nascent children’s rights’ protection movement countered the widely held view that children were mainly quasi-property and economic assets. In the United States, the Progressive movement challenged courts’ reluctance to interfere in family matters, promoted broad child welfare reforms, and was successful in having laws passed to regulate child labor and provide for compulsory education. It also raised awareness of children’s issues and established a juvenile court system. Another push for children’s rights occurred in the 1960s and 1970s, when children were viewed by some advocates as victims of discrimination or as an oppressed group. In the international context, “[t]he growth of children’s rights in international and transnational law has been identified as a striking change in the post-war legal landscape.”¹ The purpose of this overview is to describe some of the provisions of certain major international legal instruments on children’s rights that form part of that landscape.

The International instruments and conventions have contributed considerably to the issue of child rights and prevention of child abuse. The International Law lay emphasise upon participation as a core value along with survival, protection and development. It also expects that laws and legal strategies must be derived to encourage these values. The United Nations Conventions on the Rights of Child, 1989, has been ratified by India in 1992. There is a worldwide recognition to the rights of children.

The following are the conventions and treaties:-

International Instruments for Protection of Children before 1989


5.2 International Instruments for Protection of Child after 1989.

(c) UN Rules for the Protection of Juveniles Deprived Of their Liberty: Havana Convention, 1990.
(d) International Convention Concerning the Prohibition and Immediate action For the Elimination of worst form of Child Labour, 1991.
(h) Council of European Rules on Sanctions and Measures, 2008.

The important instruments alone are discussed here under: -


1.1 Declaration of the Rights of Child, 1924. This is a historic document that recognised and affirmed for the first time the existence of rights specific to children and the responsibility of adults towards children. It declares that “the mankind owes to the child, the best it has to give”. This declaration highlights the social and economic entitlement of the children and it laid the foundation for the setting up of future International standards in the fields of rights of children. The declaration discussed the well-being of children and recognised their right to development, assistance, relief and protection.²

The fundamental needs of children were summarised in five points. They are as follows:-

(i) The child must be given the mean requisite for its normal development, both materially and spiritually.

(ii) The child, who is hungry, must be fed, the sick must be nursed, the backward must be helped, the delinquent must be reclaimed, and the orphan and the waif must be sheltered and scoured.

(iii) The child must be the first to receive relief in times of distress.

(iv) The child must be put in a position to earn livelihood and must be protected against every form of exploitation.

(v) The child must be brought up in the consciousness that its talent must be developed to the service of its fellow men.

1.2 Universal Declaration of Human Rights, 1948, Children is covered by the all-inclusive language of the UDHR which guarantees specific rights to “everyone.” The UDHR does not, however, clearly espouse the idea of children as rights holders but merely draws attention to their need for special protection. Article 25(2) provides that “motherhood and childhood are entitled to special care and assistance” and that “all children, whether born in or out of wedlock, shall enjoy the same social protection.” Article 16(3) declares that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The UDHR does not define what “special care and assistance” childhood deserves or the protection that the family requires. Article 26 is also of paramount importance to children with its guarantee of the right to education and declarations that “education shall be free, at least in the elementary and fundamental stages,” and that “elementary education shall be compulsory.” In a continent where illiteracy is widespread and where the promise of universal primary education remains but a distant dream for millions of children, Article 26 continues to provide a basis for deep introspection and soul-searching. Article 26 no doubt inspired the inclusion of a right to education in the United Nations Convention on the Rights of the Child, and the International Covenant on Economic and Social Rights. Although minimalist in its pronouncement on children’s rights, the UDHR in three articles creates a solid foundation for child protection in the ensuing years. The UDHR also continues to give hope to children and lovers of children in the continent that, because the UDHR represents “a common standard of achievement for all peoples and all nations,” the struggle must continue and victory will one day be won.

5.3 Geneva Convention, 1949.

The Fourth Geneva Convention contains a number of articles which provide special protection to children. Protocol I states in Article 77 that “children shall be
the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason”. Attention is invited to the use of terms shall be object of special respect and shall be protected against any form of indecent assault. The use of the word shall make it a mandatory provision in the form of duty and casts an obligation on the parties to carry out the provision in letter and spirit. Protocol II makes a somewhat similar provision in Article 4 for application in non-international armed conflicts. It provides that children shall be provided with the care and aid they require. For the purpose of protection of children from the effects of war, it is provided (Art. 14 of IV Geneva Convention) that in time of peace, the Contracting Parties to the Geneva Conventions and the parties to the conflict, after the outbreak of hostilities may establish in their own territory and if the need arises in occupied areas hospital and safety zones and localities so organised as to protect from the effects of war children under fifteen, expectant mothers and mothers of children under seven. Children and their need for family Article 82 of the IV Gen. Con. provides that throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health. Further Art. 49 of IV Gen. Con. provide that if an Occupying Power undertakes evacuation of an area for certain reasons, specified therein, it shall see that members of the same family are not separated. Thus the unity of the family is maintained Care of Children Art. 50 of IV Gen. Con. prescribes that the Occupying Power shall with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children. This obligation is very general in scope. This is intended to cater to a wide variety of institutions and establishments of a social, educational or medical character which exist under a wide variety of names. Orphaned or Separated Children Articles 24 and 50 of IV Gen. Con. lays down very important rules for the protection and care of orphaned or separated children from their families as a result of war. It is provided that the Parties to the conflict shall take necessary measures to ensure that children under fifteen who are orphaned or are separated from their families are not left to their own resources and that their
maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall as far as possible be entrusted to persons of a similar cultural tradition. No change of Personal Status of Children Article 50 of IV Gen. Con. expressly prohibits the occupying power to change the personal status of children in any case. In the present context, the term personal status” denotes the personal attributes of a particular person which would include nationality, ethnic origin, family and religion of children. Right to Family News Art. 25 of IV Gen. Con. prescribes that all persons, which includes children, in the territory of a party to the conflict, or in its occupied territory shall be enabled to give and to receive news of a strictly personal nature to members of their families, wherever they may be, speedily and without undue delay. Detention or Internment of Children. During an armed conflict children can be interned for security reasons or can be detained for violating the penal code. But Children under fifteen years of age shall be given additional food, in proportion to their physiological needs (Art. 89, IV Gen. Con.). All possible facilities for the education of children shall be ensured. They shall be allowed to attend schools either within the place of internment or outside. Special playing grounds shall be reserved for children and young people. Penal and Disciplinary Sanction and Release of Interned Child. The parties to the conflict shall release the internee as soon as possible. They shall endeavour, during the armed conflict, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees in particular children, pregnant women, and mothers with infants and young children among others.  

5 With regard to enlistment for work, it is prescribed that a protected person may not be compelled to work unless over the age of 18 years. 6 Therefore the children under 18 years cannot be compelled to work during internment. Children and the Death Penalty The Diplomatic Conferences which concluded the Geneva Conventions regime deliberated on this subject and came out with the prescription making eighteen years the absolute age limit below which the death penalty may not be pronounced even if all the other conditions which make that penalty applicable are present. 7

5 Art. 132 of IV Geneva Convention.
6 Id. Art. 51
7 Id.Art. 68
77 of Protocol I reaffirms this principle by stating that the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years when the offence was committed. As to non-international armed conflicts, Art. 6, of Protocol II states that death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of offence and shall not be carried out on pregnant women or mothers of young children.


In 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child. It marked the first major international consensus on the fundamental principles of children’s rights. On 20 November 1959, the Declaration of the Rights of the Child was adopted unanimously by all 78 Member States of the United Nations General Assembly in Resolution 1386 (XIV). This declaration reiterates the pledge of the declaration of the Rights of Child, 1924 that the mankind owes to the child the best it has to give. The Preamble to the Declaration of the Rights of the Child highlights children’s need for special care and protection, “including appropriate legal protection, before as well as after birth.” It also places a specific duty upon voluntary organizations and local authorities to strive for the observance of these rights. The rights of child with reference to a name, nationality, nutrition, housing, recreation and medical services are emphasized. It also deals with the special needs of the physically, mentally and socially challenged children and the children who are without family. The Indian Judiciary in the case of Lakshmikanth Pandey v. Union of India⁸, have shown great concern for the welfare of the children, at the International level culminating in the declaration of rights of child adopted by General Assembly of the United Nations on November 20, 1959.

