



## CHILDREN IN HUMANITARIAN EMERGENCIES AND THE QUEST FOR HUMANITARIAN RESPONSE: A STUDY

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### Abstract

With the world witnessing continuous humanitarian emergencies one after another that directly or indirectly affects the rights and status of children in particular; the responses to such situations by states as well as non-state actors require a more careful consideration. The researchers and others should also respond to the needs of the children. A series of international instruments as well as institutions have evolved over a period of time and many member states have also created their domestic laws and legal institutions to give effect to them. Yet, there are lot of gaps between theory and reality. There is also dearth of research done on the status of children during any of the humanitarian emergencies. Keeping this in mind, this paper attempts to highlight the plight of the children in three specific situations (child soldiers, refugee children and displaced children), and explain the international norms as well as domestic developments in the protection of the rights of such children, and evoke interest among the students, teachers and researchers to take necessary initiatives in this field of research.

### I Introduction

IN ALL the international and non-international armed conflicts, natural disasters and others, among the people affected, there are a large number of children who become victims of such disasters during and even after normalcy has been restored. This vulnerable group of the population is dragged in all directions and suffer the most irrespective of the existing legal as well as institutional mechanisms present at the global as well as domestic levels. The reasons are many, but the truth is one *i.e* the children continue to suffer during these emergencies. The existence of gaps in implementation, inability or unwillingness on the part of the state, insensitive civil society and civil service all contribute to this situation.

The primary objective of this paper is to highlight the plight of the children in three specific situations, (child soldiers, refugee children and the displaced children) and analyse the applicable international norms and domestic laws in the protection of children. Secondly, the objective is to find ways and means to sensitize the civil society, civil servants, military and para-military forces, police and the like in making them respect international norms along

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with domestic laws. Finally, the objective also includes the ways and means to educate the civil society, provide specific training for security and police forces and argue in favour of enhanced intervention from the National Human Rights Commission, the National Commission for the Protection of Child Rights and other institutions for the better protection of children in India during humanitarian emergencies including that of terrorism, insurgency or any other internal conflict.

With large scale natural disasters, conflicts, wars and displacements that have taken place during the twentieth century, a phenomenon better described by the end of 1980s, as ‘complex emergencies’ or ‘complex disasters’ or ‘complex political emergencies’ came into existence. The United Nations acknowledged that disasters are caused by a combination of human and physical phenomena and adopted the term ‘complex disasters’ to describe them. This term encompasses the role of technology in creating disasters as well as the impact of civil strife and political factors in exacerbating the effects of disasters.<sup>1</sup> A complex emergency is defined by the Dutch Ministry of Foreign Affairs as ‘a large-scale emergency caused wholly or partly by an armed conflict and tending to combine an internal or international conflict with serious human rights violations and large-scale suffering among the threatened civilian population, resulting in large numbers of displaced persons’.<sup>2</sup> To this definition, the consequence of the affected population crossing over the international borders to seek refuge elsewhere can also be added. The United Nations High Commissioner for Refugees (UNHCR) defines complex emergencies as ‘taking place when a natural disaster coincides with an armed conflict or when the magnitude of an emergency makes it difficult for any single agency to handle the emergency on its own and the need arises to mobilise a range of actors and UN agencies’.<sup>3</sup>

Mark Duffield defined complex emergencies as ‘they tend to have multiple causes, including political breakdown or exploitation, and military offensive, which interact with and increase existing vulnerability to natural disasters. They are further complicated by the role of external forces in both encouraging instability, which contributes substantially to the creation of disasters, and supplying aid to mitigate their consequences.’<sup>4</sup> Andrew S. Natsios defined ‘Complex Humanitarian Emergencies’ by pointing out five characteristics which

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1. Lewis Apteekar, *Environmental Disasters in Global Perspective* 22 (G. K. Hall & Co., New York, 1994).

2. Christopher Cushing, *Humanitarian Assistance and the Role of NGOs* 8 (Working Paper Series, Dalhousie University, Nova Scotia, 1995).

3. *Ibid.*

4. David Alexander, “The Study of Natural Disasters, 1977-1997: Some Reflections on a Changing Field of Knowledge” 21 *Disasters* 289(1997).

most of these emergencies display most of the time with varying degrees of intensity. These characteristics include: (1) the most visible characteristic, civil conflict, is rooted in traditional ethnic, tribal, and religious animosities, generally accompanied by widespread atrocities; (2) deterioration of the authority of the national government resulting in the disappearance of the political control of the national government that is taken over by others; (3) mass population movements occur resulting in internally displaced as well as refugees who want to escape the conflict or go in search of food. This may also result in public health emergencies in and around the camps; (4) the economic system suffers leading to hyperinflation, decline in gross national product, unemployment and the collapse of the market; and (5) these four characteristics, sometimes exacerbated by drought, contribute to a general decline in food security, leading to severe malnutrition and widespread starvation.<sup>5</sup>

The UNDP also attempted to identify the characteristics of complex crises, based on the experiences it had from Rwanda, Mozambique, Cambodia and Central America. Accordingly, the complex crises are characterized by breakdown of legitimate institutions, violence targeted at civilians, large scale displacement of people, increased poverty and vulnerability, regional dimension, chronic crisis for extended periods often with a failure of the state, prolonged periods of *low intensity conflicts in certain areas of the country and unsustainable debt burden faced by countries concerned*.<sup>6</sup>

These and many other definitions, generally speaking, cover the following aspects:

- a. the occurrence of a physical event, natural or man-made or a combination of both;
- b. the physical events leading to the disruption of normal routine life of the people living in that territory;
- c. the loss of life as well as damage to properties, both private and public;
- d. the effect of the physical event on the people, culture, society and various other actors under such circumstance;
- e. ability or the inability of the state to take care of the consequences arising out of the physical event;
- f. nature and extent of assistance required and received by the affected population from both within and from outside the state; and
- g. the ability of such an affected population to tide over the situation and plan for the future, both preventive and curative.

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<sup>5</sup> Andrew S. Natsios, *U.S Foreign Policy and the Four Horsemen of the Apocalypse: Humanitarian Relief in Complex Emergencies* 7 (Praeger, Westport, Connecticut, 1997).

<sup>6</sup> Omar Bakht, *Linking Relief to development*, UNDP Rwanda, June 1998. (Emphasis added). Available at: [http://www.undp.org/erd/archives/rwanda\\_ob.pdf](http://www.undp.org/erd/archives/rwanda_ob.pdf). (Accessed on 1st Apr. 2012).

Although the entire population in the territory is affected by such complex humanitarian emergency, the impact is much more severely felt by the vulnerable groups, more specifically the women and children. Such humanitarian emergencies also create a situation in which the vulnerable groups are exploited by their own people and by others. As such the women and children require a different kind of protection from the beginning and through various stages of these humanitarian emergencies. Children in particular are affected by threats to life, limb, economic hardships, insecurity, loss of family, friends and relatives (community in which they live) and sometimes are forced to leave their places of residence during such emergencies.

The problems faced by the children in particular during such humanitarian emergencies immediately after the world war I, have attracted the world's attention that resulted in the first Declaration of the Rights of the Child on 23rd February 1923.<sup>7</sup> The General Assembly of the League of Nations endorsed this declaration on 26 September 1924. The preamble to this proclamation captured the sentiment very nicely through the words 'mankind owes to the child the best it has to give'.

Based on contemporary developments in addressing the needs of the children during such humanitarian emergencies, two major situations are taken up here for analysis. These are the displaced children and child soldiers. As both of them are interlinked to the issues relating to their refugee status, necessary reference is also made to the refugee children in these two situations. Towards this the international legal instruments that seek to protect the children in particular, the efforts taken by the UN and its agencies, the practices adopted by states in general and India in particular, the role played by the national human rights institutions, judiciary and the NGOs are referred to in this paper.

