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Left Out By the Pied Piper: The U.N. Response To Children In Localized Conflict Settings

Mukul Saxena Vimug*

¶1

Child participation in violent secessionist movements is an on-going problem in developing states.¹ Ever since the states gained independence from colonial rule, these secessionist movements have fought for self-determination on grounds of ethnicity, political rivalry, or religious fundamentalism. The United Nations permitted international intervention in the civil wars of the 1990s because those conflicts occurred in states lacking any semblance of rule of law. In contrast, the current third-world conflicts occur within states with a certain level of democratic governance and rule of law, thereby limiting international intervention under the auspices of the U.N. Child involvement in violent movements presents distinct challenges in terms of how to define those children (because there are strong indicators that children voluntarily participate in on-going secessionist movements),² and in terms of the state's recognition of the child soldier problem. Further, the conflicts stemming from secessionist movements present new threats to the protection of children.³

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¹ Secessionist movements are active in India within Kashmir and Northeast India, Sri Lanka from the Liberation Tigers of Tamil Eelam (LTTE), Pakistan from Balouchistan, and Nepal from the Moaists.

² There is a practice of voluntary child recruitment in most secessionist movements. For example, when the secessionist movement within Sri Lanka gained momentum between 1987 and 1994 child recruitment was largely voluntary or the result of subtle coercion or manipulation. *See* SONALI, CHILDREN AND CONFLICT: CHILD SOLDIERS AND THE ROLE OF SMALL ARMS. Similarly, a great number of children voluntarily participated in the political violence in Nepal; Palestine is another example where young people growing up in the Occupied Territories are often willing participants in the national struggle and their political consciousness is developed to an extent, and from an age, that commonly takes outsiders by surprise. JASON HART, CHILDREN'S PARTICIPATION IN HUMANITARIAN ACTION: LEARNING FROM ZONES OF CONFLICT (University of Oxford 2004); *See also* HOGG CHARU LATA, CHILD RECRUITMENT IN SOUTH ASIAN CONFLICTS: A COMPARATIVE ANALYSIS OF SRI LANKA, NEPAL AND BANGLADESH 12 (The Royal Institute of International Affairs 2006).

³ U.N. Children's Fund & Office of the Special Representative of the Secretary-General for Children and Armed Conflict: *Children and Conflict in the Changing World: Machel Study 10-Years Strategic Review*, (April 2009).

¶2 Child participation in these movements is interwoven with the history of decolonization, itself a complex internal struggle of accession and secession between newly independent sovereign states and their internal communities. These communities felt threatened by what they viewed as an oppressive, dominant regime occupying their territory, infringing on their ethnic and tribal identity, and hindering their progress toward self-determination. The communities' collective grievances formed the basis of internal struggles, which in turn became protracted armed confrontations with the newly established dominant states. These state governments, established as a result of external decolonization and the internal choice of the people,⁴ did not recognize secession as a viable means for communities to establish legitimate, democratic states.⁵ Established states believed democratic legitimization of a government contained both the external component of decolonization and the internal component of citizens' right to choose their own form of government.⁶ The right to secede did not fit within this rubric.⁷

¶3 Over the last several decades, the legal character of secessionist movements has become extremely complex.⁸ The established states regarded the movements as issues

⁴ See, e.g., U.N. Human Rights Committee, *Third Periodic Reports of States Parties due in 1992: India*, ¶ 32, U.N. Doc. CCPR/C/76/Add.6 (July 17 1996), available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/83d5a36cc444d1d3c125640400501464?Opendocument> [hereinafter *State Party Report: India*] (“[T]he right to self-determination is said to have both internal and external aspects.”). It does appear that so far as external aspects are concerned, the context, background, and drafting history, support the view that colonies (and trust territories) were seen as the groups seeking autonomy. The international community continues to affirm that the right of external self-determination does not extend to component parts or groups within independent sovereign States. If attempts are made to promote a thesis favoring the break-up of States on grounds of ethnicity or religion, there would be, as cautioned by the United Nations Secretary General in the *Agenda for Peace*, “No limit to fragmentation and peace, security and economic well-being for all would become even more difficult to achieve.” U.S. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, U.N. Doc. A/47/277-S/24111 (June 17, 1992). This was reiterated conclusively and unambiguously in the Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in 1993, which states that the right of self-determination “shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and the self-determination of peoples.” World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ch. 3, U.N. Doc. A/CONF.157/24 (Part I) (Oct. 13, 1993). The Declaration on the occasion of the Fiftieth Anniversary of the United Nations reiterates that statement.

⁵ *State Party Report: India*, *supra* note 4, ¶ 32. Nepal similarly refers to self-determination as the immediate granting of this right to the people under the domain of colonialism. See U.N. Human Rights Committee, *Initial reports of States parties due in 1992: Nepal*, ¶ 2, U.N. Doc. CCPR/C/74/Add.2 (May 18, 1994), available at

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/4a5714d7ee86f02d80256759004cd3cc?Opendocumen>. Sri Lanka also reiterates that the principle of self-determination cannot be construed as authorizing any action that would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent States. See U.N. Human Rights Committee, *Third periodic reports of States parties due in 1991: Sri Lanka*, ¶ 2, U.N. Doc. CCPR/C/70/Add.6 (Sept. 27, 1994), available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/876c193b2185d4f88025655d003cf33a?Opendocument>.

⁶ See *State Party Report: India*, *supra* note 4, ¶ 32.

⁷ *Id.*

⁸ In India, the situation in Jammu and Kashmir has existed since 1989, the situation in the Northeastern region since independence in 1947, and the most recent Naxalite problem in the Central region was officially recognized by the State in 2003. Similarly, the Maoists problem in Nepal erupted in 1990 after the restoration of parliamentary democracy where the Maoists sought establish a Maoist people's democracy. Sri Lanka too was in the middle of such a confrontation with the LTTE demanding a separate Statehood since 1972. The LTTE problem began after the replacement of the independence Constitution

either of law and order or public order, and sought to exercise sovereign discretion to eliminate the movements. The international community, on the other hand, saw the secessionist activities as internal armed conflicts. This international characterization raised the possibility that the conflicts constituted humanitarian crises warranting international intervention.⁹ The classification of the secessionist movements also affected regulations regarding child protection. After the 1996 publication of the Grac'a Machel Report (Machel Report),¹⁰ which examined child participation in internal armed conflicts in failed states (namely, states lacking any democratic governance or rule of law), the U.N. and various international non-governmental organizations (NGOs) introduced accountability mechanisms to stop the recruitment of children for participation in those armed conflicts. These mechanisms included the option to permit international intervention when peace and security are at risk, under Chapter VII of the U.N. Charter,¹¹ and the ability to declare child recruitment a war crime under the Rome Statute of the ICC.¹² However, if conflicts stemming from secessionist movements are only regarded as internal struggles to maintain public order, as the established states suggest, then international accountability mechanisms are not available to address child participation.

The concept of extending protections to children in “localized situations” (this term will be used throughout the article to refer to these secessionist movements) gained traction after the 2001 adoption of U.N. Security Council Resolution 1379, which hereafter primarily sought to address post-conflict truth-and-reconciliation mechanisms for effective reintegration of child soldiers.¹³ However, it was over-shadowed by the Machel Report, which did not create distinctions between conflicts, but rather labeled all conflicts as “armed conflicts.” Child protections thus became contingent on receiving a label of “armed conflict.” Because actions taken to “maintain public order” did not receive this classification, they did not trigger international child protections, thereby reducing the applicability of measures intended to protect children in localized conflicts.¹⁴ In 2002, the international community tried to institute child protections at the state level. The U.N. Commission on Human Rights called upon states to review any domestic laws under which children could be prosecuted (including national security and counter-terrorism laws), and to assess those laws for compatibility with applicable international human rights instruments¹⁵ and general provisions of international humanitarian law.¹⁶ In 2003 the European Union issued its Guidelines on Children and

with the Republican Constitution in 1972.

⁹ William Pfaff, *A New Colonialism? Europe Must Go Back into Africa*, 74 FOREIGN AFF. 2, 2-6 (1995)(discussing humanitarian intervention by India in Bangladesh as a classical example of unilateral intervention on grounds of necessity of preventing Pakistan from engaging in human rights abuses against Bengalis (West Pakistan then) in south Asia).

¹⁰ Expert of the Secretary-General, *Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996) (by Grac'a Machel)[hereinafter Grac'a Machel Report]; See also G.A. Res. 51/77, ¶ 35, U.N. GAOR, 51st Sess., Supp. No. 77, U.N. Doc. A/51/77 (Feb. 20, 1997) (The General Assembly adopted resolution 51/77, in which it recommended that the Secretary-General appoint for a period of three years a Special Representative on the impact of armed conflict on children).

¹¹ S.C. Res. 1314, ¶ 8, U.N. Doc. S/RES/1314 (Aug. 11, 2000).

¹² Rome Statute of the International Criminal Court, art. 8(2)(e), U.N. Doc. A/CONF. 183/9 (July 17, 1998)[hereinafter Rome Statute]; See also S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 30, 1999).