The Declaration of the Rights of the Child lays down ten principles:

1. The right to equality, without distinction on account of race, religion or 4 AIR 1984 SC 469 national origin.
2. The right to special protection for the child’s physical, mental and social development.

⁸ AIR1984 SC469
3. The right to a name and a nationality.
4. The right to adequate nutrition, housing and medical services.
5. The right to special education and treatment when a child is physically or mentally handicapped.
6. The right to understanding and love by parents and society.
7. The right to recreational activities and free education.
8. The right to be among the first to receive relief in all circumstances.
9. The right to protection against all forms of neglect, cruelty and exploitation.
10. The right to be brought up in a spirit of understanding, tolerance, friendship among peoples, and universal brotherhood.

This declaration has formulated several principles of which principles 2, 6 and 9 are very relevant. Principle 2 of the declaration states, the child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interest of the child shall be of paramount consideration. Further Principle 3 states, the child shall be entitled from his birth to a name and to a nationality. Principle 6 states, the child, for the full and harmonious development of his personality, needs love and understanding. He shall, whenever possible, grow up in the care and under the responsibility of his parents and in any case in an atmosphere of affection and moral and material security; a child of tender years shall not save in exceptional circumstances, be separated from his mother. The society and the public authorities shall have a duty to extend particular care to children without a family and to those without adequate means to support and make payment and other assistance towards the maintenance of children of large families if desirable. Principle 9 states, the child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic in any form. Principle 10 states, the child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, and friendship among peoples, races and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966. On December 16th 1966, the United Nations General Assembly adopted two covenants in its resolution 2200 A (XXI): the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants are reinforcements concerning the Universal Declaration of Human Rights (1948). Both International Covenants refers to the Rights of the Child. The Article 24 in the International Covenant on Civil and Political Rights maintain the Rights of the Child to protection, the right to have a name and a nationality. “Every child, with no discrimination based on his race, colour, sex, language, religion, national or social origin, fortune or birth, has a right, from Declaration of the Rights of the Child, 1959, his family, his society and his state, to protection accorded to its status as a minor”. Article 10 in the International Covenant on Economical, Social and Cultural Rights maintain the Rights of the Child to benefit from a protection against victimization and the obligation for the state to set a minimum age for work. Article 10 recognises the family as the natural and fundamental group of the society and therefore, accords the widest possible protection and assistance to the family. Article 10 (3) provides for separation of juvenile delinquents from adult offenders. Quick and speedy adjudication procedure is contemplated. Article 12 of this same Covenant maintains the right for the child to be nursed if sick. Finally, Article 13 maintains the right to education and the free universal primary education for every child. “[...] the education must aim to the full development of the human personality and its dignity, and reinforce the respect of Human Rights and its fundamental liberties”. As per Article 14 (1), there shall not be a public hearing when it is in the interest of the juvenile or if it is in the interest of the guardian. The reassertion of these rights is an important advancement in the protection of the Rights of the Child. Indeed, the right to a protection, the right to an identity, the right to a decent education and the right to a protection against victimization are the most fundamental rights for children.

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the adoption of these international covenants, these rights were approved only by declarations. The covenants gave a restrictive worth to these rights. Since then, all the States that signed the Declaration are legally bound to respect these rights for all children under their jurisdiction.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules). Beijing Rules are divided into six parts covering the whole of juvenile justice process and they are,

(i) General Principles,
(ii) Procedure of Investigation and Prosecution
(iii) Adjudication and Disposition
(iv) Non-Institutional Treatment
(v) Institutional Treatment, Research and Planning, and
(vi) Policy Formulation and Evaluation.

The concept of juvenile under the Beijing Rules is very important. In International legal system, the definition of child, in general, is directly or indirectly related to age. According to Beijing Rules, Rule 2(2) (a), „the juvenile“ is a child or young person, who under the respective legal system, may be dealt with for an offence in a manner which is different from an adult, which means the term „juvenile“ does not necessarily correspond to the concept of child. This definition of juvenile is critical because the standards spoken to by the Beijing Rules apply only to juvenile and not to all children. It is a manner in which a child is treated for an offence determines whether the child is also juvenile. The aim of juvenile justice system is the wellbeing of the juvenile and any reaction to juvenile offender shall always be in proportion to the circumstances of both offenders and the offence. Guiding Principles in Adjudication and Disposition (i) The disposition of the competent authority shall be guided by the following principles:-(a) The action taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society; (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the minimum possible; (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other
serious offences and unless there is no other appropriate response; (d) The well-being of the juvenile shall be the guiding factor in the consideration of his or her case. (ii) Capital punishment shall not be imposed for any crime committed by the juveniles. (iii) Juveniles shall not be subject to corporal punishment. Various Dispositional Measures (i) a large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined include: a. Care, guidance and supervision orders; b. Probation; c. Community service orders; d. Financial penalties, compensation and restitution; e. Intermediate treatment and other treatment orders; f. Orders to participate in group counseling and similar activities; g. Orders concerning foster care, living communities or other educational settings; h. Other relevant orders. (ii) No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

5.4. International Instruments for Protection of Child After 1989

2.1 Convention on the Rights of the Child, 1989. The recognition of the child’s interest and his rights becomes real on 20 November 1989 with the adoption of the International Convention on the Rights of the Child which is the first international legally binding text recognizing all the fundamental. India became signatory to the Conventions on the Rights of Child (hereinafter will be referred to „CRC”), on 02.09.1990, in accordance with Article 49 of the CRC. It is the turning point. The Convention on the Rights of the Child of 1989 defines more precisely the term “child”: “[...] a child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier” The idea, through this definition and all the texts concerning child welfare, is that the child is a human being with rights and dignity. What characterizes the child; it is his youth and vulnerability. Indeed, the child is growing, a future adult, who has no means to protect himself. So, the child has to be the object of a particular interest and a specific protection. In this perspective, texts proclaiming the protection of the child and his rights were adopted. Children’s rights are human rights. As human rights, children’s rights are constituted by fundamental guarantees and essential human rights. This
The convention provides children with basic human rights (civil, economic, social, cultural and political) which enables the children to acquire full potential. They are as follows: Children’s rights recognize fundamental guarantees to all human beings: the right to life, the non-discrimination principle, the right to dignity through the protection of physical and mental integrity (protection against slavery, torture and bad treatments, etc.) Children’s rights are civil and political rights, such as the right to identity, the right to a nationality, etc. Children’s rights are economic, social and cultural rights, such as the right to education, the right to a decent standard of living, the right to health, etc. Children’s rights include individual rights: the right to live with his parents, the right to education, the right to benefit from a protection, etc. Children’s rights include collective rights: rights of refugee and disabled children, of minority children or from autochthonous groups. This Convention provides rights adapted to children. They are as follows: - Children’s rights are human rights specifically adapted to the child because they take into account his fragility, specificities and age-appropriate needs. Children’s rights take into account the necessity of development of the child. The children thus have the right to live and to develop suitably physically and intellectually. Children’s rights plan to satisfy the essential needs for a good development of the child, such as the access to an appropriate alimentation, to necessary care, to education, etc. Children’s rights consider the vulnerable character of the child. They imply the necessity to protect them. It means to grant a particular assistance to them, and to give a protection adapted to their age and to their degree of maturity. So, the children have to be helped and supported and must be protected against labour exploitation, kidnapping, and ill-treatment, etc. Article 3 (1) recognizes the policy of the best interest of the child, in all actions concerning children.

2.2 UN Convention for Prevention of Juvenile Delinquency: The Riyadh Guidelines, 1990. These Guidelines were adopted in 1990 -- one year after the CRC was adopted, and they are considered to be supplementary to the CRC. The first phase in the child justice system is the area of prevention. Prevention, as expressed in the Guidelines, is not a negative prevention and it is positive in the sense of upgrading the quality of life, the overall wellbeing, and not merely on the immediate restriction of well-defined but partial problems. It is relevant to mention Article 2 "Prevention of
juvenile delinquency requires efforts by the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood”. Apart from prevention programmes for all children, the Guidelines emphasize the holistic nature of child justice by pointing to the important role that civil society can play in preventing all children from coming into contact with the law. This guidelines deal with almost every social area; the three main environments in the socialization process (family, school and community); the mass media; social policy; legislation and Juvenile Justice Administration. The Guidelines stress the need for a multi-disciplinary approach and for proper recruitment and training of personnel who work with children. The general prevention policies are based on the following principles: The institution of comprehensive prevention plans at every level of government. In-depth analysis of the problem and preparing lists of programmes, services, facilities and resources available.