## **II International legal obligations in the protection of children**

Although there are many international humanitarian, human rights and the rights of displaced incorporated in a number of binding and non-binding instruments, only those legal instruments that have relevance to the children caught in displacement, armed conflict and international forced migration situations are briefly mentioned here. This is not an exhaustive listing of such provisions, but the enumeration would certainly provide an understanding of the nature and extent of obligations undertaken by the states in the protection of children during humanitarian emergencies.

There are many international legal provisions on the rights of the displaced children, protection of children in situations of armed conflict, child soldiers

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<sup>7</sup> Also called 'Geneva Declaration', was adopted by an NGO called Save the Children International Union.

and refugee children. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 imposes an obligation on states parties to protect children under the age of fifteen years after the outbreak of hostilities.<sup>8</sup> The states parties are expected to take necessary measures to ensure that children under the age of 15 years, who are orphaned or are separated from their families as a result of the war are not left to their own resources.<sup>9</sup> Children under fifteen years of age shall be benefited by any preferential treatment.<sup>10</sup> India had ratified the four Geneva conventions and even enacted the Geneva Conventions Act in 1961.

The First Additional Protocol to Geneva Conventions, 1977 on 'Protection of Victims of International Armed Conflict' provides for relief actions in which priority shall be given to children.<sup>11</sup> The most important and relevant provision is article 77 on 'protection of children'. Under this article, children shall be the object of special respect and shall be protected against any form of indecent assault. In the second place this article provides that 'the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not directly take part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavour to give priority to those who are oldest'. Despite this if children take part in hostilities and fall into the power of an adverse party, they shall continue to benefit from the special protection accorded by this article, whether or not they are prisoners of war. Again, the same article provides that the death penalty for an offence related to armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed. The Second Additional Protocol to Geneva Conventions, 1977 on 'Protection of Victims of Non-International Armed Conflict' also makes specific mention about the child soldiers. Article 4(3)(c) provides that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.

The Convention on the Rights of the Child, 1989, which has near universal acceptance, seeks to protect the rights of the children affected by armed conflicts with the paramount consideration of 'best interests of the child'. Article 38 of this convention provides that the states parties undertake

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8. Art. 14.

9 Art. 24.

10. Art. 38.

11. Art. 70 for according privileged treatment or special protection.

to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. Clause (2) provides that the states parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Clause (3) provides that the states parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting persons who have attained the age of fifteen years but who have not attained the age of eighteen years, states parties shall endeavour to give priority to those who are oldest. Clause (4) provides that in accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, states parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict. Article 39 provides that the states parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

The Optional Protocol to the Convention on the Rights of the Child on 'the Involvement of Children in Armed Conflict', 2000 is the most appropriate and relevant international human rights instrument (ratified by India as well) in the recent past.<sup>12</sup> Article 1 of this protocol provides that states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. Article 2 provides that the states parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces. Article 3 provides for a series of protection to children from being recruited forcibly into armed forces. Article 4 provides that armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. States parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. Article 6 provides for a more meaningful protection of child soldiers and provides that the states parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present protocol are demobilized or otherwise released from service. States parties shall, when necessary, accord to such persons all appropriate assistance for their physical

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12. India ratified the optional protocol on 30th November 2005 with a reservation on Art. 3 (2).

and psychological recovery and their social reintegration.<sup>13</sup> The ILO Convention also prohibits the recruitment of child soldiers and described it as the worst form of child labour.<sup>14</sup> Similarly, principle 13 of the Guiding Principles on Internal Displacement seeks to protect the children against forced recruitment.

Apart from these instruments, there are many declarations and resolutions adopted by the General Assembly, the Security Council, ECOSOC, and other regional organizations that seek to protect the children during humanitarian emergencies. After the first Declaration on the Rights of the Child in 1924, the General Assembly of the UN established the UNICEF in 1946, whose mission statement is to ensure special protection for the most disadvantaged children, notably those who are victims of war. The General Assembly adopted another resolution on 20 November 1959 on the Declaration of the Rights of the Child.<sup>15</sup> Since then a number of legal instruments at the international sphere have emerged and continue to emerge even today. In spite of the presence of an international legal regime, their implementation at the domestic sphere deserves much more to be done even today. On issues relating to child soldiers, a number of declarations have been adopted by various bodies. This includes the Cape Town Principles of 1997, European Parliament Resolution on Child Soldiers of 1998, Maputo Declaration on the Use of Child Soldiers of 1999, Berlin Declaration on the Use of Children as Soldiers of 1999, Declaration by the Nordic Foreign Ministers Against the Use of Child Soldiers of 1999, Montevideo Declaration on the Use of Children as Soldiers of 1999, OAS Resolution on Children and Armed Conflict of 2000 and Amman Declaration on Child Soldiers.

The General Assembly's 'Declaration on the Protection of Women and Children in Emergency and Armed Conflict'<sup>16</sup> is probably the first to be followed by series of such declarations and resolutions seeking to protect the children during such humanitarian emergencies. The ECOSOC reiterated this declaration in the same year.<sup>17</sup> The ECOSOC at its 42nd plenary session took up this issue on a priority to prepare a draft optional protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflicts.<sup>18</sup> Again the ECOSOC requested the working group on a draft

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13. Although 18 is the prescription under these provisions, the Rome Statute that came into force later prohibits recruitment of children less than 15 years of age. There seems to be a clear conflict in the prescription of age of children for the recruitment.

14. C 182 – Worst Forms of Child Labour Convention, 1999.

15. General Assembly Resolution 1386 (XIV).

16. GA/RES/3318(XXIX) of Dec. 1974.

17. ECOSOC Resolution 1861(LVI) of 16 May 1974.

18. ECOSOC Resolution 1994/10 dated 22 July 1994.

optional protocol on the involvement of children in armed conflict to meet to finalise the draft.<sup>19</sup> It also authorised the chairman of the working group to have informal consultations with the aim of promoting an early agreement on the optional protocol and to produce the report by the end of 1998 and to finalise the draft protocol before 1999 to coincide with the tenth anniversary of the Convention on the Rights of the Child.<sup>20</sup> Similarly, the General Assembly also expressed its concern over the sufferings of women and children belonging to the civilian population who suffer serious harm requiring that they shall be prohibited and such acts shall be condemned.<sup>21</sup> It went one step further and reiterated that women and children shall not be deprived of shelter, food, medical aid or other inalienable rights in accordance with the provisions of UDHR, ICCPR and ICESCR.

Mention should be made of another important Resolution of the General Assembly (GA) on the 'Promotion and Protection of the Rights of the Children – Impact of Armed Conflict on Children' which identified a number of issues.<sup>22</sup> The issues so identified by the GA include the attack on children, child soldiers, refugee and internally displaced children, landmines, education, health and nutrition of children and promotion of psychological recovery and social reintegration. On its part, the Security Council had adopted a landmark resolution<sup>23</sup> through which it condemned the targeting of children in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement, recruitment and use of children in armed conflict in violation of international law. Subsequent to this, the Security Council also adopted the Resolution numbers 1216 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005) and 1882 (2009) on the same basis.

All these and many other decisions, resolutions, declarations and the like taken by the international community could not arrest the violation of the rights of the child during humanitarian emergencies. The reasons for this may be many. Scant respect to international law or treaty obligations, weak enforcement mechanism within the UN system, continuing conflicts between and within nations on the basis of religion, caste, political opinion, race and the like, enormity of natural disasters, failure to internalise the international law principles within the domestic jurisdiction, politics of enforcement, lack

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19. ECOSOC decision 1997/281 dated 22 July 1997.

