

Protocols For
Police and Armed Forces in Contact
With Children In Areas of Civil Unrest



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Foreword

In India, 82 districts have been declared as disturbed, causing instability in the lives of families, including children. It has come to the notice of the Commission that police and armed forces consider such children, who come in contact with them, as perpetrators of crime and often refer them to the criminal justice system or the juvenile homes.

This document spells out the protocols that are to be adopted when police, armed forces or other law enforcement agencies come in contact with children. It focuses on considering all such children as children in need of care and protection and safeguarding their basic human rights and constitutional guarantees. These children are to be regarded as victims of circumstances, which are not of their making, and therefore they require rehabilitation, as suggested by this document. Indeed there have to be mechanisms for prevention of children from even getting into the fold of armed groups. They have to be treated as children and not as adults in such circumstances.

Some of the best practices globally as well as international provisions in this context have been referred to in the preparation of this document. The document looks at the existing security situations and its consequences *qua* the children, children vis-a-vis the armed forces and its consequences, and the importance of the Juvenile Justice Act and other international instruments in protection of children's rights. It attempts to provide a perspective on children in contact with law in disturbed areas, giving specific recommendations and preventive steps for such areas, and concludes with the protocols for investigation of encounter killings, custodial deaths and custodial rape.

It is hoped that these protocols are used by the police, armed forces, and other law enforcement agencies in contact with children in areas of civil unrest, thereby enabling protection of their rights and constitutional guarantees.



(Shantha Sinha)

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1. Introduction

1.1 The present Protocols lays down the guidelines, in the form of Standing Operating Procedures, for the law enforcement agencies, to deal with children, with whom they may come in contact, in areas of civil strife and unrest. These Protocols have been framed keeping in mind the experience derived by the National Commission for Protection of Child Rights, from the handling of various complaints received by it, as also its experience from numerous field visits and investigations carried out in this respect. These Protocols also take into account relevant international instruments, existing laws, rules, regulations and policies.

1.2 The above-mentioned experience of the National Commission for Protection of Child Rights indicate increased risks of ill-treatment of children from the point they come in contact with police and armed forces, till the concerned child is produced before the Juvenile Justice Board (“**JJB**”) or the Child Welfare Committee (“**CWC**”). The instances of increased risk include the possibility of arbitrary arrest, *incommunicado* detention, deprivation of liberty, possibility of disappearance, physical and mental harm to the child, ill treatment/ torture, etc. The possible effect of the above-mentioned instances is denial of basic human rights and constitutional guarantees, including right to life, dignity and privacy, etc, of the children, apart from a very high possibility of them entering the arena of organized and un-organized crime.

1.3 Experience has established three (3) different scenarios in which children in our country usually come in contact with the armed forces and other law enforcement agencies:

- i) first, in the ‘disturbed areas’, where the Armed Forces (Special Powers) Act, 1958 is in force and the armed forces of the Union of India have been deployed with special powers (“**Disturbed Areas**”);
- ii) second, in the districts/regions affected by Left Wing Extremism (“**LWE**”), with no special legislation is in place; and
- iii) third, the rest of the country, where no special legislation or situation is in place, however, vulnerabilities exist in the treatment of children by the law enforcement agencies as part of the normal law and order enforcement regime.

Children run into an increased risk of violation of their rights at the hands of the State in all above-mentioned three (3) situations in varying degrees. Notwithstanding the situation, children in all the said circumstances are unequivocally “victim of circumstances”, and given the social circumstances in which they are living, it is imperative that they should not be seen as “perpetrators of crime”.

1.4 However, when children are apprehended/arrested by the armed forces and other law enforcement agencies in the above-mentioned circumstances, the rhetoric of defending national security is so compelling that children are often treated as adults, allegedly waging war against the State, and the protection of their inherent rights by virtue of them being children, is, more often than not, compromised.

1.5 Consequently, it is imperative to acknowledge that all children are in need of, and in fact entitled to, due care and protection, irrespective of the nature of alleged offence committed by them, and it is undesirable to treat them as persons in conflict with the law. As a corollary, the State is under a greater obligation to rehabilitate and reintegrate such children back into the main stream of the society, given the collateral vulnerabilities of inadequate safety, security and protection, poor/negligible education facilities and health infrastructure, owing to the conditions of unrest.

1.6 The present Protocols also seek to address concerns raised by the United Nations Committee on the Rights of the Child, which include steps to ensure that deprivation of liberty happens only as a measure of last resort, and that too for the shortest possible time, appropriate conditions are provided to children in such cases of deprivation of liberty, alternative measures to deprivation of liberty, separation of children from adults, etc. are devised, and adequate provisions are made for right to legal access, training of judicial professionals, rehabilitation and reintegration, etc.¹

¹ Education in Emergencies: A Resource Tool Kit, 2006, UNICEF ROSA (2006)

Also refer to, Reaching the Girls in South Asia: Differentiated Needs and Responses in Emergencies, UNICEF ROSA (2006)

Behaviour Change Communication in Emergencies: A Toolkit, UNICEF ROSA (2006)

2. Objectives and Guidelines

2.1 The broader objective of these Protocols is to set out the guidelines in the form of Standard Operating Procedures to protect children against arrest, detention, torture, rape in custody and encounter death at the hands of armed forces and other law enforcement agencies.