- A definition of responsibilities for all role players.
- The coordination of prevention efforts between government and civil society groups. Continuous monitoring.
- A reduction in the number of opportunities for committing offences.
- The involvement of the community.
- Inter-disciplinary collaboration.
- The participation of children; and
- Trained personnel who specialise at all levels
- The prevention measures are aimed at promoting human rights in general and children’s rights in particular.

The general aim is to promote the well-being of children, which is expected to prevent juvenile delinquency. The Guidelines point to the need to make specialized programmes available for children who are: “at social risk” (article 24); “school drop-outs” (article 30), and for street children (article 38). The term, social risk “ denotes children who are demonstrably endangered and in need of non-punitive measures
because of the effect of their circumstances and situations on health, safety and education as determined by the competent authority. Part IV of the Guidelines emphasise the importance of “the successful socialization and integration” of children through the family, school, vocational training, peer groups and community-based organisations. Family, including the extended family, is viewed as the central unit responsible for the socialization of children. The society has a responsibility to assist the family with providing care and protection, including day-care facilities for young children. At the same time, families must be provided with opportunities to learn about parental roles and obligations, and to promote positive relationships between parents and children. Article 46 points out that institutionalisation must always be a last resort and for the shortest possible 10 time. Institutionalisation is limited to cases when the child has suffered harm; has been sexually or physically abused; has been neglected, abandoned or exploited; or has been threatened by physical or moral danger by the parents/guardians. Article 50 emphasis on a multi-disciplinary approach for prevention programmes, which requires collaboration with schools, vocational training centres, faith-based and community based organisations, health centres, substance abuse programmes and the media. It is important to note that participation in these programmes needs to be voluntary. Governments are also expected to enact and enforce specific legislation and procedures to ensure the promotion and protection of the rights and well-being of children. Participation the normal tendency of human being is to take the decision, pertaining to others life and interest without even consulting them and to impose those decisions upon them irrespective / unmindful of their wishes. This is more so in case the person is a child, presuming that child is incapable of taking any decision. This has been proved to be foolish in several cases. Taking into account, this attitude of the people, Article 3 emphasizes upon participation of the juvenile. It is relevant to quote Article 10, which speaks about socialization reads, “Due respect should be given to the proper personal development of children and young persons, and they should be accepted as full and equal partners in socialization and integration processes”. Article 31, which states, “School policy should be fair and equitable, and students should be represented in school policy, including policy on discipline and decision-making”. Lastly, Part VII points to the need for the exchange of information, experience and expertise; for regional and
international cooperation on issues of delinquency prevention and child justice, and technical and scientific co-operation on issues of policy and training.\textsuperscript{10}

2.3 UN Rules for the Protection of Juveniles Deprived Of their Liberty: Havana Convention, 1990. These Rules were adopted by the United Nations in 1990 and have come to be known as the JDL Rules or the Havana Rules since they were adopted in Havana, Cuba. It is important to note that these Rules are not only applicable to custodial settings, but to police stations where children are often held in custody. The instruments set-out standards applicable, when the child is confined to any institution or facility by order of any judicial administrative or other public authority. The major purpose of the Rules is to ensure that the rights of the detainee are respected at all times. Deprivation of liberty must be a last resort, for the shortest possible period of time and limited to exceptional cases. Juveniles can be deprived of their liberty only in accordance with principles and procedures of international law. Section III applies to children under arrest or awaiting trial, who are presumed innocent and should be treated as such. As a general rule, detention before trial should be avoided, and is limited only to exceptional circumstances. Rule 12 specifies that the “deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles”. Section V also addresses the need for cells to be in proper condition and for general hygiene to be maintained – clean bedding, adequate medical and health care to be provided. Importance is given to the need for the rights of the detained child to be respected and for them treated with dignity at all stages of the child justice system. As such, the application of physical force is restricted, and cruel and degrading treatment or punishment is prohibited. In an effort to monitor the treatment of children in custody, it is proposed that qualified, independent inspectors conduct inspections “unannounced”. Qualified medical officers who are “attached to the inspecting authority or the public health service” are also expected to participate in the inspections. Section VI addresses the need to have qualified personnel, and a sufficient number of specialists working at the facilities where children are held in custody. It calls on personnel to: minimize differences

“between life inside and outside the detention facility”; to respect the Rules and to report any violations to their superior officers or organs “vested with reviewing or remedial power”; to ensure the full protection of the physical and mental health of children; and for personnel to continuously improve their knowledge and professional capacity by attending in service training courses.\textsuperscript{11}

2.4 Guidelines for Action on Children in the Criminal Justice System. Vienna Guidelines, 1997. This guidelines deal with children in the criminal justice system in the capacity both as perpetrators and as victims and witnesses. States are to ensure that the measures should be based on rights and it should be compatible with four general principles underlying the children’s convention, namely, non-discrimination, best interest of the child, right to life, survival and development and respect for the views of the child. Child victims and witnesses are to be provided with access to justice and fair treatment, restitution, compensation and social assistance. The persons and personnel operating the criminal justice system, namely, police, prosecutors, lawyers and the judiciary should receive special training to deal with cases involving child victims and the suggestion was also made that specialized unit should be set-up. The guidelines suggest rehabilitation should be primarily family based / community based rather than institutional base. Number of measures dealing with compensation for child victims have been suggested. States were expected to review substantive, evidentiary and procedural laws to ensure that children rights are fully protected. The identification of child victim in media should be prohibited. The States were expected to consider amendments to allow for video taping of the child’s testimony and its presentation in Court as official piece of evidence. Child witness preparation scheme were expected to be developed to familiarize the children with criminal justice process, allow children’s views to be considered, minimize the delay and ensure safety from intimidation.

2.5 The UN Guidelines on Justice In Matters Involving Child Victim And Witnesses of Crime: Adopted By The Economic And Social Council In Its Resolution

2005. These guidelines were created to make sure that the children, who have been harmed / who have seen other children being harmed, are protected and treated fairly when they speak about the incident in a Court of law. The document will also help protect children when they talk to the police, lawyers, social workers and anyone else they meet before and after they go to court. Normally, the children who are expected to depose in the Court remain frightened or worried because they don’t have the experience of either attending the Court or accustom to the atmosphere prevailing in the Court. The guidelines provide a practical framework for achieving the following objectives:-(i) To assist in the design and review of national laws, procedures and practices with a view to ensuring full respect for the rights of child victims and witnesses of crime and to furthering the implementation of the Convention on the Rights of the Child by the parties to that Convention; (ii) To assist Governments, international organizations providing legal assistance to requesting States, public agencies, non-governmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime; (iii) To guide professionals and, where appropriate, volunteers working with child victims and witnesses of crime in their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; (iv) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime..

2.6 Children’s Rights in Juvenile Policy Adopted By United Nations General Assembly, 2007. This policy seeks to achieve the following objectives:- (i) To promote the integration of the International instruments and in particular (a) United Nations Standard Minimum Rules, for the administration of Juvenile Justice (Beijing Rules), (b) United Nations Rules for Protection of Juveniles, who are deprived of their liberty (HAVANA Rules) and (c) United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines). (ii) To provide State parties with guidance

and recommendations for the content of the Juvenile Justice Policy with special attention to prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures, and for the interpretation and implementation of all other provisions contained in Articles 37 and 40 of CRC. (iii) To encourage the state parties to develop and implement a comprehensive Juvenile Justice Policy and address the juvenile delinquency based on and in compliance with CRC, and to seek advise and support from the Interagency Panel on juvenile justice with representatives of the Office of the United Nation High Commission for Human Rights, United Nation Children’s Fund and United Nations Office on Drugs and Crime and Non-Governmental Organization.