20. ECOSOC decision 1998/271 dated 30 July 1998.

21. GA Resolution 3318 (XXIX) of 14 Dec. 1974.

22. GA Resolution 51/306 of 26 Aug. 1996. Apart from this, other resolutions 49/209 of 23 Dec. 1994; 50/153 of 15 Feb. 1996; 51/77 of 12 Dec. 1996; 52/170 of 12 Dec. 1997; 52/107 of 13 Dec. 1998; 53/128 of 23 Feb. 1999 and 56/326 of 6 Sep. 2001 and many subsequent resolutions also reiterate the same.

23. Resolution 1261 of 25 Aug. 1999.

of human rights culture as well as human rights institutions and the like in a domestic jurisdiction seem to be the main reasons. In this context, three different types of emergency situations in which children are caught may be mentioned briefly and reiterate the need for respecting the international treaty obligations not only by the state actors but also by the non-state actors. Against this background, the following three specific situations are discussed briefly in an attempt to highlight the need to protect the rights of the children better.

### **Child soldiers**

As a result of the international and non-international armed conflicts during the twentieth century and the ongoing conflicts during the present century, the children have been the victims either directly or indirectly. Millions of them have been killed, disabled, orphaned, sexually abused, recruited as soldiers, separated from the families and friends, denied the support of the community in which they lived and have been exposed to a high degree of risk of disease, psychological problems and malnutrition. They have been totally denied the charm of being children for no fault of theirs. Even providing humanitarian assistance to them during such emergencies poses a series of hurdles. At times the international community has to wait and watch helplessly and at times assistance becomes a difficult commodity. There seems to a widening gap between the needs and the assistance available to face a humanitarian crisis.

This situation is explained better by the UNICEF in its Humanitarian Action Report of 2002:<sup>24</sup>

Accordingly, the global humanitarian context is a changing one. New challenges arise, priorities change, and issues inter-link with one another...The lack of humanitarian access in conflict situations has a particularly devastating effect on children, preventing delivery of assistance with major consequences for health care, education and other social services. Insecurity, the widespread presence of landmines and denial of access by warring parties are all major constraints on humanitarian action.

Focusing on the child soldiers, the report observed that ‘over the last thirty years, evidence indicates that governments or rebel armies have actively recruited hundreds of thousands of children – boys and girls – to perform a wide range of roles in armed forces. Being recruited as a soldier has a long

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24. Available at: [www.unicef.org/emerg/Appeals/2002/chapter1.pdf](http://www.unicef.org/emerg/Appeals/2002/chapter1.pdf) (accessed on 26 Mar. 2012).

lasting consequences on a child's development. Children endure enormous psychological damage from the hardships they face and the atrocities they are often forced to commit, as well as risking physical injury, illness and disease. They face being ostracised by their home communities. They have little opportunity for education or skill-acquisition. Girls face particular threats, including that of abduction, abuse and rape.<sup>25</sup> The development of small arms and light weapons that are cheap but very lethal have also had their impact on the child soldiers as such weapons could be carried and used by them easily. These children could smuggle or transport or use these small arms to their camps or from their camps without being noticed by others. The joy of using these weapons also make them trigger happy even after normalcy has been restored.

Serious international concern on the impact of war on children was first initiated at the forty-eighth session of the General Assembly that adopted a resolution on 'the Protection of Children Affected by Armed Conflicts' requesting the secretary-general to appoint an independent expert to undertake a comprehensive study on this issue. The former Minister for Education in Mozambique, Graca Machel, was appointed in September 1994 and her detailed report was presented by the secretary-general to the General Assembly in November 1996.<sup>26</sup> This report identified the nature and extent of the impact the conflicts have over children. The report observed that '...children are being sucked into seemingly endless endemic struggles for power and resources. During 1990s, more than 2 million children died as a result of armed conflicts, often deliberately targeted and murdered. More than three times that number were permanently disabled or seriously injured. Even greater numbers have fallen victim to disease, malnutrition and sexual violence.' At any given point of time, more than 300,000 children are being used in hostilities as soldiers.<sup>27</sup> Out of this, about 120,000 are said to be girls.<sup>28</sup> International emergency relief for victims of armed conflict is inadequate and uneven varying from 13 cents to 59 cents a day per person.<sup>29</sup>

Apart from the impact of conflict on children in general, they also begin to take active part in hostilities, facilitated by small arms, and are called as child soldiers. A child soldier is any child – boy or girl – under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups. Child soldiers

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25. *Ibid.*

26. A/51/306 and Add.1

27. Graca Machel, *The Impact of War on Children 1-2*(Hurst & Company, London, 2001).

28. Available at: <http://www.voanews.com/english/archive/2005-04/2005-04-25-voa27> (accessed on 1st April, 2012).

29. *Supra* note 27 at 2-3.

are used for forced sexual services, as combatants, messengers, porters and cooks. Most are adolescents, though many are 10 years of age and younger. The majority of them are boys, but a significant proportion overall are girls.<sup>30</sup>

There have been a number of studies and reports on the impact of war or displacement on children as well as what needs to be done. These studies and reports also indicate the a large number of recruitment of child soldiers, either by regular armed forces of the state or by any of the non-state actors like the insurgents or freedom fighters or ideological groups. Such states and non-state parties in those states include Burundi, Cote d'Ivoire, the Democratic Republic of Congo, Somalia and Sudan who are on the agenda of the Security Council. The other states (including the non-state actors) that recruit or use children either in situations of armed conflict not on the agenda of the Security Council or in other situations of concern, bearing in mind other violations and abuses committed against children include Columbia, Myanmar, Philippines, Sri Lanka and Uganda.<sup>31</sup> Myanmar still tops the list with the maximum number of child soldiers recruited by the state.

The Graca Machel's report made major recommendations under sixteen themes to address the problems faced by children during armed conflict and displacement. Some of these recommendations under the sub themes are briefly mentioned below:

- (a) *Child Soldiers*: States to ratify the optional protocol to the Convention on the Rights of the Child (CRC) and submit binding declarations setting 18 as the standard minimum age for voluntary recruitment. Programmes to disarm, demobilize and reintegrate child soldiers on priority basis. Child soldiers must be protected from retribution, summary execution, arbitrary detention, torture and other punitive measures in accordance with the CRC;
- (b) *Children forced to flee*: In every situation of internal displacement, a lead agency should be identified. States and other relevant actors should commit themselves to promote, disseminate, apply and integrate into national legislation and policy the Guiding Principles on Internal Displacement, with particular attention to children and women. The survival and protection of unaccompanied and separated children must be ensured;
- (c) *Children under siege from HIV/AIDS*: Care and services must be made available to all populations affected by AIDS. Schools and educational system should be the centrepiece for HIV/AIDS awareness, prevention and care during emergencies. Education and training on HIV/AIDS prevention should be made mandatory for all military and peacekeeping personnel;

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30. *Id.* at 7-8.

31. General Assembly at its 59th session (A/59/695) and the Security Council at its sixtieth year (S/2005/72) on the Promotion and Protection of the Rights of Children, dated 9 Feb. 2005.