2.2 Consequently, the Standard Operating Procedures aim to:

- i) establish a perspective on children who come in contact with law in areas of civil strife as described in this document;

- ii) establish preventive measures, as well as protocols and procedures, to be followed in relation to a child who comes in contact with armed forces and other enforcement agencies in Disturbed Areas under allegedly suspicious circumstances; and

- iii) enquire into complaints and/or allegations of arrest, detention, torture, death of children in police/judicial custody or in the custody of armed forces, death in encounter and custodial rape.

3. Existing Security Situations and its Consequences *Qua* the Children

3.1 Disturbed Areas, Armed Forces (Special Powers) Act and the Children

3.1.1 The Armed Forces (Special Powers) Act, 1958 (“**the Act**”) came into force on 11 September, 1958; and its operation was extended to the State of Jammu and Kashmir with effect from July 1990. The Act has been intermittently in effect in the “disturbed areas” in India since independence (1947), in the State of Punjab (1983-1992) and continues to be in effect in the State of Jammu and Kashmir² and North-East India³ since 1990 and 1958 respectively.

3.1.2 The Act defines a “Disturbed Area” as meaning an area which is for the time being declared by notification under Section 3 of that Act to be a disturbed area.⁴

3.1.3 The Act vests sweeping powers to the armed forces, including, powers to fire upon any person, even if this means causing death, for the maintenance of public order, arrest without warrant, destroy or search without warrant any premises wrongfully restrained or confined, etc.⁵

² Out of 22 districts, 20 districts of the State of Jammu and Kashmir have been declared as “Disturbed Areas” for the purposes of the Act.

³ The entire State of Manipur (except Imphal Municipal Area), Nagaland and Assam, Tirap and Changlang districts of Arunachal Pradesh and Meghalaya having common border with Assam have been declared as “Disturbed Areas” for the purposes of the Act . Thirty four police stations in full and part of the areas falling within the jurisdiction of six police stations in the State of Tripura have been declared as “Disturbed Areas” for the purposes of the Act.

⁴ Section 3 of the Act, reads thus:

“3.Powers to declare areas to be disturbed areas – If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State of Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be , may by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area.

⁵In this regard, Section 4 of the Act enacts thus:

“4. Special Powers of the armed forces – Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-

The armed forces are protected from persecution, as the Central Government must sanction any prosecution or legal proceeding against a member of the armed forces in relation to acts done or purported to be done in the exercise of the powers conferred upon them under the Act.⁶

3.1.4 Though the constitutional validity of the Act has been challenged three (3) times since its enactment, however, all the above-mentioned challenges to the *vires* of the Act have been unsuccessful.

3.1.5 The constitutional validity of the Act was first challenged in 1983 before the Hon'ble High Court of Delhi in **Indrajit Barua v. State of Assam**⁷, however, without success. The constitutional validity of the Act was once again challenged in 1990 before the Hon'ble Guwahati High Court in **People's Union for Civil Liberties v. Union of India**⁸. The Court while judicially reviewing the powers conferred upon the armed forces under the Act, struck down the identification of the twelve districts in the State of Assam as "disturbed areas" on the

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;

(c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

(d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary."

⁶ See, Section 6 of the Act, which enacts thus:

"6. Protection to Persons acting under Act – No persecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

⁷ **Indrajit Barua v. State of Assam**, A.I.R. 1983 Del. 513.

⁸ **People's Union for Civil Liberties v. Union of India**, A.I.R. 1991 Gua. 23.

ground that the Government had not provided sufficient evidence to justify invocation of the Act in the said districts. In Central Government's appeal to the Hon'ble Supreme Court of India from the decision of the Hon'ble Guwahati High Court, partial stay of the decision passed by the Hon'ble Guwahati High Court was granted by the Hon'ble Supreme Court, pending final hearing in the said appeal⁹. The constitutional validity of the Act was thereafter challenged before a 5 Judge Constitution Bench of the Hon'ble Supreme Court of India in **Naga People's Movement of Human Rights v. Union of India**¹⁰, wherein the Apex Court not only upheld the competence of the Parliament to enact the Act, it also declined to dilute any of the powers conferred upon the armed forces by the Act. However, the Hon'ble Supreme Court has sought to give binding effect to the instructions in the form of a list of "Do's and Don'ts" that are issued by the Army Headquarters from time to time, which are required to be followed by the members of the armed forces exercising powers under the Act, by making violations of the said instructions punishable under relevant provisions of the Army Act, 1950.¹¹

⁹ The Hon'ble Supreme Court stayed the portion of the decision of the Hon'ble Guwahati High Court that required the Government of Assam to withdraw the disturbed area declaration in respect of the twelve districts where the invocation had been held to be unjustified.