2.7 Crime Prevention for Children: Developments And Good Practices, 2009. Children are more often victims of crime than perpetrators. Children are often seen as being a problem in terms of crime and violence, even if the evidence shows that they are more often victims of crime than perpetrators. Crime prevention is more cost-effective than criminal justice system. Children are considered vulnerable for reasons such as poverty, violence, deprivation, abuse, neglect, lack of education, lack of social support, general marginalization, ethnic minorities or migrant background and being in situations of war or conflict. Towards prevention efforts, community programmes focusing on group activities like outdoor pursuit, wild side afternoons and parental work are organized. The objective of these activities are to teach children to keep to the rules, give consideration to others, engage in meaning leisure activities and develop self esteem. Other activities which are targeted at the children over 14 include role playing, self reflection, biographical work and promoting cooperation. The Inter-Agency Panel on Juvenile Justice is a group mandated to coordinate technical advice and assistance in Juvenile Justice, in accordance with United Nations Economic and Social Council (ECOSOC) Resolutions 1997. This is a report of a side-event on Crime Prevention for Children, organized by Panel Secretariat in collaboration with the United Nations Office on Drugs and Crime (UNODC), Defence for Children International (DCI), International Secretariat and Panel Reform International (PRI) in parallel to the 18th Session of the Commission on Crime Prevention and Criminal Justice (CCPCJ).
2.8 Report On The Application Of The European Union Charter Of Fundamental Rights, 2010. The Charter guarantees the right to such protection and care as is necessary for the well-being of children (Article 24 of the Charter). The Charter recognises children as bearers of autonomous rights, not just as subjects in need of protection. It recognises the need to protect children from abuse, neglect, violations of their rights and situations which endanger their well-being. The Charter provides that best interests of the child must be a primary consideration in all actions relating to children. This principle applies to all actions concerning children. It includes children’s right to maintain contact with both parents in case of a divorce, the right to express their views freely and for their views to be taken into consideration on matters which concern them. An important principle of the Charter is that when decisions are being made on what is in the best interests of children, children should have the opportunity to express their views and these views should be taken into account.

2.9 Implementation of SAARC Convention: The way forward. (i) Rights in the SAARC Convention are defined as CRC rights and it defines child as a national of any Member State of the South Asian Association for Regional Cooperation (SAARC), below the age of 18 years unless under the national law, majority is attained earlier. (ii) It recognizes the family as the best place for the well being of children and the need for State Parties to afford necessary support to that role. (iii) It directs the Juvenile Justice in a reliable way to promote child’s sense of dignity and value with the primary objective of promoting the child’s reintegration in the family and society. (iv) States Parties are expected to provide care and treatment to children in a country. (v) State Parties are expected to make arrangements for appropriate mechanisms at appropriate levels to provide various opportunities to child understanding his / her developing capacity. (vi) It directs the State to enable the child to participate fully without any discrimination in the school, family and community life. With reference to crime involving transnational nature which is committed by

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organized crime syndicates, steps were taken which will ensure Regional Cooperation. Regional taskforce was sought to be established.

2.10 Guidelines for Legislative Reforms On Juvenile Justice, 2011. This guideline, as the name goes, was intended to be a guide for parliamentarians and the Governmental authorities involved in drafting or reviewing Juvenile Justice Laws / Chapters / Sections, in general laws as well as Non-Governmental organizations, United Nation entities and other partners, providing assistance in the partners. It has set out the principles, standards and the norms that the states need to consider while drafting / amending legislations. It also adopts a rights based approach. It has used international and regional human rights instruments and particularly, CRC, United Nations Conventions on the Rights of Child, the International Covenant on Civil and Political Rights, the United Nations International Minimum Standard Norms on Juvenile Justice and the conventions on Elimination of all forms of Discrimination against women, as the basic frame work within which a juvenile justice system should be developed. This guidance is not final, but it is an evolving guide shaped by the experience of countries and by a growing understanding of what works and what does not. International Instruments / covenants / conventions and guidelines incorporate a number of basic principles, upon which a Juvenile Justice System should be based. Article 51(c) of the Indian Constitution provides that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another. Article 37 of Part IV reads as under: "Application of the principles contained in this Part.- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". A conjoint reading of Articles 51(c) and 37 implies that principles laid down in international conventions and treaties must be respected and applied in governance of the country. In Vishaka v. State of Rajasthan\(^\text{14}\), Justice Verma opined that any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the

\(^{14}\) (1997) 6 SCC 241 at 249.
constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. In People's Union for Democratic Rights v. Union of India\(^{15}\), the Court followed the International Covenant of Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Universal Declaration of Human Rights (UDHR) and International Labour Organization's conventions, to interpret and expand the ambit of Article 21 of the Constitution. It is thus settled that the Article 51(c) is to introduce and implement various international instruments particularly the UDHR, ICCPR, ICESCR and the other international treaties in the interpretation of fundamental and legal rights. A proper reading of Constitutional Law would make it clear that International Conventions can be enforced by Indian Parliament, by making laws and by the judiciary to grant relief under certain circumstances, even in the absence of Statute. The Constitution also states that the Parliament has power to make laws for the whole or any part of the territory in India for implementing any treaty agreement or convention with any other country or countries or international decisions made at conferences, associations or any other body (Article 253). It is relevant to quote the decision of the Indian Supreme Court, in the case of Visaka vs. State of Rajasthan\(^{16}\), which reiterated the principle that in the absence of domestic law the contents of International Conventions and Norms are relevant for the purpose of interpretation of the fundamental rights.

5.5 Children’s Rights: International Laws

_Declaration of the Rights of the Child 1959\(^{17}\)_

\(^{15}\) AIR 1982 SC 1473 at 1487

\(^{16}\) _Supra_ note 13.

The U.N. Declaration of the Rights of the Child (DRC) builds upon rights that had been set forth in a League of Nations Declaration of 1924. The Preamble notes that children need “special safeguards and care, including appropriate legal protection, before as well as after birth,” reiterates the 1924 Declaration’s pledge that “mankind owes to the child the best it has to give,” and specifically calls upon voluntary organizations and local authorities to strive for the observance of children’s rights. One of the key principles in the DRC is that a child is to enjoy “special protection” as well as “opportunities and facilities, by law and by other means,” for healthy and normal physical, mental, moral, spiritual, and social development “in conditions of freedom and dignity.” The “paramount consideration” in enacting laws for this purpose is “the best interests of the child,” a standard echoed throughout legal instruments on children’s rights. Among other DRC principles, a child is entitled to a name and nationality; to adequate nutrition, housing, recreation, and medical services; to an education; and, for the handicapped, to “special treatment, education and care.” Other principles are on protection against neglect, cruelty and exploitation, trafficking, underage labor, and discrimination.

5.6 Minimum Age Convention 1973

The aim of the Minimum Age Convention (MAC) is to establish a general instrument on the subject of the minimum age of employment with a view to achieving the total abolition of child labor (Preamble). Thus, each State Party is to

available at http://www2.ohchr.org/english/bodies/docs/status.pdf


19 DRC, principle 2, supra note 17

20 The 1924 Declaration stated children “must be the first to receive relief”; the DRC specifies more pragmatically that they are to be “among the first” to receive protection and relief (principle 8). Van Bueren, supra note 3, at 11.

“pursue a national policy designed to ensure the effective abolition of child labor and to raise progressively the minimum age for admission to employment to a level consistent with the fullest physical and mental development of young persons” (article 1). States Parties must specify a minimum age for admission to employment or work, subject to certain exceptions set forth in the MAC. That minimum may not be less than the age of completion of compulsory schooling and, in any case, less than fifteen years, but it may initially be set at fourteen years if a state’s economy and educational facilities are insufficiently developed (article 2). Exceptions to the age limits may also be permitted for light work or for such purposes as participation in artistic performances (articles 7 and 8). If the employment may be hazardous to a young person’s health, safety, or morals, the minimum age is generally not to be less than eighteen years (article 3(1)).