¹³ S.C. Res. 1379, ¶¶ 8,12, U.N. Doc. S/RES/1379 (Nov. 20, 2001).

¹⁴ *Id.*

¹⁵ See, e.g., U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁶ U.N. Commission on Human Rights Res. 2002/47, U.N. Doc. E/2002/23- E/CN.4/2002/200, at ¶ 16

Armed Conflict, stating its objective to “influence third world countries and non-state actors to implement international human rights and standards ... and to take effective measures to protect children from the effects of armed conflict, to end the use of children in armies and armed groups, and to end impunity.”¹⁷

¶5 Subsequent Security Council resolutions recognized child participation in localized situations.¹⁸ That recognition linked child participation with the existence of an armed conflict, thereby obliging states to comply with international humanitarian law and applicable human rights law when prosecuting children. But because labeling localized conflicts as armed conflicts imposes a duty on affected states to act in conformity with the norms of international legal conduct,¹⁹ states faced with secessionist movements have refused to refer to those movements as armed conflicts. Instead, the states view secession as merely an internal, illegal activity. Some governments are notoriously reluctant to accept the existence of an internal armed conflict, preferring instead to declare a state of emergency or to claim that they are engaged in police action against terrorism.²⁰ Without the label of “armed conflict” attached to these movements, states are not required to abide by the international community’s resolutions and guidelines. Thus, international efforts to categorize secessionist movements as armed conflicts ultimately result in distancing states affected by localized conflicts from mechanisms that could protect children.

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

¶7 This paper addresses whether the U.N.’s recent efforts to enforce strict codes of conduct regarding child participation in conflicts have left behind the majority of children in localized conflicts. Part I of the paper examines the difficulty of defining and understanding child participation in democratic states with localized conflicts. Part II discusses the increased international scrutiny applied to an affected state that hesitates to recognize a localized armed conflict. Part III examines various international organizations’ approaches to addressing child participation in armed conflicts, and the results of imposing those approaches to child participation in secessionist movements.

(Apr. 23, 2002) (The Commission’s resolution does not include a limitation on the nature of crimes committed by children or juveniles but rather enforces that the process should not defeat the object and purpose of international human rights or humanitarian law, including the Geneva Convention).

¹⁷ Council of the European Union, EU Guidelines on Children and Armed Conflict (Dec. 4, 2003), available at

http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/r10113_en.htm.

¹⁸ UNICEF refers to intrastate (internal) conflicts as low intensity conflicts and children are increasingly targeted to bear the brunt of consequences. The UNICEF defines low intensity conflict as those conflicts with fewer battle deaths and/or those wherein the parties to the conflict do not involve a State.

¹⁹ See HUMAN RIGHTS WATCH, DANGEROUS DUTY: CHILDREN AND THE CHHATTISGARH CONFLICT (2008), available at http://www.hrw.org/sites/default/files/reports/naxalite0908web_0.pdf. (The report on India’s Chhattisgarh’s state, refers to the situation as a conflict and refers to Maoist rebels (Naxalites) and state-supported anti-Maoist vigilante groups as parties to the conflict resulting in a violation of the Paris Principles for the treatment of former child soldiers).

²⁰ See Rachel Brett, *Juvenile Justice, Counter-terrorism and Children*, 3 DISARMAMENT F. 30 (2002).

Continued advocacy is necessary to raise international awareness of the need to follow the approaches used to address child participation in armed conflicts to child participation in internalized conflicts. Affected states must enact domestic legislation and executive measures that encompass and protect child participants.

I. THE COMPLEXITY IN DEFINING AND RECOGNIZING CHILD PARTICIPATION

¶8 The Grac'a Machel Report's chilling revelations of the rampant use, exploitation, and abuse of children in conflict settings stunned the international community. At the time of the report's publication in 1996,²¹ the problem was so prevalent in Africa that the report focused on Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya, and Mozambique (It also discussed non-African states including Bosnia and Herzegovina, Cambodia, Myanmar, Lebanon, and Colombia).²² The report classified all of these states as "States of Concern," meaning that they merited international attention.²³

¶9 Haunted by previous reports of the horrors of child soldiers, the international community attempted to apply the model used for child soldiers in failed states with armed conflicts to child participation in third-world states witnessing localized conflicts. The Machel Report focused on the failed state approach and examined the impact of armed conflict on children in states whose governments had collapsed sufficiently to warrant a Chapter VII intervention.²⁴ However, the failed state approach to child soldiers did not translate to localized conflicts for a number of reasons. First, the nature and extent of child participation in localized conflicts is very different from child participation in failed states. Second, those who recruit child soldiers in localized conflicts have a different level of accountability. Third, localized conflicts do not reach a level of violence that warrants international intervention. Finally, the failed state approach has had a disproportionate impact on children affected by localized conflicts. The high international accountability standards of the failed state approach led states that had previously acknowledged the use of child soldiers to shift their focus and deny any evidence of child soldiers. Thus, despite the efforts of international and national NGOs to highlight the widespread use of children in localized conflicts, states have been reluctant to explicitly recognize the problem of child soldiers. For example, India maintains that localized conflicts only have a socio-economic impact on children, namely the lack of access to education, health, and other basic services brought on by conflict create psychological problems.²⁵ Nepal has voiced concern about media reports on the Maoists' use of children as messengers, sentries, and spies,²⁶ but claims that official data is not

²¹ Grac'a Machel Report, *supra* note 10.

²² *Id.* at 12 (Three of the six regional consultations determined that regional priorities relating to children in armed conflict were in Africa. These were in Addis Ababa, 17-19 April 1995 for the Horn, Eastern, Central and Southern Africa; Cairo, August 1995, for the Arab region; and in Abidjan, 7-10 November 1995 for the children in West and Central Africa. These consultations were designed to draw the attention of governments, policy makers and opinion leaders).

²³ *Id.*

²⁴ See generally Grac'a Machel Report, *supra* note 10 (Listing these collapsed governments as Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya, and Mozambique); see also U.N. Charter ch. VII

²⁵ See, e.g., U.N. Convention on the Rights of the Child, *Initial Reports of State Parties Due in 1995: India*, ¶ 1085, U.N. Doc. CRC/C/28/Add.10 (July 7, 1997).

²⁶ U.N. Convention on the Rights of the Child, *Second Periodic Report of State Parties Due in 1997: Nepal*, ¶ 303, U.N. Doc. CRC/C/65/Add.30 (Dec. 3, 2004), available at

available.²⁷ Although the Nepalese government has recognized the need to protect children, it claims the conflict's only repercussion for children is the limitation on access to education.²⁸ Sri Lanka is one of the few states currently dealing with a localized conflict to formally recognize the problem of child soldiers, acknowledging publicly that its local secessionist group, the Liberation Tigers of Tamil Eelam (LTTE), uses child soldiers.²⁹

¶10

The child soldier template for failed states in the 1990s is not relevant to child participation in the current localized conflicts. That template forces states to either recognize illegal secessionist groups as legitimate actors, which would afford rights to the secessionist groups under international law, or regard the conflict as an action to maintain public order.³⁰ States are unwilling to define the situations as armed conflicts and are reluctant to refer to child participants as child soldiers. Instead, child participants are often referred to as terrorists or insurgents and are treated with little or no concern.³¹ State security forces that apprehend child soldiers have little concern for their age.³² The children are seen as enemies of the state who are waging war against the nation.³³ In many instances, underage suspects never go to court.³⁴ Government television news programs use nationalist rhetoric to announce the apprehension of child soldiers on a daily basis.³⁵ Such announcements are met with public jubilation and disregard for the special status of the child soldiers. International safeguards³⁶ are rarely implemented, and by the time these child "insurgents" appear in court, great harm has already occurred.³⁷

http://www.bayefsky.com/reports/india_crc_c_93_add_5_2001.pdf.

²⁷ *Id.* at 302-303.

²⁸ *Id.* at 302, 304.

²⁹ See U.N. Committee on the Rights of the Child, *Initial Report of States Parties Due in 1993: Sri Lanka*, ¶ 1085, U.N. Doc. CRC/C/8/Add.13 (May 5, 1994) (In light of the escalating conflicts in the 1990s, and the LTTE's increasing control in certain areas, Sri Lanka first recognized the LTTE's use of child recruitment in the first State party report in 1994, wherein it was recognized that children younger than fifteen were involved in the guerrilla army). Norway's later offer to play an intermediary in the peace process in 2000 further addressed the issue of child soldiering. This was followed in 2002 by a tripartite action plan between Sri Lanka, LTTE and UNICEF which included a commitment by the LTTE to stop child recruitment and established three transit centers for the rehabilitation of child soldiers. However, the LTTE refused to discuss child recruitment during the cease fire agreement talks held in Geneva in February 2006.

³⁰ U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *The Paris Principles* (2007).