¹⁰ **Naga People's Movement of Human Rights v. Union of India**, AIR 1998 SC 431.

¹¹ The Hon'ble Supreme Court of India, in this context has held thus:

"58. The instructions in the form of "Do's and Don'ts" to which reference has been made by the learned Attorney General have to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note should be taken of violation of the instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950.

....

74. In the light of the above discussion we arrive at the following conclusions:

....

(19) While exercising the powers conferred under clauses (a) to (d) of S. 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding and any dis-regard to the said instructions would entail suitable action under the Army Act, 1950.

(20) The instructions contained in the list of "Do's and Don'ts" shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of S. 4 and S. 5 of the Central Act as construed and also the direction contained in the order of this Court dated July 4, 1991 in Civil Appeal No. 2551 of 1991..."

3.1.6 However, from the stand point of the rights of children, none of the above referred decisions dwelled upon the question of vulnerability of children in the context of exercise of powers conferred upon the armed forces under the Act.

3.1.7 It is pertinent to note that the Act makes no exceptions in case of children who are apprehended and arrested by the armed forces while exercising powers conferred upon them by the Act. Consequently, the operation of this legislation has, thrown open remarkable challenges involving serious violation of human rights and constitutional guarantees of the concerned children

3.1.8 Although the Hon'ble Supreme Court of India, through its decision in **Naga People's Movement of Human Rights v. Union of India**¹² has endeavored to moderate the Act, by giving legally binding force to the above-mentioned Do's and Don'ts for the armed forces while carrying out the powers vested in them by the Act, however, the said decision does not carve out any exception as regards the children.

3.1.9 The above-mentioned instructions in the form of Do's and Don'ts envisage five (5) contingencies in which powers are exercised by the armed forces while operating under the Act, namely, actions a) before the operations; b) during operations; c) after operations; d) while dealing with the court; and e) while providing aid to civil authority.

3.1.10 The above-mentioned legally binding instructions in the form of Do's and Don'ts, in the context of children, mandates that the armed forces "[d]o not ill treat any one, in particular, women and children"¹³. However, the said mandate is only limited to cases where armed forces are providing aid to a Civil Authority, and no similar substantive binding obligation has been cast upon the armed forces in their actions before, during or after operations and while dealing with the relevant cases in the Court, and a vast scope of abuse exist, particularly, in situations wherein children are apprehended, arrested, as also with regard to their treatment post arrest. Further, the owing to the use of the expression "women and children", there is an inherent

¹² **Naga People's Movement of Human Rights v. Union of India**, AIR 1998 SC 431.

¹³ See, point no. 10 listed in don't's section of the "[I]st of Do's and Don'ts while providing aid to Civil Authority", as set out in paragraph 54 of the judgment of the Hon'ble Supreme Court of India.

tendency to link children as a sub-set of women, with a strong possibility of youth being left out of the protective clause.

3.1.11 Though there exist instances of the Courts justifying actions of the armed forces under the Act¹⁴, Courts have also attempted to restrict upon the uncontrolled exercise of powers by the armed forces under the Act¹⁵, which are important from the standpoint of children coming in contact with the armed forces under the Act.

3.1.12 However, there still exist important loopholes, which have the potential of translating into abuse of children coming in contact with the armed forces under the Act. These loopholes also translate equally in case of the Central Armed Police Forces or the police force and consequently, the below discussion is equally relatable to them.

3.1.13 The Act contains a requirement of prior sanction from the Central Government to institute any legal proceedings against a member of the armed forces for any offence committed in exercise of powers under the Act. This discretionary power has effectively been exercised by the Central Government to block all prosecution of any human rights violations, including rape, torture, enforced disappearances and extra judicial killings in case of children who come in contact with the armed forces. This is reinforced by the ordinary law under the Code of Criminal Procedure, 1973, through Sections 197 (2), 132 and 45. Section 197 of the Code of Criminal Procedure, 1973 mandates that the Court shall not take cognizance of any offence committed by a member of the armed forces or the Central Armed Police Forces, unless prior sanction is secured from the concerned government/ competent authority.

¹⁴ See, **Inderjit Barua v .State of Assam**, AIR 1983 Del 514, wherein the Delhi High Court has opined that conferment of power on non-commissioned officers under the Act, like a *Havaldar*, cannot be said to be bad and/or unjustified.