- (d) *Ending gender-based violence and sexual exploitation:* Data should be gathered on the trafficking and sexual exploitation of women and girls in conflict situations. All humanitarian responses in conflict situations must emphasise the special reproductive health needs of women and girls;
- (e) *The toll from malnutrition and disease:* Clean water and adequate nutrition are vital and emergency access must be expanded to ensure respect for children's rights at all times during conflicts;
- (f) *Psychological impact:* Psychological support must be a central part of child protection in all phases of emergency and reconstruction. Children with special needs, such as child soldiers, should receive support within the broader context of reintegration programmes for all war-affected children. Sensitivity to special protection issues affecting girls must be a priority for agencies and communities;
- (g) *Education for survival:* Educational support should include life skills training, landmine awareness, HIV/AIDS prevention, human rights, peace education and psychological support in the core curriculum;
- (h) *Protecting children from sanctions:* The international community should cease to impose comprehensive sanctions. When sanctions are applied, the Security Council must have clearly defined objectives and criteria for termination and to avoid damage to vulnerable populations, especially women and children;
- (i) *Raising standards for child protection:* Human rights treaty bodies should enhance their focus on child rights in conflict situations. Wherever gross violations of children's rights occur, the accountability of those who are directly or indirectly responsible should be established under relevant international or national provisions;
- (j) *A children's agenda for peace and security:* All operations to prevent conflict and build peace should include human rights monitoring and verification components. The internal institutional arrangements of peace support operations must ensure that the humanitarian, human rights, gender and child protection components are able to safeguard the humanitarian principles of humanity, neutrality and impartiality in carrying out their work;
- (k) *Reconstruction and reconciliation:* The Development Assistance Committee (OECD/DAC), in consultation with the UN and NGOs, is urged to establish criteria and guidelines to reduce disparities in resource mobilization for war-affected children and women across conflict situations and to reduce the institutional, budgetary and functional barriers between relief assistance, reconstruction and development cooperation. Those responsible for genocide, war crimes and crimes against humanity and

against children must be brought to justice. Post-conflict assistance should prioritise truth and reconciliation initiatives and the rebuilding of justice systems, paying special attention to juvenile justice; and

- (1) *Preventing war*: The UN as well as regional approaches must prevent conflicts, promote peace and pay increased attention to child rights, protection and gender.<sup>32</sup>

Ten years after Graca Machel submitted her first report, a strategic review on ‘Children and Conflict in a Changing World’ was undertaken with the purpose to mobilize attention to the full scope of issues addressing all impacts, on all children, in all situations affected by armed conflict. The strategic review also identified the emerging challenges and priorities and the responses required for the next decade. In this review, the changing nature of conflict, the consequences for children, the potential challenges for the future, the gaps in implementing international standards, effort to prioritise the needs of the children, participation of children and young people and the role of civil society along with the UN were highlighted.<sup>33</sup> Radhika Coomaraswamy, Special Representative of the Secretary General for Children and Armed Conflict, while presenting this report to the General Assembly highlighted three important areas from the Machel review. They are (a) what needs to be done to end impunity?; (b) what needs to be done in terms of programmatic responses to care and protect children?; and (c) what needs to be done to strengthen capacity and partnership?<sup>34</sup>

A Coalition to Stop the Use of Child Soldiers consisting of the Amnesty International, Defence for Children International, Human Rights Watch, International Federation Terre Hommes, International save the Children Alliance, Jesuit Refugee Service and the Quaker United Nations Office was formed to address all the issues during and after humanitarian emergencies in the protection of the rights of the child. This coalition has made a series of recommendations to the Security Council on Children in Armed Conflict in November 2006.<sup>35</sup>

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32. These recommendations entitled ‘The Machel Review 1996-2000: A Critical Analysis of Progress Made and Obstacles Encountered in Increasing Protection for War-affected Children’ were presented to the International Conference on War-affected Children, held in Winnipeg, Canada in September 2001. See Graca Machel, *The Impact of War on Children* 194 (Hurst & Company, London, 2001).

33. Machel Study 10-Year Strategic Review, Executive Summary of the Strategic Review Report to the General Assembly, A/62/228. Available at: <http://www.unicef.org> (accessed on 18th March, 2012).

34. Available at: <http://www.un.org/children/conflict/english/17oct2007stateme.html> (accessed on 1st April, 2012).

35. Available at: <http://www.child-soldiers.org> (accessed on 1st April, 2012).

A group of ministers and representatives from different countries assembled in Paris on 5th and 6th February, 2007 and adopted the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups. They strongly reaffirmed their collective concern at the plight of children affected by armed conflict and recognised the physical, developmental, emotional, mental, social and spiritual harm to children resulting from the violations of their rights during armed conflict and committed to identifying and implementing lasting solutions to the problem of unlawful recruitment or use of children in armed conflict.<sup>36</sup>

Having stated the importance, relevance and the developments in addressing the rights of the child during and after emergencies, it is disheartening to see that the international norms are being flouted by many states as well as non state actors with impunity. The South Asian countries also figure in the list of states and non-state actors who continue to recruit children into their fold. Bangladesh, Pakistan, Sri Lanka and India (Kashmir) figure in the list of states and non-state actors in this region to be having child soldiers. The Maoist in Nepal also has recruitment camps for children. According to an estimate made in 2000, there are some 2,000 children in the Liberation Tigers of Tamil Eelam (LTTE). During 1995 raids, about 3,000 people were killed by the Sri Lankan army, a vast majority of them being women and children belonging to the LTTE. In another battle in 1998 at Killinochchi, over 500 child soldiers might have been killed. In spite of the assurances given by LTTE not to recruit child soldiers, in practice, it continues to do so.<sup>37</sup> The Sri Lankan children have been the worst hit in this South Asian region both in terms of the impact the war has had, displacement and recruitment of child soldiers.<sup>38</sup>

A UN Mission in Nepal had observed that there are over 4,000 disqualified soldiers, the bulk of whom were recruited as child soldiers. During September 2006, about 512 cases of child recruitment have been reported. With some of the child soldiers being freed by the Maoist, the UNICEF has volunteered to oversee the rehabilitation of the child soldiers.<sup>39</sup> Yet the government has not formulated a policy to safeguard the future of other combatants, including children, who have to be discharged because they were recruited after the peace pact. In India, the regular army sends people to operational area only when they have completed 18 years of age. However, in few states like Jammu &

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36. Available at: [http://www.essex.ac.uk/armedcon/story\\_id/000692.pdf](http://www.essex.ac.uk/armedcon/story_id/000692.pdf) (accessed on 1st April, 2012).

37. Available at: <http://www.satp.org/satporgrp/countries/shrilanka/terroristoutfits/child> (accessed on 1st April, 2012).

38. Danielle Vella, "Tamil Children Have Known Nothing but War" 14 *Monitor* No. 2, May 2001 at 19-22.

39. Available at: [news.bbc.co.uk/2/hi/south\\_asia/8156415.stm](http://news.bbc.co.uk/2/hi/south_asia/8156415.stm) (accessed on 20th July, 2010).

Kashmir, Andhra Pradesh, Assam, Manipur, Nagaland and Tripura, reports of children being killed have been registered. Detention of children by police in Kashmir without their cases being heard and prolonged detention of children in Chhattisgarh has also been reported. The state backed village defence forces called Salwa Judum to fight insurgency in the state of Chhattisgarh have child soldiers as well. The Maoists in Andhra Pradesh continue to recruit child soldiers. There are few effective policies or facilities in place in these states to reintegrate former militants, particularly children, into mainstream. A draft integrated child protection scheme is also under consideration by the government though it does not contain any specific proposals relating to children involved in armed conflict.<sup>40</sup>

In Manipur, the militant groups have been recruiting child soldiers. There are cases of missing children first and subsequently found in the militant fold. Some NGOs and human rights groups have been staging protests and demonstrations against the insurgents using children. One NGO in Manipur even appealed to the militant groups to formulate a common code of conduct and not to recruit child soldiers.<sup>41</sup> Local human rights organizations and the National Commission for Women have also expressed their concern about the employment of child soldiers in Chhattisgarh.<sup>42</sup> However, in India no systematic studies have been conducted to document the life of these child soldiers.<sup>43</sup> It is also stated that child soldiers are not as wide a problem as in some of India's neighbours.<sup>44</sup> Yet it is time that policies and preventive measures are in place in India before things go out of control. The instances cited above in the recruitment of child soldiers, predominantly by non-state actors in India is a cause for concern.