5.7 U.N. Convention on the Rights of the Child 1989

The Convention on the Rights of the Child (CRC) is the most comprehensive document on the rights of children. Based purely on the number of substantive rights

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it sets forth, as distinct from implementation measures, it is the longest U.N. human rights treaty in force and unusual in that it not only addresses the granting and implementation of rights in peacetime, but also the treatment of children in situations of armed conflict. The CRC is also significant because it enshrines, “for the first time in binding international law, the principles upon which adoption is based, viewed from the child’s perspective.” The CRC is primarily concerned with four aspects of children’s rights (“the four ‘P’s’): participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs.23 For the purposes of the CRC, a child is defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (article 1). Key accomplishments of the CRC have been described as five-fold. It creates new rights for children under international law that previously had not existed, such as the child’s right to preserve his or her identity (articles 7 and 8), the rights of vulnerable children like refugees to special protection (articles 20 and 22), and indigenous children’s right to practice their culture (articles 8 and 30). In some instances, this innovation takes the form of child-specific versions of existing rights, such as those in regard to freedom of expression (article 13) and the right to a fair trial (article 40). In addition, the CRC enshrines in a global treaty rights that hitherto had only been found in case law under regional human rights treaties (e.g., children’s right to be heard in proceedings that affect them) (article 12). The CRC also replaced non-binding recommendations with binding standards (e.g., safeguards in adoption procedures and with regard to the rights of disabled children).

23 Van Bueren calls these “the four ‘P’s’”; other scholars refer to the Convention as being concerned with the three types of children’s rights, called the three ‘P’s”: provision, protection, and participation. See, for example, Jean Koh Peters, How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study [Special Issue on Legal Representation of Children], 6 Nevada Law Journal 971 (Spring 2006).

(articles 21 and 23). New obligations are imposed on States Parties in regard to the protection of children, in such areas as banning traditional practices prejudicial to children’s health and offering rehabilitative measures for victims of neglect, abuse, and exploitation (articles 28(3) and 39). Finally, the CRC sets forth an express ground obligating States Parties not to discriminate against children’s enjoyment of CRC rights. The right to participate in proceedings, it is argued, “together with the principles of non-discrimination in Article 2 and provision for the child’s best interests in Article 3, form the guiding principles of the Convention, which reflect the vision of respect and autonomy which the drafters wished to create for all children.”

5.8 Optional Protocols to the CRC on Sex Trafficking, Armed Conflict

The United Nations adopted two protocols to the CRC on May 25, 2000, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography 2000 (Sex Trafficking Protocol) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Child Soldiers Protocol). The Sex Trafficking Protocol\(^\text{24}\) addresses the problem of sex trafficking, one among many purposes for which children are bought and sold, including, in addition, forced labor, adoption, participation in armed conflicts, marriage, and organ trade. The Preamble refers to achieving “the purposes of the CRC” and to the need for States Parties to implement specific provisions, among them CRC articles 34 and 35 on broad protections against child trafficking, sexual exploitation, and abuse. The Preamble also reflects CRC language in regard to protecting children from economic exploitation and performance of hazardous or harmful work. In addition, it recognizes “that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation” and are disproportionately represented among the sexually exploited, and expresses concern over “the growing availability of child pornography on the Internet and other evolving technologies.” The STP defines and prohibits the sale of children, child prostitution, and child pornography; obliges States Parties to make certain acts punishable under

their criminal law; sets forth the bases for States Parties to assert jurisdiction over actionable practices, and strengthens their ability to pursue extradition of offenders. The STP also provides for protection of and assistance to the victimized children in the criminal justice process, the best interests of the child being the guiding principle in the children’s judicial treatment. For purposes of prevention and redress of offenses, the victims must have access to procedures to seek compensation for damages from those legally responsible (article 9(4)). The STP also has provisions on strengthening international cooperation in regard to sex trafficking involving children and on reporting requirements for States Parties (article 12).

The Child Soldiers Protocol reasserts in its Preamble that “the rights of children require special protection,” notes “the harmful and widespread impact of armed conflict on children,” and condemns their being targeted in such situations. It also refers to inclusion as a war crime in the Rome Statute of the International Criminal Court “the conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts.” The Preamble takes note of the definition of a child in article 1 of the CRC and expresses the conviction that raising the age of possible recruitment will contribute effectively to implementing the principle of the best interests of the child as a primary consideration in all actions concerning children. The Child Soldiers Protocol extends the minimum age requirement for direct participation in armed conflict and conscription to eighteen (articles 1 and 2, respectively) and forbids rebel or other non-governmental armed forces “under any circumstances,” to recruit or to use in hostilities persons under that age (article 4). It does not prescribe the age eighteen minimum for voluntary recruitment, but requires States Parties to raise the minimum age for it from fifteen (as set out in article 38, paragraph 3, of the CRC; i.e., to sixteen years of age) and to deposit a binding declaration setting forth the minimum age permitted for voluntary recruitment and describing safeguards.

adopted to ensure voluntariness (article 3(1-3), in part). The Child Soldiers Protocol requires States Parties to take “all feasible measures to ensure” the demobilization or release from service of children recruited into armed conflict or used in hostilities and, “when necessary,” to accord “all appropriate assistance” for the children’s rehabilitation and social reintegration (article 6(1) and (3)).

5.9. Regional Documentation

5.9.1 African Charter on the Rights and Welfare of the Child 1990

The African Charter on the Rights and Welfare of the Child (ACRWC), the first regional treaty on children’s rights, builds on the 1979 Declaration on the Rights and Welfare of the African Child,[19] but most of its provisions are modeled after those of the CRC. “The main difference lies in the existence of provisions concerning children’s duties [in article 31], in line with the African Human Rights Charter” The Preamble states that “the child occupies a unique and privileged position in the African society” and requires legal protection as well as “particular care with regard to health, physical, mental, moral and social development.” A child is defined as “every human being below the age of 18 years” (article 2). The ACRWC sets forth the principles of non-discrimination and the best interests of the child and also provides that children have an inherent right to life, protected by law. The death sentence is not to be applied to crimes committed by children (articles 3-5). Children have a right to a name and nationality as well as to freedom of expression, association and peaceful assembly; thought, religion, and conscience; privacy; education; and rest and leisure (articles 6-12). Special measures of protection are to be taken for handicapped children and children should enjoy physical, mental, and spiritual health (articles 13-14). Children should also be protected against all forms of economic exploitation and from performing work likely to be hazardous (article 15) and against all forms of torture, maltreatment, and abuse (article 16); harmful social and cultural practices (article 21); all forms of sexual exploitation or abuse (article 27); the use of narcotics and illicit drugs (article 28); and abduction, sale, trafficking, and use in begging (article 29).

26 Article 11 on education is the longest article in the ACRWC. It also provides, among other measures, that States Parties are to in particular to provide free and compulsory basic education (art. 11(3)).
5.9.2 **European Convention on the Exercise of Children’s Rights 1996**

The European Convention on the Exercise of Children’s Rights (ECECR) stresses in the Preamble the aim of promoting the rights and “best interests” of children.\(^27\) To that end, it states that children should have the opportunity to exercise their rights, particularly in family proceedings affecting them; they should be provided with relevant information (defined as information appropriate to the child’s age and understanding, given to enable the child to exercise his or her rights fully, unless contrary to the welfare of the child) and their views should be given “due weight”; and, “where necessary,” States as well as parents, should engage in the protection and promotion of those rights and best interests (Preamble). The ECECR applies to children who have not reached the age of eighteen (article 1(1)). The ECECR procedural rights include the child’s right to be informed and to express his or her views in proceedings; the right to apply for the appointment of a special representative; and “other possible procedural rights,” e.g., the right to apply to be assisted by an appropriate person of their choice to help them express their views, the right to appoint their own representative, and the right to exercise some or all of the rights of parties to the proceedings (articles 3-5).

5.10. **Specific Provisions in Other International and Regional Instruments**

5.10.1 **Universal Declaration of Human Rights 1948**

The Universal Declaration of Human Rights contains two articles that specifically refer to children. Article 25(2) states: “[m]otherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection.”\(^28\) Article 26 calls for the right to education for all, and deals both with access to and the aims of education. Thus, education is to be

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28 This gives no recognition, however, to the role of fatherhood, and the “twinning of the exclusive role of women and children continues to resound throughout international law.”
free, at least in the elementary and fundamental stages; elementary education is to be compulsory; and education should be “directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.” Nevertheless, “[p]arents have a prior right to choose the kind of education that shall be given to their children.”