¹⁵ See, **Luithukia v. Rishang Keishing**, (1988) 2 Gau LR 159, wherein the Gauhati High Court has held that the armed forces, while acting under the Act, must act in cooperation with the district administration and not as an independent body. The Act, in this regard, provides that—any person arrested and taken into custody by the armed forces under the Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

3.1.14 The experience establishes that the above-mentioned statutory immunities provide complete and absolute immunity to members of the armed forces against any prosecution by ordinary courts. The said statutory immunities, available under the law to the armed forces and the Central Armed Forces, have a grave tendency to translate into absolute impunity for sexual violence and other human rights violations in cases of children. The provision of prior sanction introduced during colonial times to protect public servants from frivolous, vexatious prosecutions persist in our law today and have morphed into an iron shield that protects these forces from accountability for egregious human rights violations including sexual violence *qua* the children.

3.1.15 Further, special laws regulating the armed forces and other Central Armed Police Forces, such as the Indian Army Act, 1950 and the Border Security Forces Act, 1968, provide that cases of rape of a civilian¹⁶ will be treated as a “civil offence”¹⁷ and tried before the ordinary criminal court. However an over broad interpretation of the term ‘active duty’/ ‘active service’ and the prior right given by these laws to the Commanding Officer of the unit of the accused to determine whether a personnel accused of rape will be tried before the ordinary criminal court or through court martial proceedings,¹⁸ has ensured that members of the armed forces and other security forces are not prosecuted by the ordinary criminal courts. A court martial proceeding does not meet the test of fair trial before an independent and impartial judiciary, infringes the right to justice and remedy of the victim and is in contravention of international human rights jurisprudence.

¹⁶ See, Section 70 of the Army Act, 1950.

¹⁷ See, Sec. 3 (ii) of the Army Act, 1950 defines “civil offence” as “an offence, which is triable by a criminal court”.

¹⁸ See for example, Section 125 of the Army Act, 1950, which enacts thus:

“125. Choice between criminal court and court-martial When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court- martial, to direct that the accused person shall be detained in military custody.”

3.1.16 Consequently, there is an imperative need to do away with the requirement of prior sanction for prosecution, of a member of the armed forces, the Central Armed Police Forces or the police force, under Section 197(2) (3) and (3A) of the Code of Criminal Procedure, 1973, and similar provisions under special laws such as the Act, for all cases of rape or any other form of sexual violence, against children. As a corollary, that all cases of rape or any other form of sexual violence by a member of the army or the Central Armed Police Forces, *qua* children, shall be treated as a civil offence and shall be tried before the ordinary criminal court.

3.2 LWE Affected Areas

3.2.1 According to the Ministry of Home Affairs, Government of India, eighty two (82) “Selected Tribal and Backward Districts”, identified for accelerated development, are the ones adversely affected by LWE¹⁹. Majority of these LWE affected areas are in the States of Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Uttar Pradesh, Uttarakhand and West Bengal.

3.2.2 No Special law, vesting additional powers to the armed forces operating in LWE affected areas, has been enacted. ‘Police’ and ‘public order’ being State subjects²⁰, enacting legislations with respect to maintenance of law and order in the States, vests primarily in the domain of the concerned State Governments, who deal directly with the various issues related to LWE activities in the States²¹. However, due to continued civil unrest and sustained and planned attacks on the civilians by the left wing extremists, seventy four (74) battalions of the Central Reserve Police Force and Commando Battalion for Resolute Action teams are currently deployed to assist the State Police in the States of Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Uttar Pradesh and West Bengal²². Additionally, thirty seven (37) Indian Reserve Battalions and ten (10) Commando Battalion for Resolute Action teams are currently being raised for this purpose. Twenty (20) Counter Insurgency Anti-

¹⁹ Ministry of Home Affairs, Government of India, Naxal Management Division
http://mha.nic.in/uniquepage.asp?Id_Pk=540

²⁰ See, Entries 1 and 2 of List II of the Seventh Schedule to the Constitution of India, read with Article 246 of the Constitution of India.

²¹ Ministry of Home Affairs, Government of India, Annual Report 2011-12, para 2.9.7.

²² Ibid, para 2.9.10.

Terrorism units, too, have been commissioned or are in the process of being commissioned for this purpose. Due to the intense security threat occasioned by the above-mentioned activities, the Central Government is also providing assistance to the concerned State Governments' for construction/ strengthening of fortified police stations under the Scheme for Construction/ Strengthening of 400 Fortified Police Stations in LWE affected districts.

3.2.3 The operations captioned 'Blue Bird' (1987), 'Sunny vale' (1993), 'Loktak' (2005), 'Tornado' (2005), 'Dragnet' (2006), 'Somtal I' (2006), 'Somtal' II (2008), and 'Summer Storm' (2009), carried out in LWE affected areas, have reportedly resulted in killings of unarmed civilians and more particularly children, however, such killings have not been documented.

3.2.4 High involvement of the armed forces and sustained operations against the left wing extremists has severely impacted child rights issues in these areas.

3.3 Rest of the Country not affected by LWE or covered by the Act

3.3.1 No special powers have been vested in the Police; however, the officers manning the law enforcement agencies are virtually un-informed about the issues concerning protection of child rights in the routine operation of the law enforcement agencies.