³¹ See, e.g., CHAKMA SUHAS, *Representative Correspondence From Asian Centre for Human Rights*, ACHR Index: IND/JH/03/03, <http://www.achrweb.org/countries/india/jharkhand/POTA0303.htm> (last visited Oct. 26, 2010) (noting in India, children as young as fourteen years old have been detained under the Prevention of Terrorism Act (POTA) and kept in jails for allegedly waging a war against the State. On July 9, 2002, fourteen year-old Mayanti Raj Kumari was arrested for allegedly waging war against the State under Sections 121 A (Conspiracy to commit offences punishable by sections 121 which includes Waging, or attempting to wage war, or abetting waging of war, against the Government of India) and 122 (Collecting arms, etc., with intention of waging war against the Government of India) of the Indian Penal Code and POTA. She was detained in Ranchi jail and not in a juvenile home as required under the law).

³² *Id.*

³³ *Id.*; See also Ramachandran Sudha, *Delhi Targets Rebels With a Cause*, ASIA TIMES (June 8, 2010), available at <http://rememberjenkinsear.blogspot.com/2010/01/status-of-anti-maoist-war-in-orissa.html>

³⁴ See Brett, *supra* note 20, at 33 (quoting RACHEL BRETT AND MARGARET MCCALLIN, CHILDREN: THE INVISIBLE SOLDIERS (2nd ed. 1998)).

³⁵ *Id.*

³⁶ U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 25, U.N. Doc. A/44/25 (Nov. 20, 1989); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. GAOR 54th Sess., Supp. No. 263, U.N. Doc. A/RES/54/263 (May 25, 2000); U.N. Declaration on the Protection of Women and Children in

¶11 Current localized conflicts also differ from the failed state conflicts of the 1990s in terms of the extent and type of child participation. In Sierra Leone (1991-99), Rwanda (1990-93), and the Democratic Republic of the Congo (DRC) (1998-2003), children were involved in heinous crimes that constituted grave breaches of the laws of war and triggered potential punishment under Common Article 3 of the Geneva Conventions.³⁸ In localized conflicts, however, child participation is limited to assistance roles: children serve as messengers, take on administrative tasks in camps, or plant explosive devices against armed forces. The tacit approval of these acts in communities supporting secessionist movements leads children to believe they are behaving heroically.³⁹ Compared to the type of acts children performed in the more violent conflicts in failed states, these less egregious acts of children in localized conflicts merit rehabilitation rather than punishment. However, states are likely to punish apprehended children because it is easy to establish that they participated in the secessionist movements. In many developing states, children as young as seven can be held criminally accountable, which allows states to detain children before sending them to observation homes or treatment centers specifically created to treat at-risk youth.⁴⁰

¶12 Both *Prosecutor v. Lubanga Dyilo*⁴¹ and *Prosecutor v. Norman*⁴² established that the recruitment of children younger than fifteen is a war crime. In addition, the Optional Protocol to the Convention on the Rights of the Child absolutely prohibits armed groups from recruiting children under the age of eighteen. However, because only a limited number of states have ratified the Optional Protocol,⁴³ and because many states have no

Emergency and Armed Conflicts, G.A. Res. 29/3318, U.N. Doc. A/RES/29/3318(XXIX) (Dec. 14, 1974); U.N. Standard Minimum Rules for the Administration of Juveniles Justice, G.A. Res. 40/33, U.N. Doc. A/Res/40/33 (Nov. 29 1985); U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

³⁷ See ROMAINE ROLLAND, Asian Human Rights Commission, THE STATE OF HUMAN RIGHTS IN ELEVEN ASIAN NATIONS IN 2007—INDIA 22-24 (2007), available at <http://material.ahrchk.net/hrreport/2007/India2007.pdf>.

³⁸ See Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Aug. 12, 1949) (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment”).

³⁹ David Rosen, *Without Precedent*, ATLANTIC MONTHLY (Sept. 2005) available at <http://www.fdu.edu/newspubs/magazine/05sf/childsoldiers.html>.

⁴⁰ U.N. CHILDREN’S FUND, SOUTH ASIA AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY, at 6, Table 2, available at http://www.unicef.org/rosa/Criminal_Responsibility_08July_05%28final_copy%29.pdf.

⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, at 153-157 (Jan. 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>. (Thomas Lubanga Dyilo is accused of committing the following crimes from July 1, 2002 to Dec. 31, 2003: enlisting or conscripting children into the FPLC (the military wing of the *Union des Patriotes Congolais*) and using these children to participate actively in hostilities).

⁴² *Prosecutor v. Norman*, Case No. SCSL-03-14-I, Indictment (Mar. 7, 2003).

⁴³ India ratified the Optional Protocol on Nov. 30, 2005 (Entry into force on Dec. 30, 2005), Nepal on Jan. 30, 2007 (Entry into force on Feb. 3, 2007) and Sri Lanka on Sept. 8, 2000 (Entry into force on Feb. 12, 2002).

domestic legislation prohibiting child recruitment, armed groups enjoy *de facto* impunity.⁴⁴

¶13 Further, peace negotiations rarely address accountability for those who recruit and use child soldiers. Eager to establish peace, states make an uneasy, but realistic tradeoff, granting amnesty to commanders who possibly bear the greatest responsibility for child soldier recruitment. In Sri Lanka, neither the Ceasefire Agreement of February 2002⁴⁵ nor the 2003 Action Plan for Children Affected by War between Sri Lanka and the LTTE⁴⁶ make any mention of a perpetrator's accountability for child recruitment. Understandably, armed groups do not want to address the issue. States also seek to avoid the issue because addressing the grave offense of child recruitment could potentially derail the entire peace process. Unless a state is a failed or nearly failed state, such that international intervention is mandated, it is difficult to enforce international law pertaining to child soldiers in the absence of its incorporation into domestic law.

II. THE AFFECTED STATE'S RELUCTANCE TO RECOGNIZE THE PROBLEM

¶14 Localized conflicts in third-world states (including not only those mentioned at the outset of this article, but also the Philippines, Indonesia, and East Timor) are clearly characterized by: (1) protracted violence against the established order; (2) a common ethnic, religious, or political community seeking self-determination; and (3) the presence of defined military and political wings of the warring armed groups. In order to achieve self-determination, communities engaged in secessionist movements employ protracted violence implemented through organized and hierarchical military and political wings. This easily meets the threshold for classification as an armed conflict.⁴⁷ A state's recognition of either self-determination or armed conflict is extremely risky. Acceptance of an intrastate-armed conflict invokes the application of Common Article 3, signaling that the state is no longer capable of maintaining order and that the armed group has

⁴⁴ There was no legal provision criminalizing the recruitment of children in India or Nepal. The Juvenile Justice (Care and Protection) Act makes no reference to criminalization of child recruitment although Article 24 of the Indian Constitution. The Juvenile Justice (Care and Protection) Act, 2000, No.56, Act of Parliament, 2006 (India); INDIA CONST. art 24, *available at* http://india.gov.in/govt/documents/english/coi_part_full.pdf (referring to rights against exploitation, and prohibits the employment of children below the age of fourteen in any factory or mine or other hazardous employment). *See also* COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIER REPORT 2008 (2008), *available at* <http://www.child-soldiers.org/home> (noting that Nepal has no domestic legislation that criminalizes recruitment of children. In the Comprehensive Peace Agreement (CPA), finalized in November 2006, the parties agreed not to use or enlist children in any military force and to rescue and rehabilitate such children immediately. In contrast, Sri Lanka's Penal Code was amended in 2006 to make "engaging/recruiting children for use in armed conflict" a crime punishable by twenty years in prison. Thus far, despite these provisions, no member of the LTTE or Karuna group has been arrested for child recruitment).

⁴⁵ Secretary-General of the Secretariat for Coordinating the Peace Process, Ceasefire Agreement, Feb. 2002, *available at* <http://www.peaceinsrilanka.org/negotiations/cfa>.

⁴⁶ The 2003 Action Plan for Children Affected by War was the first (and to date the only) human rights agreement formally entered into between the Sri Lankan government and the LTTE. It included a pledge by the LTTE to end all recruitment of children and to release children from its forces, both directly to the children's families as well as to new transit centres that were constructed specifically for this purpose. CHARU LATA HOGG, THE LIBERATION TIGERS OF TAMIL EELAM (LTTE) AND CHILD RECRUITMENT; Coalition to Stop the Use of Child Soldiers 2006 14, *available at* http://www.child-soldiers.org/childsoldiers/CSC_AG_Forum_case_study_June_2006_Sri_Lanka_LTTE.pdf.

⁴⁷ *See supra* ¶4-¶6 (providing various definitions for "armed conflict").

achieved a degree of international legal status akin to that of belligerents.⁴⁸ Recognition of self-determination imposes a requirement on states to comply with Article 1 of the Additional Protocol I to the Geneva Convention, which refers to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁴⁹

¶15 This uncertainty of labeling localized situations as armed conflicts has led many states facing secessionist movements to refuse to acknowledge the problem or ratify treaties that would label the violence as an armed conflict. The post-1990s era of internal conflict has introduced the challenge of labeling violent secessionist movements as armed conflicts in order to ensure the application of at least minimal humanitarian norms. Although the Geneva Conventions do not provide a definition of “armed conflict,” the International Criminal Tribunal for the former Yugoslavia (ICTY) decision in *Prosecutor v. Tadić*,⁵⁰ the *Prosecutor v. Akayesu* decision out of the International Criminal Tribunal for Rwanda (ICTR),⁵¹ and the Rome Statute of the International Criminal Court,⁵² provide more detailed, comprehensive definitions of “armed conflict,” all recognizing the need to expand the reach of the accountability process under humanitarian law to cover internal conflicts. In *Prosecutor v. Tadić*, the ICTY appeals chamber held:

[A]rmed conflict exists whenever there is a resort to armed force between States or protracted armed violence between such groups within a State. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the

⁴⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 3, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II], available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>. This Protocol, which develops and supplements the Geneva Conventions Common Article 3 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (Organization and territorial control refers to the issue of belligerency). See also Moir Lindsay, *THE LAW OF INTERNAL ARMED CONFLICT* (Cambridge University Press 2004).