5.10.2 International Covenant on Economic, Social and Cultural Rights 1966

The Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR), insofar as it recognizes the indivisibility of human rights, is applicable to children’s rights as well. Thus, it notes that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and that “these rights derive from the inherent dignity of the human person.” Specific references to children are found in articles 10 and 12. Under article 10, “[t]he widest possible protection and assistance should be accorded to the family, … particularly for its establishment and while it is responsible for the care and education of dependent children” (item 1, in part). It further stipulates that “special measures of protection and assistance” should be taken on behalf of the young without any discrimination; that they should be protected from economic and social exploitation; that employing them in morally or medically harmful or dangerous work or in work likely to hamper their normal development should be punishable by law; and that age limits should be set below which the paid employment of child labor is prohibited and punishable by law (item 3). Article 12 addresses the right of all to “enjoyment of the highest attainable standard of physical and mental health,” to be fully realized by, among other measures, States Parties’ providing “for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child” (item 2(a)). The ICESCR also provides for the right of everyone to education (article 13(1)) and stipulates “primary education shall be compulsory and available free to all” (article 13(2a)).

5.10.3 International Covenant on Civil and Political Rights 1966

The International Covenant on Civil and Political Rights (ICCPR) contains general provisions from which children are entitled to benefit as well as certain specific provisions on safeguards for children in the administration of justice and as
members of a family unit. Thus, article 2 obliges States Parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights recognized in the ICCPR, “without distinction of any kind;” to adopt laws to give effect to those rights; and to provide effective remedies where there are violations. Article 14(1) incorporates a more specific reference to rights of the young: “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” Furthermore, criminal proceedings “should take account of [juveniles’] age and the desirability of promoting their rehabilitation” (article 14(4)) and the penal system should segregate juvenile offenders from adults and accord them treatment “appropriate to their age and legal status” (article 10(3)).[28] Like the ICESCR, the ICCPR recognizes the family as entitled to societal and state protection (article 23(1)), and so States Parties are to respect the liberty of parents to ensure their children’s religious and moral education in conformity with their own convictions (article 18(4)). If a marriage is dissolved, provision must be made for the protection of any children (article 23(4)). Article 24 of the ICCPR is specifically devoted to children. It stipulates that “every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” It further prescribes that every child must be registered immediately after birth and have a name and that every child has the right to acquire a nationality.

5.10.4 European Convention on Human Rights 1950

29 The Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 005, with a Preamble and fifty-nine articles, was adopted on November 4, 1950, and entered into force on September 3, 1953. There have been eleven Protocols to the Convention, but as from November 1, 1998, Protocol 9 was repealed and Protocol 10 lost its purpose. For an online text as amended by Protocol 11 (E.T.S. No. 155, in force November 1, 1998), see the Council of Europe Web site, [http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm](http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm) (last visited July 26, 2007). Other documents, such as the status of ratifications and an explanatory report, are also available through links provided on the same Web site, [http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG](http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG) (last visited July 26, 2007).
The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), the first international human rights agreement to establish supervisory and enforcement machinery, obliges States Parties to “secure everyone within their jurisdiction” the rights and freedoms it sets forth (article 1). The ECHR uses throughout the term “everyone” (or, where appropriate, “no one”); as a result, children have successfully brought suit either on their own behalf or as co-applicants with their parents.[30] Specific references to the young are found in two articles of the ECHR and concern legal proceedings. Article 5(1)(d), on the lawful procedures for depriving a minor of his or her liberty, permits the lawful detention of a minor for the purpose of educational supervision or for bringing him before the competent legal authority. Article 6(1) stipulates that everyone is entitled to a fair and public hearing and that judgment will be pronounced publicly, but the hearing may be held in private when required by the interests of juveniles or the protection of the parties’ private life. Protocol No. 7 to the ECHR provides that while spouses enjoy equality of rights and responsibilities in their relations with their children, this does not prevent States “from taking such measures as are necessary in the interests of the children” (article 5).

5.10.5 African Charter on Human and People’s Rights 1981 (Banjul Charter) and Protocol

The African Charter on Human and People’s Rights (hereinafter ACHPR) (also known as the Banjul Charter) encompasses civil and political as well as economic, social, and cultural rights. In regard to children, it emphasizes the rights of the family and of duties towards the family rather than the rights and duties of individual family members, which can be viewed as a reflection of African customary law. Thus, the ACHPR makes it incumbent on the individual “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need” (article 29(1)). The ACHPR does not set forth any additional specific rights for children, relying instead on existing international protections regarding children’s rights (in article 18(3)). As in other international human rights documents, however, rights in the ACHPR are mentioned in connection with “the individual” or “every individual.”
Women in Africa makes numerous specific references to children, and to girls in particular. The Preamble calls for the condemnation and elimination of “any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls.” States Parties are to enact and implement legislative measures to prohibit all forms of such harmful practices (article 2(1)(b)); protect women and girls against rape and all other forms of violence, including trafficking; and “ensure that in times of conflict and/or war, such acts are considered war crimes and are punished as such” (article 4(c) and (d)). States Parties should also condemn harmful practices such as medicalization of female genital mutilation and scarification that affect the fundamental human rights of women and girls and are contrary to recognized international standards, and take measures against them, such as rehabilitation of the victims and granting of asylum to those at risk (article 6(b-d)). States Parties should afford effective protection to women and children in emergency and conflict situations (article 11(4)) as well. In furtherance of the right to education and training, “all appropriate measures” should be taken to eliminate discrimination against women and girls, with specific positive action to be taken to promote girls’ education and training “at all levels and in all disciplines” as well as their retention in schools and other training institutions (article 12).

**5.10.6 American Convention on Human Rights (Pact of San José, Costa Rica)**

The American Convention on Human Rights (ACHR) obliges States Parties to respect the rights and freedoms recognized in its provisions and “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. The term “person” used in the ACHR means “every human being” (article 1). Thus, every person has the right to a legal personality, to life, to humane treatment, to personal liberty, and to a fair trial, among many other rights set forth. However, parents or guardians “have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions” (article 12(4)), and “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence,” notwithstanding the right to freedom of
thought and expression (article 13(4). The ACHR stipulates that provision must be made for the protection of children “solely on the basis of their own best interests” when a marriage is dissolved and that equal rights must be recognized by law for children born in and out of wedlock (article 17(4) & (5)). Everyone also has the right to a given name and to the surnames of one or both parents (article 18). The ACHR has a separate provision on the rights of the child: “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state (article 19).” This article is listed among those that may not be suspended in time of war, public danger, or other emergency (article 27(2)).

5.10.7 Convention on the Elimination of all Forms of Discrimination against Women 1979

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been described as an international bill of rights for women. It defines what constitutes discrimination against women and establishes an agenda for States Parties to act to end it.[37] The Preamble, in invoking the Universal Declaration of Human Rights, notes its affirmation of the principle of the inadmissibility of discrimination and its proclamation “that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.” This kind of statement forms the backdrop for certain rights set forth in CEDAW, even though girls specifically are mentioned only once: the obligation of States Parties to ensure the reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely (article 10, in part). States Parties are also to take appropriate steps “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (article 5(a)). CEDAW refers to the interests of children being paramount in relation to the common responsibility of men and women for their children’s upbringing and development (article 5(b)) as well as in regard to States Parties’ ensuring the same rights and responsibilities between men and women as parents in matters relating to their children and in matters of guardianship, ward ship,
trusteeship, and adoption of children (article 16 (1)(d) and (f)). CEDAW also proscribes betrothal and marriage of children and calls for action to specify a minimum age for marriage and to make marriage registration compulsory (article 16(2)).

5.11 Child Protection and Placement Agreements

5.11.1 Hague Convention on Jurisdiction, etc., for the Protection of Children 1996

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Convention) covers a wide range of civil child protection measures, “from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children’s property.”\(^{30}\) The Preamble confirms “that the best interests of the child are to be a primary consideration.” Article 2 stipulates that the Convention is applicable “to children from the moment of their birth until they reach the age of 18 years.” The 1996 Convention provides a structure to resolve disputes over contact and custody issues when parents are separated and living in different countries and has uniform rules to determine which country’s authorities are competent to take the necessary protection measures. Provisions on recognition and enforcement ensure that primacy be given to decisions taken by the authorities of the country where the child has his or her habitual residence, reinforcing provisions of the 1980 Hague Convention (see below). There are also provisions on cooperation procedures to better protect unaccompanied minors who cross borders and are in vulnerable situations and children placed in alternative care across frontiers. The latter includes arrangements such as foster care and the Islamic law institution of Kafala, a functional equivalent of adoption falling outside the scope of the 1993 Inter country Adoption Convention.