4. Children vis-a-vis Armed Forces – Some Consequences

4.1 A few noteworthy consequences and implications flow as a result of the above-mentioned situations, which are listed in the subsequent paragraphs.

4.2 Since the Act does not make any distinction between adults and children, apprehended children are handcuffed, kept in police lock up and/or in detention centers, along with other apprehended adults, where they are subjected to further torture and various other forms of ill treatment and their right to life and liberty stand jeopardized.

4.3 Further, from the point when the children are apprehended or picked up, they are denied the right of information about the reason(s) of their detention or arrest and right of establishing communication with their parents, respected community leaders or for the purposes of seeking appropriate legal advice, which ultimately results in denial of their fundamental rights guaranteed by Article 22 of the Constitution of India. Additionally, the Police fail to produce such children before the Juvenile Justice Board, as mandated by law.

4.4 Further, between the source point from where the children are apprehended or picked up, and the point of final destination the children are often deprived of the basic right of access to food, water, personal hygiene and sanitation.

4.5 Additionally, institutional and statutory mechanisms such as Juvenile Justice Boards, Child Welfare Committees, Juvenile Observation Homes, Children's Homes, Special Juvenile Police Units, etc. either do not exist in the "disturbed areas" and in LWE affected areas, or are not fully operational and/or are inhibited in their functioning due to lack of financial resources and/or non-compliance with Central and State legislations, rules, regulations, policies, etc., and directions of the Hon'ble Supreme Court/High Courts'. Even in cases where such mechanisms exist, their services are not invoked in cases of children who are apprehended or arrested under the Act.

4.6 Consequently, when children are produced before a Magistrate who is not empowered to exercise the power of a Juvenile Justice Board or Child Welfare Committee, the Magistrate does not refer the case to either of the above-mentioned statutory bodies, as mandated by law, and proceeds to deal with the case. In fact, in a few such cases, the children have been sent to jail, and have been illegally detained therein, against the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (“**the JJ Act**”), and the guidelines issued by National Human Rights Commission.

5. Importance of the JJ Act

5.1 The JJ Act, is a legislation to consolidate and amend the legal framework relating to juveniles in conflict with law and children in need of care and protection. The JJ Act envisages proper care, protection and treatment to children, by catering to the child's development needs. The JJ Act attempts to adopt a child-friendly approach in the adjudication and disposition of matters in the best interest of the Child, and to secure the Child's ultimate rehabilitation through various institutions established under the said enactment.

5.2 Apprehension and arrest of children, following the same processes and protocols that are used for the arrest of adults, as envisaged in the general laws, is in clear violation of the provisions of the JJ Act, which is a special statute dealing with juveniles in conflict with law. Sub-section 4 of Section 1 of the JJ Act, in this regard, mandates thus:

“Notwithstanding anything contained in any other law for the time being in force, the provisions of the Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of Juveniles in conflict with law under any such law.”

5.3 Consequently, the JJ Act supersedes the provisions of the Act, in so far as children below the age of eighteen (18) years are concerned.

5.4 In order to better appreciate the actual implementation of the JJ Act, as also its policy outcomes, the National Commission of Protection of Child Rights (“**NCPCR**” or “**the Commission**”) undertook a systemic review of the failures and gaps affecting children and their rights within the juvenile justice system envisaged under the JJ Act.

5.5 The above-mentioned review conducted by the Commission indicated that the failures in the juvenile justice system predominantly relate to the entrenched criminalisation and institutionalisation of children in conflict with the law and children in need of care and protection. This is reflected in the pervasive violation of children's fundamental rights in every

step of a child's contact with the juvenile justice system. Further, there are continuous breaches of a child's rights in the procedural processes for adjudication, disposition and placement of children, as well as within existing institutional care, rehabilitation and detention facilities.

5.6 Most importantly, there was a fundamental lack of understanding and recognition within the juvenile justice system that:

- i) children in conflict with law are also children in need of care and protection;
- ii) children in need of care and protection are also at risk of becoming children in conflict with law; and
- iii) all 'at risk' children are also potential entitlement holders within the juvenile justice system.

5.7 Though the juvenile justice system is meant to cover each and every child who requires care and protection, it has been found that its capacity has been limited to cover a miniscule set of children, owing to the lack of targeted procedural mechanisms and operational capacity. Whilst the JJ Act refers to some of these categories in its definitional scope, the categories of children highlighted below are either:

- i) not explicitly or comprehensively addressed by existing legislative and policy provisions; or
- ii) have been largely excluded in the implementation of juvenile justice system.

5.8 With regard to children apprehended under security legislations, they are currently not tried through the juvenile justice system and are often reportedly detained in adult correctional facilities, without access to due process of law. The judicial opinion of the Courts²³ has supported the overriding effect of security legislations vis-a-vis the application of the JJ Act.