⁴⁹ Protocol I, *supra* note 48, art.1(4). The situations referred to in the preceding paragraph include armed conflicts in which communities are fighting against colonial domination, alien occupation, and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

⁵⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶96-127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁵¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, U.N. Doc. SC Res. 955, art. 4, 33 ILM 1598 (Nov. 8, 1994).

⁵² Rome Statute, *supra* note 12, art. 8(2)(e).

case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁵³

However, “the use of military force by individual persons or groups of persons will not suffice” to constitute an armed conflict.⁵⁴

¶16 The *Tadić* decision created a new temporal element, finding that an armed conflict exists whenever there is “protracted violence” extending beyond the cessation of hostilities until a final settlement is reached.⁵⁵ In *Prosecutor v. Boškoski*, the ICTY expanded the definition to take into account the intensity of the conflict (as measured by both the escalation of violence and the reaction of the government), and the command structure of the parties (and their corresponding abilities to carry out organized operations).⁵⁶ The ICTR made the temporal element even more explicit in *Prosecutor v. Akayesu*, finding that armed violence extending over a few months satisfies the “protracted” requirement. In that case, the ICTR also found that the intensity of the violence was such that it constituted an “armed conflict” within the meaning of Common Article 3.⁵⁷

¶17 Although the Rome Statute also maintains that an armed conflict is defined by “protracted violence,” it fails to offer any substantive definition of the term “armed conflict.” It excludes from the definition of internal armed conflict any “situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence.”⁵⁸ However, the wording of the Rome Statute’s Article 8(2)(f) suggests that it applies to one type of internal armed conflict—one involving protracted violence.⁵⁹ This wide spectrum can accommodate a number of contemporary terms often used to describe internal violent situations, including armed rebellion, insurgency, terrorism, and militancy.

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

⁵³ *Prosecutor v. Tadic*, *supra* note 50, ¶70; *see also* Derek Jinks, *September 11 And The Laws Of War*, 28 YALE J. INT’L L. 1, 27–28 (2003).

⁵⁴ D. Fleck ed., *The Handbook of Humanitarian Law in Armed Conflicts* 40 (Oxford University Press 1995).

⁵⁵ *Prosecutor v. Tadić*, *supra* note 50.

⁵⁶ *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶¶ 208-291 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

⁵⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 619-627 (Sep. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998); *see also* Jinks, *supra* note 53, at 10. Common Article 3 does not specify the term “intensity of violence.” However, when read in conjunction with Article 1(2) of Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, the violence does not apply to, “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

⁵⁸ *See* Rome Statute, *supra* note 12, art. 8.

⁵⁹ *Id.* art. 8(2)(f) ¶ 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. *See also* *Prosecutor v. Tadic*, Appeal on Jurisdiction, Case No. IT-94-1-AR72 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), 35 I.L.M. 32, 54 (1996).

greater number of intrastate conflicts qualify as armed conflicts.⁶⁰ As a result, these internal situations open states up to international monitoring. Skepticism toward international interference in domestic affairs is often cited by states as a reason for failure to ratify international treaties.⁶¹ South Asian states provide perfect examples of this skepticism. While many states in the region suffer from protracted, internal strife (which qualifies as armed conflict), neither Afghanistan, Bangladesh, Bhutan, India, Indonesia, Iran, Iraq, Malaysia, Myanmar, Pakistan, Nepal, nor Sri Lanka have ratified the ICC Statute or the Additional Protocols I or II to the Geneva Conventions.⁶² The level of internal conflict and the reasons for its existence vary in each of these states. The internal conflicts in India, Sri Lanka, and Nepal turn on the issue of self-determination, while the conflicts in Iran and Iraq have to do with politico-religious clashes.⁶³ During discussion regarding the definition of “war crimes” within Article 8 of the Rome Statute, many states openly voiced concerns regarding defining “armed conflict” as ‘armed conflict not of an international character.’ For example, India opposed the language on the grounds that it would result in the labeling of situations in Northeast India and Kashmir as armed conflicts.⁶⁴

¶19

States’ concerns over the labeling of internal situations as armed conflicts are also concerns over whether internal communities have the right to self-determination under international law. The right exists under Article 1 of the International Covenant on Civil and Political Rights (ICCPR).⁶⁵ In most developing states, decolonization has been

⁶⁰ For example, many intrastate conflicts in South Asia qualify as armed conflicts under the current international legal definition.

⁶¹ For example, during the drafting process of additional Protocol II to the Geneva Conventions, the Indian delegate noted, “the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of states. The definition of non-international armed conflicts was still vague and no convincing argument has been put forward to justify the need for draft Protocol.” CDDH/I/SR.2:VIII, 215 at 224 (taken from MOIR LINDSAY, *THE LAW OF INTERNAL ARMED CONFLICT* 92 (Cambridge 2004)). See also Usha Ramanathan *India and the ICC*, J. INT’L CRIM. JUSTICE 3, 627-631 (2005).

⁶² ICRC, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 23-MAR-2011, [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited March 24, 2011). Afghanistan has signed but not ratified the ICC Statute.

⁶³ IRAN CHAMBER SOCIETY, IRAN-IRAQ WAR 1980-1988, http://www.iranchamber.com/history/iran_iraq_war/iran_iraq_war1.php (last visited Oct. 2010).

⁶⁴ Ramanathan, *supra* note 60, at 631. India’s skepticism toward the term “armed conflict” became clearer during the question of ratification of the Statute of the International Criminal Court (ICC Statute). India was also strongly against the very concept of Additional Protocol II during the drafting process, fearing that it encourages intervention in domestic affairs. India noted, “the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of States. The definition of non international armed conflicts was still vague and no convincing arguments had been put forward to justify the need for draft Protocol II, the provisions of which would not be acceptable to (his) delegation.” See CDDH/I/SR.23:VIII, 215 at 224.

⁶⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR].

Article 1 states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the

closely linked to self-determination. The situations in India, Sri Lanka, and Nepal are highlight the issue itself, as well as the states' corresponding understanding of the periods of unrest caused by self-determination movements. In all three states, protracted situations of violence continue as armed groups claim to be fighting for self-determination. And yet all three states refer to these situations as issues of law and order rather than armed conflicts.

¶20

India has always maintained that no emergency situation exists in areas of unrest. However, some of these areas have been declared “disturbed areas” meriting deployment of armed forces under the Armed Forces (Special Powers) Act.⁶⁶ Despite the extensive use of troops in Kashmir and Northeast India, the State continues to maintain that the situation falls within a law and order framework such that the use of troops constitutes aid to civil authorities.⁶⁷ Nepal also considers the secessionist Maoist group to be a law and order problem. The Nepalese government has set up two commissions—the Dhimi Commission in 1997 and the Deuba Commission in 2000—to identify the root causes of the Maoist insurgency and suggest remedial action. In identifying the insurgency as “political” in nature, and thus an issue of law and order, both Commissions paved the way for the government to retaliate through police action.⁶⁸ Similarly, Sri Lanka’s Prevention of Terrorism Act of 1979 is a public order issue through which Sri Lanka has sought to address the LTTE problem.⁶⁹

administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

⁶⁶ The UN Human Rights Committee: Addendum to the Third Periodic Reports of States Parties Due in 1992, India (¶ 37, CCPR/C/76/Add.6 (June 17, 1996), *available at* <http://www.unhcr.org/refworld/docid/3ae6b02f3.htm>), states “These Armed Forces (Special Powers) Act and the Terrorist and Disruptive Security (Amendment) Act legislative measures have been enacted to meet certain special situations such as organized forms of terrorism and insurgency and are subject to adequate safeguards to ensure against violation of human rights.”