In this regard, the recent ruling by the Supreme Court of India deserve a mention as well as a brief analysis in the light of the international legal protection extended to children as mentioned above. In *Nandini Sundar v. State of Chhattisgarh*,<sup>45</sup> it was alleged that the State of Chhattisgarh was actively promoting the activities of a group called 'Salwa Judum', which was in fact an armed civilian vigilante group, thereby further exacerbating the ongoing

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40. "Child Soldiers" *Global Report* 2008, India at 169-172.

41. Available at: [http://mynews.in/printstory.aspx?story\\_id=8111](http://mynews.in/printstory.aspx?story_id=8111) (accessed on 12th April, 2012).

42. Available at: [http://www.alrc.net/doc/mainfile.php/alrc\\_statements/442](http://www.alrc.net/doc/mainfile.php/alrc_statements/442) (accessed on 15th April, 2012).

43. Available at: <http://www.indianofficer.com/forums/current-issues/5916-child-soldie...> (accessed on 1st April, 2012).

44. Available at: <http://www.countercurrents.org/dixit051207.htm> (accessed on 12th April, 2012).

45. (2011) 13 SCC 46.

struggle, and was leading to further widespread violation of human rights. The court had previously passed various orders as appropriate at the particular stage of hearing. It had previously noted that it would be appropriate for the National Human Rights Commission to verify the serious allegations made by the petitioners, by constituting a committee for investigation, and make the report available to the court. On 25-08-2008 the NHRC filed its report.

The court did not find appropriate conditions to infer informed consent by these youngsters being appointed as SPOs. The court further observed that many of these tribal youngsters, on account of the violence perpetrated against them, or their kith and kin and others in the society in which they live, have already been dehumanized. To have feelings of deep rage, and hatred, and to suffer from the same is a continuation of the condition of dehumanization. The role of a responsible society, and those who claim to be concerned of their welfare, which the state is expected to under the Constitution, ought to be one of creating circumstances in which they could come back or at least tread the path towards normalcy, and a mitigation of their rage, hurt, and desires for vengeance. To use such feelings, and to direct them into counterinsurgency activities, in which those youngsters are placed in grave danger of their lives, runs contrary to the norms of a nurturing society. That some misguided policy makers strenuously advocate this as an opportunity to use such dehumanised sensibilities in the fight against Maoists ought to be a matter of gravest constitutional concerns and deserving of the severest constitutional opprobrium.

The court went on to direct the State of Chattisgarh to immediately cease and desist from using SPOs in any manner or form in any activities, directly or indirectly, aimed at controlling, countering, mitigating or otherwise eliminating Maoist/Naxalite activities in the State of Chattisgarh and recall all firearms issued to any of the SPOs, whether current or former, along with any and all accoutrements and accessories issued to use such firearms. The State of Chattisgarh shall take all appropriate measures to prevent the operation of any group, including but not limited to Salwa Judum and Koya Commandos, that in any manner or form seek to take law into private hands, act unconstitutionally or otherwise violate the human rights of any person. The court directed the Union of India to cease and desist, forthwith, from using any of its funds in supporting, directly or indirectly the recruitment of SPOs. The court also directed the State of Chattisgarh and the Union of India to submit compliance reports with respect to all the orders and directions issued today within six weeks.

This decision of the Supreme Court probably would serve as a guideline to both state and non-state actors from recruiting the children during the conflicts, domestic or international. The awareness needs to be further carried forward

by organizing seminars and conferences along with training programmes for the security and police personnel on issues relating to child soldiers and the need to protect them in a meaningful manner.

### **Displaced children**

The concerns relating to the displaced people are yet to take shape in the form of a binding international instrument, and such people have been suffering from the causes as well as the consequences of their displacement. The international response to the sufferings of the internally displaced people has resulted only in developing the Guiding Principles on Internal Displacement in 1997. The internally displaced persons (IDPs) are those people who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflict, internal strife and systematic violations of human rights, as well as natural or man-made disasters involving one or more of these elements, and who have not crossed an internationally recognized state border.<sup>46</sup> Although it is purely the concern of the government of the state, there is a wide gap between the policies and law on one hand and law and practice on the other. The courts in India have been active in protecting the rights of such people affected by displacement. However, there seems to be a very slow and knee-jerk reaction from the law makers in India, and consequentially the need to depend upon other institutions like the National Human Rights Commission for better protection has gained momentum in India in the recent past. It is to be noted here that India has not even recognized the Guiding Principles on Internal Displacement.

The concern for the IDPs, apart from the guiding principles, has produced different initiatives from the international agencies, NGOs and the like. The United Nations General Assembly, Security Council, Economic and Social Council as well as the Council on Human Rights (earlier was known as the Commission on Human Rights) have all passed resolutions at times repeatedly, to raise the concern of the IDPs among the member states as well as the humanitarian agencies.<sup>47</sup> These resolutions and the developing policies concerning the IDPs should be viewed in the light of the extent of displacement and other consequences arising out of them.

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46. Pramod Nair, "Towards a Regime for the Protection of Internally Displaced Persons" I *Year Book of International Humanitarian and Refugee Law* 193 (Indian Society of International Law, New Delhi, 2001).

47. For details, see A/RES/46/182 dated 19 Dec. 1991; 2816 (XXVI) of 14 Dec. 1971; 44/236 of 22 Dec. 1989; 45/100 of 14 Dec. 1990; 56/164 of 20 Feb. 2002; E/2002/23-E/CN.4/2002/200 on IDPs; CHR/RES.2001/54 dated 24 Apr. 2001; CHR/RES.2002/56 dated 25 Apr. 2002 and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.

The Centre for Research on Epidemiology of Disasters (CRED) surveyed the disasters of the world during the last decade (1991-2000) and has been publishing annual reports highlighting the causes, consequences as well as the vulnerability of certain societies in the world today. According to the reports, during 1991-2000, a total of 4,703 disasters have resulted in a total of 752,521 deaths. Out of this, a total of 2,557 natural disasters have been reported, resulting in a total of 665,598 deaths. Out of those killed, 83% were Asians.<sup>48</sup> Comparing the effect of natural and man-made disasters, the report also indicated that 2.3 million people were killed by various conflicts and out of those killed, about three fourths were from countries of low human development (LHD).<sup>49</sup> However, the number of people affected by natural disasters, on an average of 211 million every year during 1991-2000 is seven times more than the average of 31 million people affected by conflicts. On an average, about 242 million people are affected and killed by disasters and conflicts every year.<sup>50</sup> In terms of the region affected the most by disasters, both people affected and killed, and the amount of estimated damage, Asia is the worst affected.<sup>51</sup>

In India, close to 56 million people are affected by disasters every year. In terms of money, such calamities cost India nearly \$190 billion. More than half of India is reported to have been affected by earthquakes and nearly 4,700 miles of coast line is whipped by cyclones, especially in the states of Andhra Pradesh and Orissa. Indian government's policies on natural disasters are more reactive than preventive. There is poor coordination between the government and the civil society.<sup>52</sup> Not more than 10 per cent of the multi storey structures in Indian cities are built according to earth-quake resistant norms. A study commissioned by the Government of India had warned during 1998 that there is lack of compliance with building codes in India. Even the hospital buildings collapsed during the recent earthquakes in Gujarat or they become useless because of the damage to the buildings. With the then existing knowledge, it would have been possible to reduce the number of people killed in Gujarat.<sup>53</sup> The Indian Ocean tsunami of December 26, 2004 inflicted

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48. Available at: <http://www/cred.be/emdat/sumdata/wdr/wdr2000.htm> (accessed on 30th March, 2012).