²³ See, POTA Special Court's decision in Anwar Abdullah Kalandhar's case, 2007 POTA case no. 8/2004; Orissa High Court's decision in **V.A. Mohta, C.J. & R.K. Dash. J. v Distt. Magistrate, Cuttack & Ors.**, O.J.C. No. 220 of 1995, wherein it has been held that when a juvenile stands accused of offences under Prevention of Terrorism Act, 2002 he will be tried under Prevention of Terrorism Act, 2002 and not the JJ Act.

6. Protection of Child Rights under International Instruments

6.1 International instruments are equally committed towards the protection of child rights. As an example, Article 40 (3) and (4) of the United Nations Convention on the Rights of the Child, 1989 obliges United Nations member states to frame judicial procedures, specifically applicable to children accused of, or recognized as having infringed the penal law.

7. Perspective on Children in contact with Law in Disturbed Areas: Certain Recommendations

7.1 With regard to children apprehended under security legislations, there is an imperative requirement of changing the inherent basis of the emerging judicial view on the overriding powers of such legislations, including the National Security Act, 1980, Prevention of Terrorism Act, 2002 etc., vis-à-vis the application of the JJ Act. The Judicial Authorities need to be sensitized that when there is a conflict between the above-mentioned security legislations, and the JJ Act on the issue of children, the JJ Act must have the overriding effect.

7.2 Further, as a priority, human rights' bodies in all the States need to identify the individual cases and circumstances of affected children, currently being detained, and act to ensure their access to due process, in line with the principles envisaged by the JJ Act and protection of their fundamental human rights envisaged in international instruments.²⁴

7.3 Additionally, all children up to the age of eighteen (18) years, who have come in contact with law in such areas, are to be treated as children in need of care and protection, and consequently, being governed by the provisions of the JJ Act dealing with children in need of care and protection. Similarly, children who have been displaced, either due to civil unrest, natural disasters, or the like, steps need to be taken to:

- i) bring such children within the purview of the juvenile justice system;
- ii) ensure provision and continuity of services towards the care and protection of such children, and ensure that there is no gap in their access to education;
- iii) set up a separate Child Welfare Commission in such affected areas, with a stipulation that the concerned State needs to respond immediately to the recommendations of the Child Welfare Commission. .

²⁴ See, International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000; Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2002, etc.

7.4 It is reiterated that even when such children are found to be in conflict with law by any authority, whom the child comes in first contact, the authority shall deal with them as “victims of circumstances” and not as ‘perpetrators of crime’. They are therefore to be given care and protection. They are entitled to inalienable rights and deserve to be treated with dignity and decency.

7.5 Under very specific circumstances²⁵, children in the age group of 16-18 years, especially those who have actively participated in, or have been associated with armed conflict, shall be referred to the Juvenile Justice Board by the Special Juvenile Police Unit (SJPU). Further, even in the above-mentioned circumstances, the Juvenile Justice Board shall avoid using judicial proceedings and exercise the option of a variety of dispositions proportionate to the circumstances of the alleged offence. The Juvenile Justice Board should follow processes, and facilitate the child’s physical and psychological recovery in such cases, as also his/her social reintegration into an environment that fosters his/her health, self-respect, dignity²⁶ and total rehabilitation, in conformity with Articles 3.1, 37 and 40 of United Nations Convention on the Rights of the Child, 1989 and the relevant provisions of the Beijing Rules, 1985.²⁷

²⁵ “Specific Circumstances” as defined in the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 2007 (“**the Paris Principles**”).

²⁶ See, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (“**the Beijing Rules**”).

²⁷ See, The Beijing Rules, Rule No.13, which provides thus:

“ **13. Detention pending trial:** 1. Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

....

5. While in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational psychological, medical & physical that they may require in view of their age, sex & personality.

....

9. Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the treatment of prisoners adopted by the UN.”

8. Preventive Steps for “Disturbed Areas”

8.1 Prevention is currently not a core objective of the juvenile justice system. Child protection institutions, structures and processes currently provide limited support to prevention of child delinquency, abuse, neglect, exploitation, etc., through targeting of ‘high and at risk’ families and children and utilization of ‘early intervention’ mechanisms. Even with regard to the children, who do come in contact with the juvenile justice system, there is a significant degree of recidivism and many children continue to suffer from repeated cycles of maltreatment as a result of return to child labour, re-trafficking, return to circumstances of abuse and neglect, etc.

8.2 There is an urgent need for a systematic and localised approach for prevention of children falling into the category of children in need of care and protection or in conflict with law and to ensure that children are not forced to participate in any manner in armed conflict, trafficking, early marriage, recruitment as child labourers, or become victims of abuse. Additionally, there is a strong requirement of fostering a dialogue between the community and the government and constant building of mutual trust and faith in order to protect children and bring stability in their lives.

8.3 Local bodies, such as *gram panchayats*, should be equipped to monitor every child and co-ordinate with the local officials for provisioning of services to children, and addressing their requirements and entitlements.