⁶⁷ The issue of the deployment of the armed forces in aid to civil authority was also raised during consideration of India’s second periodic report U.N. Human Rights Committee in 1996. In reply, India noted that “[T]he Armed Forces (Special Powers) Act 1958 was enacted when India was faced with an acute law and order situation on account of activities of insurgents in the border areas in the eastern frontiers of India. Armed raids were being carried out by such insurgents in the small towns, villages and in the tea gardens followed by destruction of property, wanton killings, kidnapping and other acts of violence with the result that people in these areas were living under constant terror and were apprehensive about the safety of their lives and property. The army had to be called out to aid civil authorities for the apprehension of the offenders, who were usually armed, and to assist in the detection and search for the sources of weapons and ammunition supply.” *See* UN Human Rights Committee (HRC), UN Human Rights Committee: Addendum to the Third Periodic Reports of States Parties Due in 1992, India, CCPR/C/76/Add.6 (June 17, 1996), *available at* <http://www.unhcr.org/refworld/docid/3ae6b02f3.htm>. Similarly when the Act was challenged in the *Nagaland People’s Movement for Human Rights v. Union of India case* ([1997] ICHRL 117) on the imposition of the Armed Forces (Special Powers) Act calling for the deployment of the armed forces in disturbed areas on grounds that maintenance of public order was a state subject and the Parliament had no legislative competence to the enact the Act. The court ruled that deployment of armed forces was in aid of civil power. *See* Supreme Court of India on Armed Forces (Special Powers) Act, 1958, A.I.R. 1998 S.C. 463-464, *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/COHR_IND_UPR_S1_2008anx_Annex%20XXIII_Supreme%20Court%20%20ruling%20on%20AFSPA.pdf.

⁶⁸ Also see Dalal, Dev Raj, *Nepal Supporting Peace Processes Through a Systemic Approach* (Bergh of Foundation for Peace Support 2005). The report also says politicalization of the insurgency also allowed the “militariz[ation of] the local political conflict.”

⁶⁹ Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 [Sri Lanka], ¶ 137, July 20, 1979, *available at* <http://www.unhcr.org/refworld/docid/4561dac84.html> (see also the Preamble of the Act, “... WHEREAS public order in Sri Lanka continues to be endangered”).

¶21 The ICCPR Article 1 right to self-determination can be linked to situations that qualify as armed conflicts under international law. When a local ethnic or tribal population seeks self-rule or independence (and subsequent de facto control over certain territory) through protracted strife, the international right to self-determination is implicated and the violence qualifies as an international armed conflict. Thus, state sovereignty is threatened both when the international community invokes the right to self-determination and when states themselves recognize the right. Kosovo's unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, and the International Court of Justice (ICJ) ruling approving the legality of Kosovo's independence from Serbia, strengthen the cause of secessionist movements seeking self-determination through the creation of conflict with state sovereignty.⁷⁰ The ICJ concluded that "general international law contains no applicable prohibition of declarations of independence,"⁷¹ and that the February 17, 2008 declaration of independence did not violate general international law.⁷² On the question of *lex specialis*, as created by Security Council Resolution 1244 (1999), the ICJ ruled that there is no general prohibition against a unilateral declaration of independence. The ICJ also examined the lawfulness of declarations of independence under general international law against the background of Resolution 1244, and noted: "...the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation...[and]...a great many new States have come into existence as a result of the exercise of this right."⁷³ However, the ICJ also stated that questions regarding declarations of independence must be analyzed "on a case-by-case basis, considering all relevant circumstances."⁷⁴

III. CHILD PARTICIPATION AND INTERNATIONAL ADVOCACY

¶22 Immediately following the publication of the Grac'a Machel Report, the U.N. General Assembly called for the appointment of a Special Representative on the Impact of Armed Conflict on Children.⁷⁵ The U.N. Security Council condemned "the targeting of children in armed conflicts, including their humiliation, brutalization, sexual abuse, abduction and forced displacements, as well as their recruitment and use in hostilities in violation of international law," and "called upon all parties concerned to put an end to such activities."⁷⁶ Olara Otunnu, the U.N. Special Representative for Children in Armed

⁷⁰ Accordance With the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. No. 141 (July 22), *available at* www.icj-cij.org/homepage/pdf/20100722_KOS.pdf.

⁷¹ *Id.* The Court has concluded above that the adoption of the declaration of independence of Feb. 17, 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

⁷² *Id.*

⁷³ *Id.* at 30.

⁷⁴ *Id.* at 41.

⁷⁵ G.A. Res. 51/77, U.N. Doc. A/RES/51/77 (Feb. 20, 1997), *available at* <http://www.un.org/documents/ga/res/51/ares51-77.htm>. The General Assembly adopted resolution 51/77, in which it recommended that the Secretary-General appoint for a period of three years a Special Representative on the impact of armed conflict on children.

⁷⁶ U.N. President of the Security Council, Statement by the President of the S.C., U.N. Doc.

Conflict, presented the Security Council with information and statistics on the use of child soldiers.⁷⁷ At that time, “over 250,000 children under the age of eighteen were serving in government military forces or with armed rebel groups.”⁷⁸ In over fifty countries, children served as cooks, spies, messengers, “comfort women,” and soldiers in armed conflicts.⁷⁹

¶23 The grim reality of the exploitation and vulnerability of children immersed in conflict led the Security Council to pass six important resolutions pertaining to child soldiers and the general effects of armed conflict on children. In 1999, the Security Council passed Resolution 1261, noting that international law prohibits the forced or voluntary recruitment of children as soldiers, and stating that it is a war crime to conscript or enlist children under the age of fifteen into national armed forces or to allow them to participate in hostilities.⁸⁰ The resolution called upon states to comply strictly with their obligations under international law and to “ensure that the protection, welfare, and rights of children are taken into account during peace negotiations.”⁸¹ It also called upon states to undertake feasible measures to protect and minimize the harm children suffer during armed conflict.⁸²

¶24 In 2000, the Security Council passed Resolution 1314, which noted that the “committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security.”⁸³ This resolution linked the mandatory power of the Council under Chapter VII of the U.N. Charter with the issue of children and armed conflict.⁸⁴ The means of enforcement available under Chapter VII (including complete or partial interruption of economic relations, severance of diplomatic relations,⁸⁵ demonstrations, blockades, and other operations by air, sea, or land necessary for the purpose of maintaining international peace and security)⁸⁶ were also reflected in the subsequent country-specific resolutions. For example, Resolution 1332, pertaining to armed conflict in the DRC, called upon “armed forces and groups to immediately cease all campaigns for the recruitment, abduction, cross-border deportation and use of children,” and demanded “immediate steps for the demobilization, disarmament, return and rehabilitation of all such children.”⁸⁷ As a result of this resolution, 165 Congolese children were returned to

S/PRST/1998/18 (June 29, 1998).

⁷⁷ Olara A. Otunnu, *Promotion and Protection of the Rights of the Children*, U.N. General Assembly, Third Committee, Introductory Statement (Oct. 27, 1999).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 25, 1999), available at <http://www.unhcr.org/refworld/docid/3b00f22d10.htm>.

⁸¹ *Id.* ¶ 3, 7.

⁸² *Id.* ¶ 9.

⁸³ S.C. Res. 1314, ¶ 9, U.N. Doc. S/RES/1314 (Aug. 11, 2000).

⁸⁴ *See Id.*, which notes “that the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard *reaffirms* its readiness to consider such situations and, where necessary to adopt appropriate steps.”

⁸⁵ U.N. Charter art. 41.

⁸⁶ *Id.* art. 43.

⁸⁷ S.C. Res. 1332, U.N. Doc. S/RES/1332 (Dec. 14, 2000).

UNICEF from a training camp in Uganda.⁸⁸ In accordance with Article 99 of the Charter of the United Nations⁸⁹ the Security Council issued Resolution 1379, requesting that the Secretary General provide a list of every party to an armed conflict that recruits or uses children,⁹⁰ and calling on member states to “[p]ut an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children ... and ensure that post-conflict truth-and-reconciliation processes address serious abuses involving children.”⁹¹

¶25 In 2003, the Security Council recognized that the “conscription or enlistment of children under the age of fifteen into the national armed forces or using them to participate actively in hostilities is classified as a war crime as mentioned in the Rome Statute of the International Criminal Court,” and called “for ‘an era of application’ of international norms and standards for the protection of children affected by armed conflict.”⁹² Further emphasizing its concern over the continued recruitment of child soldiers in violation of international law, the Security Council adopted Resolution 1539 in 2004,⁹³ reminding states that the Optional Protocol to the Convention on the Rights of the Child requires states to set a minimum age of eighteen for compulsory recruitment of children for armed conflict and takes measures to ensure children under eighteen years of age do not directly take part in hostilities.⁹⁴ Finally, in 2005, the Security Council called upon the Secretary General to work with national governments, relevant United Nations agencies, and national and international civil society groups to implement monitoring and reporting mechanisms on children and armed conflict for six egregious violations of children’s rights during armed conflicts.⁹⁵

¶26 The combination of Security Council resolutions, the Convention on the Rights of the Child (CRC), and the Rome Statute,⁹⁶ along with the general call for an era of application of international law, served to solidify the recruitment of child soldiers as a crime under international law.⁹⁷ These various instruments also helped the Office of the

⁸⁸ U.N. Secretary-General, *Children and Armed Conflict*, ¶ 24, U.N. Doc. A/56/342 S/2001/852 (Sept. 7, 2001) [hereinafter *Children and Armed Conflict*].

⁸⁹ U.N. Charter art. 99 (permitting the Secretary General to “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.”).