49. *Ibid.*

50. *Ibid.*

51. Available at: <http://www/cred.be/emdat/sumdata/wdr/wdr2001.htm> (accessed on 1st April, 2012).

52. Available at: [http://news.bbc.co.uk/hi/english/w...outh\\_asia/newsid\\_652000/652696.stm](http://news.bbc.co.uk/hi/english/w...outh_asia/newsid_652000/652696.stm) (accessed on 1st April, 2012).

53. Available at: [http://www.oberlin.edu/news-info/01feb/wisnered\\_disaster.html](http://www.oberlin.edu/news-info/01feb/wisnered_disaster.html) (accessed on 1st April, 2012).

massive destruction in the region, including India. More than 200,000 people were killed or remained missing out of which one third of them were children. Many children were separated from their families.<sup>54</sup>

When children are separated from their families, relatives, friends and the community in which they have been living, they become even more vulnerable and has a negative effect on such children. Many children during such humanitarian emergencies are affected by threats to life, economic and social hardships, uncertainty, fear, sleeplessness, insecurity, physical and psychological effects and ultimately leading to trauma. Trauma in turn can limit a child's social and emotional development as well as ability to learn. Such impacts may also leave long term effects on a child's outlook on life.

Everett M Ressler had narrated a number of humanitarian emergencies that resulted in large number of unaccompanied children.<sup>55</sup> This phrase 'unaccompanied children' was probably first used in 1940 and such children are also called as 'detached children', 'homeless children', 'separated children', 'vagabond children', 'street children', 'waifs', 'foundlings' and 'orphans'.<sup>56</sup> The author suggests three important courses of action, namely, (a) provide legal status/protection; (b) the national government and appropriate local agencies should be encouraged to implement programmes based on sound child welfare principles; and (c) to improve international response to children's needs in emergencies including the specific needs of unaccompanied children. The term 'separated children' probably came into use in 1990s during the emergency relief responses in Great Lakes region of Africa to reflect the specific needs of the children who were separated from their parents but accompanied by other adults.

Similarly, James Kunder and Bo Victor Nylund have also suggested various measures to protect the rights of the displaced children due to war, conflict or natural calamities. According to them, three suggestions for improving human rights monitoring of and reporting on the forcibly displaced have emerged

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54. UNICEF *Annual Report*, 2005, at 12-13.

55. Russian Revolution, 1919; Children evacuated in Spanish civil war, 1936; Finnish children evacuated to Sweden in 1939; unaccompanied children and displaced persons camps in Europe, 1945; children removed from Greece during civil war, 1948; unaccompanied children in the Korean war, 1950; Vietnamese children taken to France with French withdrawal, 1954; exodus of Hungarian children to Austria after the uprising, 1959; unaccompanied children in the Cuban exodus to the U.S, 1960 and 1980; unaccompanied Tibetan children to India and other countries, 1960 (this continues even today); unaccompanied children from Vietnam, 1975; unaccompanied children from Laos, 1975; unaccompanied Cambodian refugee children to Thailand, 1975; unaccompanied children in the Haitian exodus to the U.S, 1980; and unaccompanied Lebanese children to West Germany, 1980.

56. Everett M. Ressler, "Unaccompanied Children in Emergencies", Unpublished article, available at the library of the Centre for Refugee Studies, York University, Toronto, Canada. Reference no. z.chi 1980, 0240-CRS, YU.

from UNICEF's field experience and its efforts to enhance its capacity to protect the rights of the displaced children. They are: (a) to better employ the Convention on the Rights of the Child as a tool to protect the displaced children; (b) to more effectively mobilise UN program agency field staff; and (c) to better integrate traditional program service delivery with human rights monitoring, reporting and protection.<sup>57</sup> Demobilising children who have taken part in the hostilities, various activities in the recovery period, advocating safe environment for the children, landmines awareness programme, developing educational programmes, improving infrastructure and basic services and the like have been suggested by them.<sup>58</sup> The issues relating to the protection of the rights of the unaccompanied refugee children, legal response and the judicial decisions to protect them have been discussed in detail by Simon Russel.<sup>59</sup>

An analysis of data provided by these reports and writings, proves that the disasters, natural or man-made, do occur within a society that is ill-prepared and affect its people, property, institutions, infrastructure and culture. The societies that are vulnerable to the effects of such disasters take a lot of time to bounce back to the normal situation which, in turn, takes away the steam out of the developmental work of such societies. The response to such disasters particularly in developing countries has been, at the best, *ad hoc*. Disaster management has been lowest on the list of priorities for many of the developing countries, and consequentially, their dependence on international assistance is very high. This in itself has been a major reason for international concern about the disasters and their consequences in any of the developing countries. Some of these developments need to be mentioned here.

With the growing incidents of violence, conflicts, natural and man made disasters, the UN Commission on Human Rights gave the mandate to Francis M. Deng in 1992 that was subsequently reinforced by several resolutions of the General Assembly to study the situations in detail. Assisted by a team of international legal experts, the Guiding Principles on Internal Displacement was prepared and submitted to the Commission on Human Rights in 1998. These principles were unanimously adopted by the Commission and General Assembly that encouraged UN agencies, regional organizations, and NGOs to disseminate and apply them. The 'Guiding Principles on Internal Displacement' reflect the principles of international human rights law and humanitarian law.

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57. James Kunder and Viktor Nylund, "Protecting the Rights of the Displaced Children: Some Suggestions for Enhanced Monitoring and Reporting" in Anne Bayefsky and Joan Fitzpatrick (eds.), *Human Rights and Forced Displacement* 89 (Martinus Nijhoff Publishers, The Hague, Netherlands, 2000).

58 *Id.* at 94-96.

59. Simon Russel, "Unaccompanied Refugee Children in United Kingdom" 11 *International Journal of Refugee Law* 126-154 (1999).

Building on the ‘Guiding Principles on Internal Displacement’, the International Law Association at its 69th Conference held in London during July 25-29, 2000 approved by consensus the Declaration of International Law Principles on Internally Displaced Persons. This ‘London Declaration’ focuses on the status of IDPs under international law, human rights and humanitarian law in the context of refugees, aliens, stateless persons and other nationals. It also deals with the establishment and status of safe areas, institutional arrangements to provide protection and assistance to IDPs and the essential role of the Security Council.<sup>60</sup> However, these instruments are not legally binding on any of the states.

Similarly, Francis M. Deng, the Special Representative of the UN Secretary-General on Internally Displaced Persons, has identified a number of international human rights, humanitarian and refugee instruments as sources of law governing displacement in recognized situations.<sup>61</sup> According to Deng, international law recognizes three categories of situations, each of which is governed by a different set of norms, namely. (i) situations of tensions and disturbances, or disasters where human rights law is applicable, (ii) situations of non-international armed conflicts covered by some of the most central principles of humanitarian law and by many human rights guarantees, and (iii) situations of inter-state armed conflict where the detailed provisions of humanitarian law become primarily operative although many important human rights guarantees also remain applicable.<sup>62</sup> In this perspective, one can see the applicability of human rights laws and guarantees to all the situations which displace people within national borders.

In the absence of any specific law governing either the refugees or the IDPs in India, there are related laws that could be relied upon depending upon the circumstances. The Constitution of India also provides a number of rights both to citizens and non-citizens based on which the constitutional courts can intervene to protect the rights of the refugees or the IDPs as the case may be.<sup>63</sup> The provisions of the Convention on the Rights of the Child

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60. “The London Declaration of International Law Principles on Internally Displaced Persons” 12 *International Journal of Refugee Law* 672-73(No.4).