8.4 There is also a need to develop the ”outreach” capacity of the Child Welfare Committees’ under the juvenile justice system and the Integrated Child Protection Scheme (ICPS) to deliver early intervention and follow-up support, including counseling, referral, monitoring, etc., to vulnerable families and at-risk children.

8.5 Urgent need has been felt to develop ‘early intervention’ initiatives, which allow local bodies to trigger care and placement support for families under duress and ‘at risk’ children. As a priority, there is a need to establish direct linkages between each Childline and primary and secondary schools, through appointment of responsible teachers, as liaison contacts. Educational

opportunities and facilities for hostels, scholarships, free text books and education material up to the age eighteen (18) years are to be ensured to every such child. Early child care centers, including *anganwadi* centers, are to be made available with universal coverage of all children under age of six (6) years.

8.6 There is a requirement for operationalising district and block level coverage of child protective services, through focus on strong linkages with the *panchayat* administration, which must be equipped to identify local child protection requirements and monitor provision of appropriate services to children.

8.7 There is also a need to operationalise multi-sectoral collaboration for appropriate referrals across all child relevant departments and ministries of the Central Government and State Governments, and law enforcement agencies.

8.8 There is a necessity to invest in expansion and roll-out of government and Non-Governmental Organisation / Community based Organisation led prevention initiatives, e.g., drop-in recreation centers, youth volunteering programmes, child sensitive education initiatives on high risk behavior, emergency shelters, etc.

8.9 There is also a requirement to formulate coordinated reform strategies, including strategies regarding organization set up and proper functioning of Juvenile Justice Boards and juvenile police units, initiation of financial capacity building initiatives, closely integrated to rehabilitation and reintegration, monitoring and evaluation of post release scenarios.

8.10 There is a need to train key personnel involved in the juvenile justice system, to ensure effective implementation. Police/armed forces, prosecutors, legal and other representatives of the child, judges, probation officers, social workers, peer educators and parent/guardians are important stake holders in the effective functioning of the juvenile justice system, which fact needs to be duly recognized.

8.11 There is a requirement to accord high priority to plans and programs for young persons and to make provision for adequate resources – human, material and financial – for effective delivery of relevant services²⁸.

8.12 All Central Government and State Government schemes and programs shall accord flexibility to the district administration to innovate and modify the relevant scheme/programme and allocate funds accordingly to address the concerns of children in the affected areas. There is also a need to provide for children's emergency relief fund, in all components of government schemes and programs that would enable the administration to respond to the exigencies in a timely, urgent and effective manner.

²⁸See, the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990.

9. The Protocols: Standing Operating Procedures

9.1 The armed forces and the law enforcement agencies are to be guided by the Standard Operating Procedures when in contact with a child:

- i) ensure respect for human rights and fundamental rights of children, as enshrined in various international instruments and the Constitution of India, and follow legal safeguards as indicated in the relevant legislations, as also in the Beijing Rules, 1985;
- ii) not to resort to a formal trial while dealing with juvenile offenders;
- iii) give due weightage to non- punitive and restorative approach by exercising variety of dispositions proportionate to the circumstances of the offence, without resort to judicial proceedings. These include care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programmes and other alternatives to institutional care²⁹;
- iv) adequate help should be provided for the physical and psychological recovery of the concerned child, and his/her social reintegration into an environment that fosters their health, self-respect and dignity.

9.2 When armed forces and the law enforcement agencies find a child engaged in activities that are associated with armed groups or any illegal activity, the following steps should be followed³⁰:

²⁹ Similar guarantees are ensured in the United Nations Convention on the Rights of the Child, 1989. Article 40 (2) of the said convention contains an important list of rights and guarantees that are meant to ensure that every child, alleged or accused of having infringed the penal law, receives fair treatment and trial. Articles 40(3) and 40(4) of the convention stipulate that state parties shall avoid using judicial proceedings and exercise the option of a variety of dispositions proportionate to the circumstances of the offence. Most of these guarantees can also be found in Article 14 of the International Covenant on Civil and Political Rights, 1966.

³⁰ These recommendations are based on the Paris Principles and are suitably modified to ensure their adaptability to the structures and institutions as they exist in the Indian context.

- i) ensure that children are not handcuffed, kept in police lock up and/or in detention centers along with adults;
- ii) between the source point where the children are apprehended or picked up and the final destination point, they must have access to food, water, personal hygiene and sanitation;
- iii) children apprehended or picked up, must not be denied the right to information and they must be furnished with reason(s) of their arrest or detention and be given the right to establish communication with their parents or respected community leaders or persons who can provide them access to legal remedies;
- iv) the child and/ or his/her family/ guardian should be provided with complete information at every step, to enable their effective participation in all the decisions that are taken regarding the rehabilitation and education of the child concerned;
- v) the principle of diversion, as articulated in the JJ Act, must be put to effect and the concerned child should be referred to the Child Welfare Committee under the juvenile justice system, which would, in turn, relocate them in a safe home and proceed to arrange for their psycho-social support and counseling;
- vi) Child Welfare Committee should contact the District Child Protection Unit and in consultation therewith, prepare a care plan for the concerned child and facilitate the child's enrollment in school into an age appropriate class, admission into a hostel if need be, and reintegrate the child with the family, where ever possible. If such children are already apprehended and in police custody, the Child Welfare Committee should facilitate the unconditional release of such children, by providing free legal aid, through the District Legal Services Authority;
- vii) establish permanency planning as a core objective of Child Welfare Committee's assessment and placement processes. Strong permanency planning would require strong implementation and development of the following processes and capacities:

- a) individualised case management, addressing the child's living circumstances before she came in contact with the juvenile justice system, which should continue until a stable and safe placement outcome is achieved;
- b) integrate the involvement of the child and his/her parents or guardian(s), where appropriate, in the assessment and planning process;
- c) child welfare professionals should be employed to maintain contact with the child and family or guardian(s) beyond the initial intake and placement, and to review the child's placement situation, following systematic on-going monitoring protocols;
- d) clear criteria and guidelines should be devised for juvenile justice authorities, setting out the determinative considerations for adoption or selection of appropriate alternate care placements, e.g., kinship care, group foster care, etc.;
- e) establish hostels and transitional education centers, as important alternatives, to be utilised by the juvenile justice system, particularly in cases of children with parental care in vulnerable families that need support. Strengthen linkages between juvenile justice system and procedures and programmes initiated by the education, labour and welfare departments;
- f) establish non-institutional services, such as foster care programs, kinship care and sponsorship, to facilitate integration of such children into the society in a systematic manner;
- g) provide training to organisations, individuals or groups working with children to help rehabilitation of children; and
- h) put in place mechanism for monitoring and reporting violations and fixing the responsibility of individuals responsible for such violations.

9.3 The accountability of armed forces and the law enforcement agencies in front of the Child Welfare Committee must establish the following safety concerns:

- i) arrest and/or detention was not arbitrary or illegal;
- ii) the burden of proof as regards age determination should be on armed forces and the law enforcement agencies;
- iii) apprehended child was not detained in the Police Station;
- iv) under no circumstances was the juvenile ill treated, The onus of ensuring this safeguard is not limited to the juvenile police officer only, but also extends to all functionaries in the juvenile justice process;
- v) no interrogation, extraction of information, confessions/statements were taken from the child by armed forces and the law enforcement agencies.

10. Standing Operating Procedures for investigation of encounter killings, custodial deaths and custodial rape:

10.1 In case of encounter killings, custodial deaths, custodial rape, interrogation and torture of a child, the relevant provisions of the Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Guidelines issued by the National Human Rights Commission and the Protection of Children from Sexual Offences Against Children Act, 2012 should be applied to all such cases.

10.2 The following four (4) methods of inquiry, which are most commonly used, should be employed:

- i) enquiry under the Commission of Inquiry Act, 1952;
- ii) Magisterial inquiry under Section 176(1) of the Code of Criminal Procedure, 1973. The following principles must be followed in the conduct of Magisterial inquiry:
 - a) The Magisterial inquiry must invariably be held in all cases of death which occur in the course of police action or action by the Central/State security forces or rape in custody;
 - b) the next of kin of the deceased must invariably be associated with such inquiry. The inquiry shall be completed within a period of four (4) months.
 - c) The District Magistrate or the District Judge, as the case may be, who is responsible for securing desired cooperation and coordination between police and magistracy should oversee whether the Chief Judicial Magistrates of the district are discharging satisfactorily the role assigned to them under Section 14 (2) of JJ Act, while reviewing the functioning of Juvenile Justice Boards' in the district.
- iii) Judicial inquiry conducted as per order of the High Court/Supreme Court of India; and

iv) Inquiry in compliance with the guidelines by the National Human Rights Commission.

10.3 The State Governments and Administrations of Union Territories must discharge the following roles and responsibilities in relation to the inquiries:

i) in case of difficulty in communication through any particular language, including the language commonly spoken in a particular State, which is being experienced either by the parents or the next of the kin or any witness being called upon for examination, the State must make available the services of a qualified and experienced interpreter to facilitate the inquiry process;

ii) while the procedure established by law shall be followed in all such inquiries, the State Governments and Administrations of Union Territories shall ensure that the Magistrate holding the inquiry should, as far as possible, create conditions in terms of selection of venue, time, duration of interrogation, etc., in a such a manner as would inspire confidence in the minds of the parents or the next of the kin to wholeheartedly participate in the inquiry process;

iii) the State Governments and Administrations of Union Territories shall ensure that the inquiry should be conducted in such a manner as would be in the best interests of the child; and

iv) the State Governments and Administrations of Union Territories shall ensure that the inquiry should be conducted as expeditiously as possible and should be completed within a maximum period of four (4) months, and no request for extension should ordinarily be entertained by the State Governments and Administrations of Union Territories.