⁹⁰ The listing of offending parties in the Secretary-General’s annual reports to the Security Council, which gives this report a unique saliency and impact, has evolved in three stages. First, the Security Council in S/RES/ 1379 (2001) requested a “list of parties to armed conflict that recruit or use children... in situations that are on the Security Council’s agenda”. S.C. Res. 1379, U.N. Doc., S/RES/1379 (Nov. 20, 2001). This provided the basis for the listing practice. Second, in 2003, the Security Council added a new provision in the context of listing, i.e. “taking into account the parties to other armed conflicts that recruit or use children which are mentioned in the report.” S.C. Res. 1460, U.N. Doc. S/RES/1460 (Jan. 30, 2003). This provided the basis for the second list, contained in Annex II since 2003. Finally, in 2004, the Security Council added another provision in the context of listing, i.e. “bearing in mind all other violations and abuses committed against children affected by armed conflict.” S.C. Res. 1539, U.N. Doc. S/RES/1539 (Apr. 22, 2004). This provided the basis for recording other grave abuses under the lists.

⁹¹ S.C. Res. 1379, ¶ 9(a), U.N. Doc. (Sept. 18, 2001).

⁹² S.C. Res. 1460, ¶ 1, U.N. Doc. S/RES/1460 (Jan. 30, 2003).

⁹³ S.C. Res. 1539, ¶ 5, U.N. Doc. S/RES/1539 (Apr. 22, 2004).

⁹⁴ *Id.*

⁹⁵ S.C. Res. 1612, ¶ 2-3, U.N. Doc. S/RES/1612 (July 25, 2005).

⁹⁶ These included the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the ICC Statute, S/RES/1539 (2004), S/RES/1460 (2003), S/RES/1314 (2000), S/RES/1379 (2001) and S/RES/1261(1999).

⁹⁷ *Children and Armed Conflict*, *supra* note 88.

Special Representative of the Secretary General for Children and Armed Conflict (SRSG/CAAC),⁹⁸ UNICEF, and several NGOs to raise advocacy and awareness, strengthen international standards and norms, and increase monitoring and reporting. Although the CRC Optional Protocol on children in armed conflict encourages states to ensure that no child under the age of eighteen participates in hostilities, international law does not prohibit the voluntary participation in hostilities by children over fifteen.⁹⁹ The Optional Protocol does, however, impose an absolute prohibition on the recruitment of children under the age of eighteen by armed groups.¹⁰⁰

¶27 The development of the Statute of the Special Court of Sierra Leone¹⁰¹ (“the Special Court”) and the Sierra Leone Law,¹⁰² adopted after that country’s 1991 conflict,¹⁰³ added a layer of accountability for child soldiers between the ages of fifteen and eighteen.¹⁰⁴ Although many children were conscripted into combat in the conflict, a

⁹⁸ In 1996, Ms. Graç’a Machel, an independent expert appointed by the Secretary-General, submitted her report to the General Assembly entitled *Impact of Armed Conflict on Children*. The report led to the adoption by the General Assembly of resolution 51/77 of 12 December 1996, establishing the mandate of the Special Representative of the Secretary-General for Children and Armed Conflict for a period of three years. The Assembly has since extended this mandate four times and most recently by its resolution A/RES/63/241 of 13 March 2009.

The Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UNITED NATIONS, available at <http://www.un.org/children/conflict/english/theoffice.html>.

⁹⁹ Convention on the Rights of the Child, G.A. Res. 44/25, art. 38, U.N. Doc. A/RES/4/25 (November 20, 1989).

¹⁰⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, art. 4(1), U.N. Doc. A/RES/54/263 (“[A]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”).

¹⁰¹ S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2002).

¹⁰² *Id.* See also Agreement between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137, 147 [hereinafter *Sierra Leone*].

¹⁰³ The issues of natural resources (diamonds) in Sierra Leone led to a civil war in 1991 amidst political upheaval over a multi-party democratic system of governance. The Revolutionary United Front forces in Sierra Leone committed grave atrocities and overthrew the elected government and influenced control over the diamond mines. The Revolutionary United Front forces in Sierra Leone committed grave atrocities and overthrew the elected government and influenced control over the diamond mines.

¹⁰⁴ See *Sierra Leone*, *supra* note 102, art. 7, which states:

Jurisdiction over persons of 15 years of age:

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

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

Also, at the time when the statute came into effect the age of criminal responsibility in Sierra Leone was 10 years which has now been raised to 14 years by the Sierra Leonean Parliament in 2007 in the Child Rights Bill. See e.g., Juvenile Justice Panel, General Comment No. 10 Children’s Rights in Juvenile Justice: Fact sheet #4, available at

http://www.juvenilejusticepanel.org/resource/items/D/C/DCI_GC10FactSheet4_EnsureAppropriateAgeofCR08_EN.pdf (Last visited Oct. 20, 2010). See also Ilene Cohn, *The Protection of Children and the Quest*

significant number of children voluntarily participated in the brutalities.¹⁰⁵ Children were involved in some of the most heinous crimes committed in violation of the laws and customs of war: for example, the RUF forces in Sierra Leone (30% of whom were child soldiers) implemented a war operation known to RUF commanders as “Operation No Living Thing,” in which rebel forces ripped through the capital city of Freetown, raping thousands of women, killing innocent civilians, and destroying the capital city. These brutal operations gave juvenile soldiers the reputation of being cruel combatants.¹⁰⁶ Many child combatants were also victims themselves: abducted by rebels under the effects of drugs, coercion and threats, these children were manipulated into maiming their countrymen.

¶28 During the post-conflict negotiations in Sierra Leone, the government did not spare juvenile soldiers, demanding punishment (including the death penalty) for all culpable parties.¹⁰⁷ The SRSG supported the Special Court’s jurisdiction to prosecute children over the age of fifteen who “bear the greatest responsibility” for the atrocities.¹⁰⁸ The SRSG also recommended that the penalty be limited to imprisonment as a matter of last resort, subject to judicial reviews, and only if the child’s family was able to have close and frequent contact.¹⁰⁹ The Special Court’s founding statute allows for consideration of counseling, foster care, educational programs, and reintegration programs, but not imprisonment.¹¹⁰

¶29 The issue of accountability for children in Sierra Leone sparked a debate in the international community. The SRSG and organizations including Amnesty International and the International League for Human Rights (ILHR) supported juvenile accountability. The SRSG felt that child soldiers could “benefit from participation in a process that ensures accountability for one’s actions, respects the procedural guarantees

for Truth and Justice in Sierra Leone, 55 J. INT’L AFF. 1, 8-9 (2001) available at <http://www.allbusiness.com/government/3493258-1.html> (debate regarding personal jurisdiction over former child soldiers.).

¹⁰⁵ See Rachel Brett, AMNESTY INT’L UK, *Child Soldiers*, IN THE FIRING LINE: WAR AND CHILDREN’S RIGHTS 56, 61 (1999) (stating that children’s negative experiences with governmental armed forces was the predominant factor in the children’s decision to volunteer to fight). See also Ismene Zarifis, *Sierra Leone’s Search for Justice and Accountability of Child Soldiers*, 9 No. 3 HUM. RTS. BRIEF 18 (2002) (In fact, some juvenile soldiers voluntarily served as commanders and foot soldiers during executions and mutilations.); Jeana Webster, Note, *Sierra Leone—Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security*, 11 IND. INT’L & COMP. L. REV. 731, 755 (2001); and U.N. Secretary-General, *The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 31 - 38, U.N. Doc. S/2000/915 (Oct. 4, 2000). See also Michael A. Corriero, *The Involvement and Protection of Children in Truth and Justice Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y.L. SCH. J. HUM. RTS. 337, 339 (2002) (These juvenile soldiers earned a reputation throughout the region as fearless and blood-thirsty killers.).

¹⁰⁶ See Joshua A. Romero, *The Special Court For Sierra Leone And The Juvenile Soldier Dilemma*, 2 NW. U. J. INT’L HUM. RTS. 8, 9 ¶ 20 (2004). (During the conflict, an estimated five thousand juvenile soldiers committed widespread and systematic atrocities in defiance of international conventions, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II.). See also Zarifis, *supra* note 105.

¹⁰⁷ See *Brutal Child Army Grows Up*, BBC NEWS ONLINE, May 10, 2000, available at http://news.bbc.co.uk/hi/english/world/africa/newsid_743000/743684.stm; See also U.N. Secretary-General, *The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 31-38, U.N. Doc. S/2000/915 (Oct. 4, 2000).

¹⁰⁸ S.C. Res. 1315, art.1, U.N. Doc. S/RES/1315 (Aug. 14, 2002).

¹⁰⁹ Ilene Cohn, *supra* note 104.