61. Francis M. Deng, “Internally Displaced Persons: Compilation and Analysis of Legal Norms” Office of the United Nations High Commissioner for Human Rights, Geneva, Human Rights Study Series No. 9, 1998 at 5-10.

62. *Id.* at 10.

63. Art. 14 that provides for equality before the law and equal protection of laws, art. 21 that provides for protection of life and liberty and their applicability to all persons would be more than sufficient to invoke the jurisdiction of the constitutional courts for protecting the constitutional rights of refugees and fundamental rights of the displaced persons. For example, the Supreme Court in *Loins de Raedt v. Union of India*, AIR 1991 SC 1886 upheld the applicability of arts. 14 and 21 of the Indian Constitution to foreigners.

to which India is a party would certainly provide the necessary support. Yet the judicial process is time consuming and its implementation is left to the executive branch. It is because of this, there is a vast gap between law, rules and regulations on one side and their implementation on the other.

### **Refugee children**

The Constitution of India that came into force on January 26, 1950 provides specific protection in favour of children. Article 15(3) provides that ‘nothing in this article shall prevent the state from making any special provision for women and children’. Article 24 provides that ‘no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment’. These two provisions fall under part III on fundamental rights of the Constitution. Article 39(e) provides that ‘the tender age of children is not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength’. Article 39(f), inserted by an amendment<sup>64</sup> provides ‘that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment’. Article 45 provides for free and compulsory education up to the age of fourteen. These provisions fall under part IV on directive principles of state policies of the Indian Constitution. Although technical distinctions do exist between part III and part IV mentioned above, the courts have interpreted them to be supplementary to each other. However, it remains to be seen clearly whether these rights would go to the benefit of refugee children present in India.

There are many statutes passed by the legislatures in India that seek to prohibit and regulate child labour, suppression of immoral traffic as well as the Juvenile Justice Act, 2000. The Juvenile Justice Act of 1986 has been substituted with this new legislation on the basis of the recommendation made by the U.N Committee on the Rights of the Child that monitors the implementation of the Convention on the Rights of the Child. Before getting into details, it may be argued that these provisions are meant for citizens and not for others. This argument is likely to fail in the context of children, particularly after India has undertaken the obligations under the Convention on the Rights of the Child.<sup>65</sup> India is also a signatory to the World Declaration on the Survival, Protection and Development of Children. India being a federal state, the policies and

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64. The Constitution (Forty Second Amendment) Act, 1976, w.e.f. 3 Jan. 1977.

65. India ratified the Convention on the Rights of the Child, 1989 on 11 December 1992 and the Convention came into force with effect from 10 Jan. 1993.

responsibilities relating to the protection of children are shared among the central, state and local self-governments in India.

As a follow up of the commitment and being a party to the U.N Declaration on the Rights of the Child, the Government of India had initiated a draft national policy on child development in 1974. This was followed by the launching of Integrated Community Development Services (ICDS) to reach out to the poorest and most vulnerable and targeted the children below six years of age. This benefited more than 20 million children all over India. This became one of the largest schemes in the world of its kind. Successive five-year plans strengthened the efforts in education, health and basic needs. After ratifying the convention, a National Plan of Action for Children was formulated by the Central Government in the same year, 1992, with a focus on children, especially in difficult circumstances. A National Plan of Action for the Girl Child for 1991-2000 was announced along with 'Education for All'. Subsequently, number of special schemes and programmes were also launched by the central and state governments. In spite of all these efforts, the nature and dimension of problems related to children in general and 'refugee children' in particular paints a gloomy picture.

Statistics reveals that there are 4,20,400 refugees and asylum seekers,<sup>66</sup> 5,00,000 internally displaced persons<sup>67</sup> and more than 18 million illegal migrants from Bangladesh<sup>68</sup> present in India. Even if a conservative estimate of about 30 to 35 percent of them being children is taken into consideration, it amounts to a total of about 3.5 million to 4.1 million 'children of concern' present in India. These children have not received any consistent status or protection at the hands of governments in India due to one reason or the other. Irrespective of this, there are some positive and some negative developments that have taken place in India in the protection of these children of concern. Some of them are highlighted here. In doing so, specific refugee communities have been mentioned in detail to highlight the issues in protracted refugee situations, protection extended by UNHCR, other refugee crises and humanitarian emergencies. The nature and extent of international obligations undertaken by India, present national legal regime and the judicial trends are analyzed to advance few recommendations for more effective and meaningful protection of refugee children as well as the children of concern.

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66. World Refugee Survey 2008, United States Committee for Refugees and Immigrants, USA at 31 (accessed on 1st April, 2012).

67. Available at: [http://www.internal-displacement.org/8025708F004CE90B/\(httpCountryes\)/5762D122F45E14B0802570A7004BBA1F?opendocument&count=10000](http://www.internal-displacement.org/8025708F004CE90B/(httpCountryes)/5762D122F45E14B0802570A7004BBA1F?opendocument&count=10000) (accessed on 1st April, 2012).

68. *The Hindu*, 7 Feb. 1999.

Among the refugees, the most vulnerable are the children. The condition of the refugee children becomes even worse, if not accompanied by the family members or other elders who would look after them. They are vulnerable because childhood is a period of development that means continuous, intense and fast changes. It is when human resources develop, physically and mentally. Children learn, in interaction with others, who they are and about gender differences and roles. The refugee child does not enjoy the benefits of good health, nutritious food, stable environment, security, play *etc* that are made available to them by the family.<sup>69</sup> The unaccompanied refugee children are most likely to be at risk of mistreatment than children in biological families and thus they are at least twice disadvantaged.<sup>70</sup> There are many studies conducted on the mental health, primary health, nutritional factors, well-being and the overall development of refugee children that should be kept in mind in appreciating the concerns raised in those studies. Based on the experiences, the UNHCR has developed a set of guidelines for the protection of refugee children including that of unaccompanied children in 1988. The same was modified and published in 1994.

There were a few major unprecedented humanitarian crises faced by India resulting in large scale displacement of people. The first one was immediately after its independence when an estimated 15 to 20 million people crossed the newly created border between India and Pakistan. As both the governments took interest in resettling the affected population, various legal, social and welfare measures were taken by them with very little international assistance and no involvement of any refugee agency. The second humanitarian crisis took place in 1971, the largest refugee movement seen so far, when an estimated 10 million Bengali refugees from East Pakistan (Present Bangladesh) sought protection in India. During this massive relief operation, specific needs of the refugee children in particular were taken into consideration. A brief summary of the proportion of the problem and the actions taken is mentioned here to explain the nature of protection and care extended to refugee children under such circumstances. Large scale displacement of people in various developmental projects like Narmada dam, earthquakes, droughts, floods, insurgencies in a few states, low intensity conflicts and the tsunami have taken place in the recent past.

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69. Eva Segerstrom, *Focus on Refugee Children* 16 ( Grafiska Punkten, Vaxjo, 1995).

70. Daniel J. Steinbock, "Unaccompanied Refugee Children in Host Country Foster Families" 8 *International Journal of Refugee Law* 47 (Nos.1 and 2, 1996).

When ten million people sought asylum in India during 1971, with the peak inflow touching 1,00,000 a day during May-June 1971,<sup>71</sup> they were accommodated in five north-eastern states of India. Although no specific number of refugee children is available, the Government of India's tabulation of October 1971 listed at least 2.5 million refugee children under 8 years of age and some 7,00,000 lactating mothers.<sup>72</sup> One among the critical problems in these camps was that of sanitation. With the monsoon rains, it only got aggravated. Yet another problem specific to children was that of nutritional and health problems. The Kennedy Report explains the phenomenon in the following words: 'the nature of the refugees' nutritional and health problems are familiar to many parts of India and Pakistan, but the extent and severity of these problems among the refugees are wholly without precedent.'<sup>73</sup> Children with 'edema' due to protein malnutrition or starvation, 'avitaminosis A' and the like in the camps have increased the child mortality to unprecedented levels.