5.11.2 Hague Convention on Jurisdiction, etc., Relating to Adoptions 1965

The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (1965 Convention), the first Hague Convention on the issue, apparently has no contracting parties at present. The Convention is applicable “to all international adoptions, not only where a child originated from another country but also to adoptions where the only international aspect is the foreign nationality of the child.”31 It has been characterized as incorporating four important provisions. The authorities are not to grant an adoption “unless it will be in the interest of the child.” Before granting an adoption, the authorities should conduct “a thorough inquiry” relating to the adopter(s), the child, and the child’s family. The inquiry should be carried out “as far as possible … in cooperation with public or private organizations qualified in the field of inter-country adoptions” and with the help of specially trained or qualified social workers (article 6). Furthermore, the national law of the child is to be applied in decisions pertaining to consent and consultation issues, rather than that of the adopter, family, or spouse (article 5, paragraph 1). The 1965 Convention also allows States Parties to make a declaration at the time of signature, ratification, or accession but revocable at any time, specifying provisions of domestic law prohibiting adoptions founded upon certain specified grounds, e.g., the existence of a previous adoption of the child or the age of the adopter and that of the child (article 13).

5.10.3 European Convention on the Adoption of Children 1967

The European Convention on the Adoption of Children (ECAC) applies to the legal adoption of children under the age of eighteen, not currently or previously married, and not deemed in law to have come of age earlier (article 3). Its provisions are only minimum standards; States Parties may adopt provisions more favorable to the adopted child (article 16). The ECAC ensures that national child protection laws apply not only to adoptions of children from the States Parties, but also to those of children from other States. The essential provisions are on adoption practices that each Party should undertake to incorporate in national legislation. Under them,

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adoption must be granted by a judicial or administrative authority in order to be valid (article 7) and the competent authority should not grant an adoption unless it “will be in the interest of the child” (article 8(1)). The authority is to make appropriate inquiries into such matters as the child’s views with respect to the adoption and the mutual suitability of the child and the adopter (article 9). After the adoption, the child should generally be able to acquire the adopter’s surname and be treated as having rights of succession (article 10 (3) and (5)). States Parties should prohibit any improper financial advantage arising from a child being given up for adoption (article 15). Four supplementary provisions, requiring only the States’ Parties’ consideration, stipulate, inter alia, that provision be made to enable adoption to be completed without the adopter’s identity being disclosed to the child’s family (article 20(1)) and to require or permit adoption proceedings to take place in camera (article 20(2)). Children are not accorded the right to know the identity of their former parents.\textsuperscript{32}

5.12 Juvenile Justice Legislation in India

Earlier the concept of juvenile justice was based on a belief that the problems of juvenile delinquency in aberrant situations are not amenable to the resolution within the edifice of traditional process of criminal law.\textsuperscript{33} The term ‘Juvenile’ justice emerged from the word ‘juvenis’ which means young so it implies that it is a justice system for the young. During the course of time, it was felt that juvenile justice system beside catering the needs of young offenders, it also deliver specialized and preventive treatment services like community support, harmonizing impersonal state intervention with the family, community and institutional interventions for the children and as a means of prevention, rehabilitation and socialization through schools and religious bodies.

Juvenile Legislations

5.12.1 The Apprentices Act, 1850


\textsuperscript{33} V. Kumari, the Juvenile Justice in India: from welfare to rights, 1 OXFORD U.P (1\textsuperscript{st} ed., 2004).
The Apprentices Act, 1850 was the first legislation dealing with children in conflict with the law in India. The Indian Jail Committee established in 1919 urged for demonstrating separate institutions and to have separate trials for the juveniles. Reformation and Rehabilitation of juveniles should be the motive of the law.\(^{34}\)

### 5.12.2 The Code of Criminal Procedure, 1898

The Code of Criminal Procedure, 1898 contained the provisions of juvenile justice along with many other things regarding an adjective or procedural law. Many States enacted their own State enactments in adjudication of matters involving the child or the juveniles which were in force in the respective States such as: Bombay Children Act, 1924 Bombay Children Act, 1948 U.P. Children Act, 1951 West Bengal Children Act, 1959 Rajasthan Children Act, 1970 Bihar Children Act, 1982, etc. The Children Act, 1960 applied only to Union Territories. There were many such enactments in many states of India which prevailed for administration of juvenile justice.\(^{35}\)

Supreme Court in its judgment in Sheela Barse’s case played a vital role in passing the constant and uniform law on juvenile justice where it acknowledged that the children in the jails are subject to special treatment and recommended that parliament should make the uniform law applicable throughout the country.\(^{36}\) As an outcome of the case, for the first time, the law mandated care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for adjudication and disposition of juvenile delinquency matters in India.\(^{37}\)

### 5.12.3 Normative Structure of Juvenile Justice System

The National Policy for the Welfare of Children, 1974 was formulated that declared the children of the nation to be the supremely important asset. So there should be a prominent part in the national plans for children’s programs for development of human resources, so that they grow up to become robust citizens.\(^{38}\)


\(^{36}\) Sheela Barse & Anr. v. Union of India & Ors., 1986 AIR 1773 ORS.


\(^{38}\) Laxmikant Pandey v. Union of India, 1984(2) SC 244.
The main aim would be equal opportunities for development to all children during the period of growth which would ultimately serve the large purpose of reducing inequality and ensuring social justice.\(^{39}\) So after the proper review of the existing Children’s Act, the Juvenile Justice Act, 1986 was enacted to implement some objectives.

### 5.12.4 Juvenile Justice Act, 1986

The indigenous thinking on Juvenile Justice has been keeping up with the global trends in this field. With the adoption of the United Nations Standard Minimum Rules for the administration of the Juvenile Justice, India has become the first country to grow its system in the light of the principles enunciated therein. The main reason behind enacting the Juvenile Justice Bill of 1986 was to bring the operation of the Juvenile Justice System in the country in conformity with these Rules. And the other objectives were to lay down a uniform legal framework for Juvenile Justice, to provide a specialized approach towards the prevention and control of juvenile delinquency, to come up with the machinery and infrastructure for Juvenile Justice operations, to establish the norms and standards for the administration of Juvenile Justice, to develop the proper linkages and coordination between the formal system and voluntary agencies and to constitute special offences in relation to juveniles and to prescribe punishment thereof.\(^{40}\) With its enforcement, the Juvenile Justice Act of 1986 has replaced the earlier mechanism of the Children Act enacted by the Central and State Governments for dealing with children coming in conflict with Jaw. This Act does not only aim at restructuring the system in the line of internationally proclaimed set of principles but also intends to evolve a new concept of juvenile justice within the true meaning of social justice as enshrined in the Constitution of India.\(^{41}\) It surely represents an enlightened response to the socio-cultural and economic transition that affects juveniles more than any other segment of society.\(^{42}\) It attempts to bring them back within the mainstream of social life. It calls

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\(^{39}\) Gaurav Jain v. Union of India, 1997 (8) SCC 114.


for a diversified approach towards the recovery, re-education and rehabilitation of various categories of socially maladjusted juveniles, through an active participation of the public.\textsuperscript{43} In order to achieve this goal, the Act imbibes the essential elements of all the due processes, parens patriae and participatmy models. The definition of juvenile, as per this act, included boys who had not completed the age of 16 and girls who had not completed the age of 18 years. The law undoubtedly places a crucial duty on the state to appropriately utilize the resources from various sectors of socio-economic development in ensuring the well-being and welfare of juveniles and a chance to recover if they happen to falter.