¹¹⁰ Joshua A. Romero, *The Special Court For Sierra Leone And The Juvenile Soldier Dilemma*, 2 NW. U. J. INT’L HUM. RTS. 8, 9 (2004).

appropriate in the administration of juvenile justice, and considers ... the child's reintegration into society."¹¹¹ The ILHR insisted that a process that tries juveniles but does not impose punitive prison sentences can simultaneously provide some compensation for the victims and encourage communities to reintegrate children who had victimized those communities during the conflict.¹¹² Amnesty International supported the argument that failure to hold children accountable would create a climate of impunity and lead to the denial of justice for the victims, but noted that the child's age should be a mitigating factor in a process of accountability.¹¹³

¶30 The Coalition to Stop the Use of Child Soldiers also supported the prosecution of any juvenile under the age of eighteen, but argued that such action should be in line with international principles of juvenile justice,¹¹⁴ and that the child should be guaranteed rehabilitation rather than punishment.¹¹⁵ Others felt that judgment by the Truth and Reconciliation Commission (TRC) was sufficient "punishment" for juvenile soldiers, and that prosecution would only weaken rehabilitative efforts.¹¹⁶ Providing supervised access to rehabilitation for the most recalcitrant and feared young offenders, would ensure individual reintegration, social reconciliation, and ultimately a more solid basis for lasting peace.¹¹⁷

¶31 Several organizations, including UNICEF, Cause Canada, the International Rescue Committee, Save the Children (UK), and a representative of the National Child Protection Committee in Freetown, have expressed concerns regarding the prosecution of

¹¹¹ *Id.*

¹¹² Letter from Ms. Kakuna Kerina, African Program Director, International League for Human Rights to the U.N. Security Council Delegation in Sierra Leone (Oct. 6, 2000).

¹¹³ Amnesty Int'l, *Sierra Leone: Recommendations on the draft Statute of the Special Court*, Nov. 14, 2000, available at http://www.essex.ac.uk/armedcon/story_id/000143.html (suggesting that few children would have voluntarily committed serious crimes and noting that "in cases where a person under 18 did act entirely voluntarily, and was in control of his or her actions, ... they should be held to account for those actions in an appropriate setting, with due weight given to their age and other mitigating factors. ... Where an individual can be held responsible for his or her actions, failure to bring them to justice will perpetuate impunity and lead to a denial of justice to the victims.").

¹¹⁴ The International principles of juvenile justice include U.N. Conventions of the Child (G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)), the United Nations GA Declaration on the Protection of Women and Children in Emergency and Armed Conflicts (G.A. Res. 29/3318, U.N. Doc. A/29/3318 (Dec. 14, 1974)), United Nations Standard Minimum Rules for the Administration of Juveniles Justice 1985 (The Beijing Rules, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1983)), and the U.N. Rules for the Protection of Juveniles Deprived of their Liberty (JDL) (G.A. Res. 46/113, U.N. Coc. A/RES/46/113 (Dec. 14, 1990)).

¹¹⁵ The Coalition also argued that the court should prioritize prosecution of the adults responsible for recruiting the child soldiers, noting the limited resources and capacity of Sierra Leone's court. See generally, Letter from Letter from Judit Arenas, Coalition to Stop the Use of Child Soldiers (Nov. 7, 2000) and Letter from Joe Becker, Steering Committee of the Coalition to Stop the Use of Child Soldiers, to Ambassador Richard Holbroke, USA Mission to the U.N. (Oct. 12, 2000). See also Letter from Human Rights Watch, Justice and the Special Court for Sierra Leone to United Nations Security Council (Nov. 1, 2000), available at <http://www.hrw.org/press/2000/11/sl-ltr.htm> (expressing the view that "Although we believe that children should be accountable for their offenses, in light of their inherent immaturity as well as the subjection of many child combatants to forcible abduction, brutalization and other forms of coercion, we recommend that the Special Court's limited resources would be far better used in pursuit of justice for adult offenders, rather than children.").

¹¹⁶ See Diane M. Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167, 177 (2001).

¹¹⁷ Ilene Cohn, *The Protection of Children and the Quest for Truth and Justice in Sierra Leone* 55 J. Int'l Aff. 18 (2001), available at <http://www.allbusiness.com/government/3493258-1.html>.

child soldiers.¹¹⁸ These organizations believe that such measures undermine efforts at rehabilitation, stigmatize children, and place them at risk of re-recruitment.¹¹⁹ The 2001 adoption of the Optional Protocol to the CRC on the involvement of children in armed conflicts reflects this preference for rehabilitation rather than prosecution. It requires that state parties submit to the CRC information on “the criminal liability of children for crimes they may have committed during their stay with armed forces or groups and the judicial procedure applicable, as well as safeguards to ensure that the rights of the child are respected.”¹²⁰

¶32 The international response toward children caught in localized conflicts is limited due to the dilemma of “legally reconcil[ing] respect for the preeminent principle of state sovereignty with the critical human rights necessity.”¹²¹ In all of the UN’s Chapter VII interventions, with the exception of Burundi, the parties to the conflicts at issue engaged in child recruitment.¹²² But, as discussed above, permitting Chapter VII intervention¹²³ dangerously limits the implementation of child protection mechanisms in localized conflicts within democratic states. Thus, because rule of law and democratic governance prevail in these states, the possibility of intervention in these states is less likely; indeed, intervention in democratic states contradicts well-established principles of state sovereignty under Article 2(1) of the U.N. Charter.¹²⁴

¶33 Asymmetric warfare and the complexity of intrastate conflicts is a new phenomenon within contemporary conflicts. In the future, Article 2(7) protections of the U.N. Charter, which limit the UN’s ability to intervene in matters under domestic jurisdiction, will undermine U.N. Chapter VII intervention. Moreover, it will be difficult to argue that democratic states forfeit their right to non-intervention due to either their unlawful practices or their evident inability to protect human rights in such deteriorating localized situations.¹²⁵ To remedy the potential limitations of U.N. intervention, many commentators have proposed imposing an international “conservatorship” involving a loss of sovereignty to the affected state,¹²⁶ or utilizing sanctions as a quick, flexible tool to promote democracy and help restore a failed state.¹²⁷

¹¹⁸ See generally, *id.*

¹¹⁹ *Id.*

¹²⁰ U.N. Committee on the Rights of the Child, *Guidelines Regarding Initial Reports to be Submitted by States Parties under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, Article 6, ¶ 3(f), U.N. Doc. CRC/OP/AC/1 (November 14, 2001).

¹²¹ Christopher C. Joyner, “*The Responsibility to Protect*”: *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT’L L. 693, 694 (2007).

¹²² U.N. Security Council, *Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized and on the Stage Reached in their Consideration*, ¶ 72, U.N. Doc. S/2002/30 (March 14, 2002).

¹²³ S.C. Res. 1314, ¶ 1, U.N. Doc. S/RES/1314 (Aug. 11, 2000) (formally affirming that the protection and security of children affected by armed conflict was an international peace and security issue, and therefore, firmly within the remit of the Security Council).

¹²⁴ United Nations, Charter of the United Nations, art. 2 ¶ 1 (Oct. 24, 1945) (the Organization is based on the principle of the sovereign equality of all its Members).

¹²⁵ ALLEY RODERIC, *INTERNATIONAL CONFLICT AND THE INTERNATIONAL COMMUNITY: WARS WITHOUT ENDS* 91 (Ashgate Publishing Limited 2004).

¹²⁶ Henry J. Richardson III, “*Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia And Democratic Expectations*,” 10 TEMP. INT’L & COMP. L.J. 1, 2 (1996).

¹²⁷ *Id.* at n.19.

¶34

The international community's failure to intervene in democratic states also stems from the failure to address secessionist issues on two axes: human rights and state sovereignty. The UN's use of humanitarian intervention peaked in the 1990s when there was a global ideological shift in favor of human rights protections. From its creation in 1945 until the early 1990s, the U.N. launched fourteen humanitarian missions. In contrast, during the 1990s there were thirty-five U.N. missions, sixteen of which took place under a Chapter VII mandate¹²⁸ and nine of which are on-going.¹²⁹ Fifty-six of the fifty-nine world conflicts that occurred between 1990 and 2000 were intrastate.¹³⁰ International legal conduct in these intrastate conflicts was limited to the imposition of international sanctions either under Chapter VI and VII of the U.N. Charter or under triangular agreements between the ICRC, the state, and the armed groups, in which the parties agreed to abide by the principles or the provisions of the Geneva Conventions.¹³¹ From 2000 to 2005, the U.N. has launched sixteen additional missions, only six of which were mandated. The sharp decline in humanitarian missions is indicative of the shift toward the idea of states' sovereign primacy. An emphasis on sovereignty does not necessarily mitigate the complex humanitarian problems states face. States strongly advocate that localized conflicts are internal matters, and have dealt with such conflicts by declaring states of emergency or reinforcing domestic laws with special legislation.¹³²

¹²⁸ These States were Afghanistan, Angola, Cote d'Ivoire Ethiopia and Eritrea, Haiti, Iraq, Liberia, Rwanda, Sierra Leone, Somalia, South Africa, Southern Rhodesia, Sudan, and The Former Yugoslavia. 1990-1999 UNITED NATIONS PEACEKEEPING OPERATIONS, <http://www.un.org/events/peacekeeping60/1990s.shtml> (last assessed March 24, 2011).

¹²⁹ *Id.*

¹³⁰ The three interstate conflicts during this period were: Iraq-Kuwait, India-Pakistan, and Eritrea-Ethiopia. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE (SIPRI) YEARBOOK, ARMAMENTS, DISARMAMENTS AND INTERNAL SECURITY (Oxford University Press 2001).

¹³¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 3, Aug. 12, 1949, 75 UNTS 287, *available at* <http://www.unhcr.org/refworld/docid/3ae6b36d2.htm>. *See also* Michel Veuthey, *Implementation And Enforcement Of Humanitarian Law And Human Rights Law In Non-International Armed Conflicts: The Role Of The International Committee Of The Red Cross*, 33 AM. U.L. REV. 83, 92 (1983).

¹³² For example, India's Armed Forces (Special Powers) Act (AFSPA) permits deployment of troops in violent areas without any special invocation. The AFSPA has been applied in violent regions (including Kashmir and the northeastern part of the country) where secessionist forces have fought for self-determination. Since self-determination as a right is not recognized by the State, the state has declared the areas to be disturbed areas fulfilling the precondition for the deployment of the armed forces in these areas. The Act grants powers to the armed forces to fire upon or otherwise use force, including lethal force, against any person who acts in contravention of any law or order against civilians without warning (Section 4(a)), to destroy shelters from which armed attacks are made or likely to be made (Section 4(b)), or enter and search or arrest without warrant 'any person who has committed or is about to commit a cognizable offence' (Section 4(c&d)). It also requires government permission to initiate proceedings against, 'any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act' (Section 6). India came under scrutiny after the submission of the State's first report to the Human Rights Committee (HRC) pursuant to Article 41 of the International Covenant of Civil and Political Rights (U.N. Doc. CCPR/C/10/Add.8 (13 July 1983)). During the examination of the first report, the HRC questioned the rationale for the lack of any kind of mention in the Indian Constitution, to the non derogable rights found in article 4 of the Covenant (U.N. Doc. CCPR/C/SR.493 (Sir Vincent Evans)) The HRC raised concerns about the situation in the Northeast, in general, and the AFSPA, in particular. The HRC said that certain provisions of the Act (AFPSA) effectively derogated the rights contained in Article 6, 9 and 14 of the Covenant (U.N. Doc. CCPR/C/SR.1041, Prof Rosalyn Higgins; *and* U.N. Doc. CCPR/C/SR.1042, ¶ 16). The HRC also raised concerns that the existing practice has led to a 'de facto' declaration emergency which were not in line with the Covenant provisions.

The present Act now extends to the whole of Manipur, Nagaland and Assam, the Tirap and Changlang districts of Arunachal Pradesh and a 20 km belt in the States having common border with Assam and 22

State action with regard to localized conflicts does not protect children. The international community therefore needs to assist states in understanding the complex realities of intrastate warfare. Only then can states develop and implement effective measures to protect children. Without action, international law is at risk of being perceived as largely irrelevant to the modern reality of child soldiers.¹³³

¶135 In 2000, at the start of Asia's first conference on child soldiers, the Coalition to Stop the Use of Child Soldiers announced that Asia ranked second only to Africa in the use of child soldiers.¹³⁴ This announcement came a week before the release of UNICEF's first report on child soldiers in East Asia and the Pacific region.¹³⁵ The UNICEF report found that of the 300,000 child soldiers worldwide, one-fourth were in East Asian countries (including Myanmar, Indonesia, East Timor, Cambodia, Philippines and Papua New Guinea).¹³⁶ When the Security Council published Resolution 1379, there were concerns that it was too Africa-centric.¹³⁷ The resolution and its progeny resolutions included a list of states parties that recruit and use child soldiers.¹³⁸ This group of resolutions recognized twenty-three armed groups involved in recruiting child soldiers for conflict situations in five states: of those five, four were African states (the sole outlier was Afghanistan).¹³⁹ Subsequent reports emphasized the list of states mentioned in the Machel Report,¹⁴⁰ leading to progress toward ending the recruitment and use of children in armed conflict.¹⁴¹ While emphasis on these states was an important aspect of the reports, the reports lacked a more in depth analysis of the underlying problems in other affected states. For example, some Asian countries, including Myanmar, Nepal and Sri Lanka, are consistently mentioned as "States of Concern"¹⁴² but are not on the Security Council's agenda.¹⁴³ Because these states represent areas with complex problems very

Police Stations and part of areas under 5 Police Stations in Tripura in the Northeast India. In Jammu and Kashmir, "the Districts of Jammu, Kathua, Udhampur, Poonch, Rajouri, Doda, Srinagar, Budgam, Anantnag, Pulwama, Baramulla & Kupwara" In effect, the Act is in force in the entire state of Jammu and Kashmir and nearly the entire North-eastern region of India with the same substantive provisions.

¹³³ ALLEY RODERIC, *INTERNATIONAL CONFLICT AND THE INTERNATIONAL COMMUNITY: WARS WITHOUT ENDS* 115 (Ashgate Publishing Limited, London 2004).

¹³⁴ Press Release, Amnesty International, *Children as Cannon-Fodder: The Darkest Side of Asian Conflicts* (May 10, 2000), available at <http://web.amnesty.org/library/index/ENGASA010012000>.

¹³⁵ Memorandum from UNICEF, *Adult Wars, Child Soldiers, Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region* (Jun. 3, 2010), available at http://www.unicef.org/sowc06/pdfs/pub_adultwars_en.pdf.

¹³⁶ *Id.*

¹³⁷ Thalif Deen, *U.N. Report on Child Soldiers Ignores Worst Offenders*, INT'L SERV. PRESS, Nov. 7, 2002, available at <http://www.commondreams.org/headlines02/1107-05.htm>.

¹³⁸ S.C. Res. 508, ¶16, U.N. Doc. S/RES/1379 (Nov. 20, 2001); S.C. Res. 1460, ¶16(a), U.N. Doc. S/RES/1460 (Jan. 30, 2003); The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict, delivered to the Security Council and the General Assembly*, U.N. Doc. Ss/2005/72, A/59/695 (Feb. 9, 2005).

¹³⁹ The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict, delivered to the Security Council*, U.N. Doc. S/2002/1299; see also Thalif Deen, *supra* note 137.

¹⁴⁰ These include Rwanda, Angola, Somalia, Liberia, Ethiopia, Kenya, and Mozambique, Bosnia and Herzegovina, Cambodia, Myanmar, Lebanon, and Columbia. *Supra* Part I.

¹⁴¹ *Report of the Secretary-General on Children and Armed Conflict, delivered to the Security Council and the General Assembly, supra* note 138. The report states, "Information on compliance and progress in ending the recruitment and use of children in armed conflict by those parties mentioned in my 2003 report (A/58/546-S/2003/1053 and Corr.1 and 2), including information on other grave violations and abuses (see resolution 1539 (2004), para. 15 (a))."

¹⁴² See *supra* Part I (listing "States of Concern").

¹⁴³ It is estimated that 75,000 child soldiers participate in rebel groups in Myanmar In Nepal, child recruits

different from those in failed states, they demand urgent international attention. However, international NGOs have attempted to table issues relating to child soldiers in states other than Africa, choosing to instead focus efforts on the States of Concern.

¶36 Although the recruitment occurring in other countries needs to be addressed, Africa is still the continent that recruits the most children. For example, the 1999 background document to the African Conference on the Use of Children as Soldiers estimated that more than 120,000 children under eighteen years of age are currently participating in armed conflicts across Africa.¹⁴⁴ In mid-2004, the Coalition to Stop the Use of Child Soldiers stated that Africa has the largest number of child soldiers, with up to 100,000 children believed to be involved in armed conflicts in Burundi, Cote d'Ivoire, Democratic Republic of Congo, Rwanda, Somalia, Sudan, and Uganda.¹⁴⁵

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

IV. CONCLUSION

¶38 States' reluctance to recognize the international legal consequences of internal strife is based on their misunderstanding of the principles of sovereignty and non-interference. That misunderstanding, in turn, makes it virtually impossible for the international community to implement international humanitarian and human rights law.¹⁴⁶ This state reluctance is not perceived as a grave or imminent problem. However, the problem of child participation in localized conflicts illustrates how important it is to address this issue. In today's world, there are rarely instances of failed states or civil wars leading to the total collapse of the rule of law such that full-scale international intervention is warranted. Instead, intrastate conflicts in the modern world occur in states with a well-established rule of law. States have invariably perceived the problem as one of merely law and order, and therefore have either not recognized the conflict or the participation of children, or have done too little to protect child participants.

have been used in armed conflicts since the Secretary General's first report. Nepal has no commitment or action plan to halt the recruitment and use of children, induce child disarmament, or create demobilization and reintegration programs.

¹⁴⁴ See *The Use of Children as Soldiers in Africa: A country Analysis of Child Recruitment and Participation in Armed Conflict*, <http://www.reliefweb.int/library/documents/chilsold.htm>.

¹⁴⁵ See *Africa-Child Soldiers*, http://www.child-soldiers.org/library/global-reports?root_id=159&directory_id=165 (follow "Global Report 2004 – Africa Overview").

¹⁴⁶ See EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSON AND MATERIAL FIELDS OF APPLICATION 23-24* (Kluwer Academic Publishers 1992) (mentioning conflicts in Angola, Mozambique, Afghanistan and El Salvador).

¶39

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