\textbf{5.12.5 Juvenile Justice (Care and Protection of Children) Act, 2000}

Diagnosing the current developments, the juvenile justice administration in India was found to have several flaws or gaps in legal provisions and shortcomings by the way of linkages between the governmental and non-governmental efforts in the care, treatment and rehabilitation of such children. The JJ Act 1986 required that the pre-existing system built around the implementation of the then available Children’s Acts be restructured. However, due to the absence of a national consensus on the time frame for such a restructuring, the steps taken by most of the State Governments were still heavily short of the proclaimed goals.\textsuperscript{44} The inadequacy of the juvenile justice personnel, in terms of both quantity and quality continues to be the weakest part of the operational strategy. In order to rationalize and standardize the approach towards juvenile justice in keeping with the relevant provisions of the Constitution of India and International obligations in this regard, the Juvenile Justice (Care and Protection of the Children) Act, 2000 was (re)enacted by the government of India.\textsuperscript{45} The Interim Report of the Working Group of Ministry of Social Justice and Empowerment (2001-02) has drawn attention to some additional inputs incorporated under the Juvenile Justice (Care and Protection of Children) Act, 2000. The Act with all additional inputs has been enforced since April 1, 2001, to deal with the children within its purview.


\textsuperscript{45} R. Pandey, \textit{India: Juvenile Justice Act Amendment “Need Of Hour”}, SINGH & ASSOCIATES
The upper age limit of the children within the purview of the law has been raised. The upper age limit of the boys has been increased from 16 to 18 years, which would increase the actual coverage by seven times. It was then mandatory to constitute a ‘National Level Advisory Board’ on juvenile justice, to advice the Central and State Governments as well as the Voluntary Organizations associated with this work.\(^{46}\)

### 5.12.6 Juvenile Justice (Care and Protection of Children) Act, 2015

But then again the Juvenile Justice Act, 2015 was enacted to replace the existing Indian Juvenile Delinquency law, Juvenile Justice (Care and Protection of Children) Act, 2000, so that juveniles in conflict with law in the age group of 16-18 years, involved in heinous offences can be tried as adults. In our country, it was the high time to bring some reform in the Juvenile laws as there has been a steep rise in serious crimes involving youth of 16 – 18 years of age and they very well know that below 18 years is the ‘getaway pass’ for them from the criminal prosecution. The punishment has to be made a bit deterrent in order to inject the feelings of fear in the mind of the criminal. The recent “Nirbhaya rape case“ has caused utter dismay, concern and outrage amongst the people. The gruesome act of brutalizing her with an iron rod was done by none other but a juvenile and he has been sentenced for a period of 3 years as per Section 15 of JJ Act, 2000 as per our law for juveniles. The principal ought to have been followed for trying juvenile offenders is that Juvenility should be decided as per the state of mind and not just the state of body. In the recent Nirbhaya rape case all the other co-accused are awarded death sentence but the person who committed the most brutal part of the case has been awarded a mere 3 years of remand as per JJ Act, 2000.\(^{47}\)

In the light of above incident, the bill was introduced in the parliament by Maneka Gandhi on 12th August 2014. The bill adopts several new features which were missing in the earlier act like it adopts the concept of Hague convention and cooperation in respect of Inter-country Adoption, 1993. The bill also seeks to make adoption process of orphaned, abandoned and surrendered children more streamlined. One of the most criticized step in the new juvenile justice bill 2015 is introduction

\(^{47}\) Ibid.
of “judicial waiver system” which will allow treatment of juveniles in certain conditions, in the adult criminal justice system and to punish them as adults. Juvenile Justice Boards (JJB) and Child will be constituted in each district. The role of JJB would be to conduct a preliminary in each district. The role of JJB would be to conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or be tried as an adult. The CWC will determine institutional care for children in need of care and protection. It is for the first time in India that such provisions have been applied. This act totally deals with punishing children involved in crimes which are sort of well planned crimes, which creates a sense that the person committing the crime clearly know about what he is doing and still committing it, the crimes which are heinous in nature like rape and murder, dacoity or kidnapping.  

This new act is considered as the biggest legal reform by the Indian judiciary and should be welcomed and implemented fairly and considered as a move towards stopping crimes by the teenagers of country by creating a sense of fear of punishment in the minds of teenagers by introduction of such type of laws. 

The first proper intervention by the government of India in justice for children was via the National Children’s Act, 1960. This act was replaced later with Juvenile Justice Act, 1986. In 1992, India ratified the United Nations Convention on the Rights of the Child (UNCRC). To adapt to the standards of the convention, the 1986 act was repealed and the JJ Act, 2000 was passed. The JJ Act 2000 dealt with two categories of children viz. ‘child in conflict with law’ and ‘child in need of care and protection’. As per JJ Act, 2000, a juvenile is a person who is below 18 years of age. This act has a provision that a child in conflict with law cannot be treated as an adult. If a child is convicted for any offence, he may spend a maximum of three years in institutional care. This act empowered the Child Welfare Committees (CWCs) to deal with child in need of care and protection. Juvenile Justice Boards (JJB) were empowered to deal with child in conflict with law.

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5.12.7 Need for the Amendment of the JJ Act 2000

The National Crime Records Bureau (NCRB) data shows that there has been an increase of offences committed by juveniles, especially in the age group of 16-18. One of the perpetrators in the Delhi gang rape of 2012 was few months short of 18 years age and he was tried as juvenile. He was sent to reformation home for three years and was released in December 2015. This had raised the public demand for lowering the age of juveniles under the act. The 2000 act was also facing implementation issues particularly in cases of adoption.

5.12.8 Salient Features of the Juvenile Justice Act, 2015

The JJ Act 2015 also deals with both categories of children. Children in conflict with law It treats all the children below 18 years equally, except that those in the age group of 16-18 can be tried as adults if they commit a heinous crime.

1. A child of 16-18 years age, who commits a lesser offence (a serious offence), may be tried as an adult if he is apprehended after the age of 21 years.

2. A heinous offence attracts a minimum seven years of imprisonment. A serious offence attracts three to seven years of imprisonment and a petty offence is treated with a three year imprisonment.

3. No child can be awarded the death penalty or life imprisonment.

4. It mandates setting up of Juvenile Justice Boards (JJBs) in each district with a metropolitan magistrate and two social workers, including a woman. The JJBs will conduct a preliminary inquiry of a crime committed by a child within a specified time period and decides whether he should be sent to rehabilitation centre or sent to a children’s court to be tried as an adult. The board can take the help of psychologists and psycho-social workers and other experts to take the decision.

5. A Children’s court is a special court set up under the Commissions for Protection of Child Rights Act, 2005, or a special court under the Protection of Children from Sexual Offences Act, 2012. In absence of such courts, a juvenile can be tried in a sessions court that has jurisdiction to try offences under the Act.
5.13 Children in Need for Care and Protection

Child Welfare Committees (CWCs) should be set up in each district with a chairperson and four other members who have experience in dealing with children. One of the four members must be a woman. The committee decides whether an abandoned child should be sent to care home or put up for adoption or foster care.

Other Salient Provisions

1. The *Central Adoption Resource Agency* will frame rules and regulations for adoption of orphaned children. Inter-country adoption is allowed when no Indian adoptive parents are available within 30 days of child being declared free for adoption.

2. Adoptive parents should be financially and physically sound. A single or divorced person may adopt a child. A single male may not adopt a girl child. Disabled children will be given priority for adoption.

3. Children in need of care and protection can be placed in foster care based on the orders of the CWC. The selection of the foster family is based on the family’s ability, intent, capacity and prior experience of taking care of children.

4. Buying and selling of a child attracts imprisonment up to five years. Giving an intoxicating or narcotic substance to a child attracts imprisonment up to seven years.

5. Institutions for child-care must be registered. Corporal punishment of children in child-care institutions is also punishable.


- The JJ Act 2000 empowers the Juvenile Justice Board, which has psychologists and sociologists on board, to decide if a juvenile criminal in the age group of 16–18 should be tried as an adult or not.

- It has also tried to make the adoption process of orphaned, abandoned and surrendered children more streamlined while adopting some of the concepts from the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption.
• Further, the act has *introduced foster care in India* under section 44. As per this, the families would sign up and the abandoned, orphaned children or those in conflict with the law would be sent to them.

• Such families will be monitored and shall receive financial aid from the state.

• The law has also made provision that while adopting child, priority is given to disabled children and physically and financially incapable children.

• The parents who are giving up their child for adoption get 3 months to reconsider their decision {It was earlier 1 month}.  

• The law mandates that any person giving alcohol or drugs to child would be punished with 7 years imprison or Rs. 1 Lakh fine or both. A person selling a child would be imprisoned for five years or Rs. 1 lakh fine or both.\(^\text{50}\)