Irrespective of the ration and the food program, the protein requirements were not met. The refugee children developed various forms of malnutrition. 'Marasmus' (severe body wasting due to partial starvation) and Kwashiorkor (severe protein deficiency) were increasingly diagnosed, particularly among the refugee children under the age of 5. The Indian medical team that visited many camps between 4th and 10th August 1971 concluded that one-fifth of the children under 5 years of age were critically malnourished- they were in imminent danger of death or permanent disability. As early as October 1971, at least 3,00,000 refugee children were in very urgent need of nutritional rehabilitation to avoid a high risk of death or permanent disability and that another million were in danger of falling into this category in the near future. The Indian health service reported that, unless a crash program was launched immediately, the death rate would escalate dramatically, nearly 4,300 per day.<sup>74</sup>

Diarrheal disease that results from poor sanitary conditions in the camps got aggravated in refugee children suffering from malnutrition as they developed lower resistance power. Yet another nutritional problem, in terms of its long-range consequences, was the development of xerosis of the eye and keratomalacia (softening of the cornea) in young children as a consequence of inadequate vitamin A in the diet that could lead to permanent blindness. Outbreaks of cholera, diphtheria, whooping cough, measles could have had

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71. *Crisis in South Asia*, 5(A Report by Senator Edward M. Kennedy to the Sub-Committee to investigate problems connected with refugees and escapees of the Committee on the Judiciary, United States Senate, Nov. 1, 1971).

72. *Id.* at 23.

73. *Id.* at 19.

74. *Id.* at.20-21.

devastating effect on children. In this extreme condition, the All India Institute for Medical Sciences (AIIMS) developed a scheme and was approved by the Indian Ministry of Health. With the UNICEF coming forward to provide all needed supplies, the two stages of the scheme was in its place. Accordingly, 500 nutritional therapy centres for all children under 5 years of age who exhibited signs of moderate and severe forms of protein-calorie malnutrition as a life-saving was provided during the operation in the first stage. The second scheme covered all infants and children below five years in an attempt to prevent those children who are in the early stages of nutritional deprivation and were beginning to falter, from getting into graver forms of malnutrition. To achieve this, 1,000 large-scale milk feeding centres were established. Over 700 physicians and 2,000 paramedical staff were engaged in health care, with 50 referral hospitals and 700 medical units were functioning in the camps.<sup>75</sup> Irrespective of the non-realization of 'burden sharing', India and its people were able to provide whatever they could in minimizing the suffering of the refugee children, although they could not totally eliminate their suffering.

These actions taken by the Government of India, at times more than what she could undertake, very clearly establish the nature and extent of protection extended to refugee children irrespective of non-ratification of the Convention on the Status of Refugees, 1951 or its Protocol, 1967. However, there have been few other occasions on which India could have taken specific initiatives to protect the rights of the children particularly coming from neighbouring states. The efforts of the Government of India in protecting the refugee children during 1971 and 1972 seem to be diluted in other refugee situations. India ratified the Convention on the Rights of the Child, 1989 without any reservation. Article 22 of this Convention seeks to protect the rights of the refugee children.<sup>76</sup> There seems to be no policy initiative or legislative initiative on this issue so far. Under those circumstances, the judiciary in India has

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75. *Id.* at 20-23.

76. Art. 22(1) States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. (2) For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

extended the support necessary for the protection of such refugee children. At times, the judiciary in India had even directed the individuals to approach the UNHCR in New Delhi in seeking refugee status, irrespective of the fact that the Government of India would or would not recognize them as refugees. On few occasions, the National Human Rights Commission, established by the Protection of Human Rights Act, 1993, has also taken necessary steps to protect the rights of the refugees in general. A brief explanation of the nature and extent of judicial interventions in this regard are briefly explained here.

In *People's Union for Civil Liberties v. Union of India*,<sup>77</sup> the Supreme Court went one step further and held that 'the customary principle of international law, if there is nothing against it in the domestic sphere, would be part of the domestic law of the land'. The court also observed that '*international law is now more focused on individuals than ever before*'. In *Nilabati Behra v. State of Orissa*,<sup>78</sup> the court went to the extent of overriding the reservation India had on the International Covenant on Civil and Political Rights and held that individuals are entitled to compensation even in the absence of a statutory law. In another case, *Vishaka v. State of Rajasthan*,<sup>79</sup> the Supreme Court very effectively brought the international obligations India has undertaken to the protection of the rights of women and put in place a set of guidelines regarding sexual harassment of women in work places in the absence of any specific law.

At the international level, the Convention on the Status of Refugees, 1951 clearly reiterated the importance of 'family' as a unit and subsequently in an attempt to provide specific protection to refugee children the UNHCR issued Guidelines on the Protection of Refugee Children in 1988. The Canadian Immigration and Refugee Board even went to the extent of issuing the 'Guidelines on Child Refugee Claimants' in 1996. The Immigration and Naturalization Services of the United States of America followed suit by issuing similar 'Guidelines for Children's Asylum Claims' in 1998. Although these legal developments are treated as part of the soft law, nonetheless, they seek to address the peculiar situations faced by the children in general under these circumstances. The Federal Court of Canada even went to the extent of protecting the refugee children under the category of 'particular social group' as provided under article 1 of the Convention on the Status of Refugees.<sup>80</sup>

Within the South Asian region, India had played an important role at various meetings of the governments in reiterating the importance of protecting

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77. (1997) 3 SCC 301. (Emphasis added).

78. AIR 1993 SC 1960.

79. (1997) 6 SCC 241.

80. *Li v. MCI, Canada*, (2000) FCJ 2037. Available at: [http://decisions.fct-cf.gc.ca/en/2000/imm-932-00\\_11049/imm-932-00.html](http://decisions.fct-cf.gc.ca/en/2000/imm-932-00_11049/imm-932-00.html) (accessed on 1st April, 2012).

the rights of the child. The South Asian Association for Regional Cooperation (SAARC) had declared the period 2000-2010 as the SAARC Decade of the Rights of the Child. Earlier, a Ministerial conference on Children of South Asia was organized leading to the Male Declaration in 1997 in an attempt to bring the general awareness of the issues involved, special needs of the children under the age of ten, child labour, prostitution and child trafficking.

India has also been actively participating in the deliberations of the Asian-African Legal Consultative Committee (AALCC) both in the areas of human rights and refugees. One of the recommendations at its 31st session held in Islamabad, Pakistan during 1992, emphasized the need to prepare a draft model legislation on refugees to assist member states of AALCC in enacting a national law on refugees. This was reiterated at the 33rd session in Tokyo during 1994.<sup>81</sup> The Delhi Declaration of AALCO in 2002 on this issue is a move in the right direction. The Model National Legislation on Refugees drafted by the eminent persons group also specifically mentions about the 'refugee children'.

In spite of the absence of a specific law on refugees or on internally displaced, provisions of various other existing laws can be successfully invoked to get the protection from the courts. India being a party to the CRC, no specific mention about its obligations under article 22 of the Convention on the Rights of the Child was even mentioned in the decision of the Gujarat High Court in *Ktaer Abbas Habib Al Qutaiji v. Union of India*.<sup>82</sup> The high court went to extend the protection to two children aged 16 and 17 years respectively based on other provisions of international conventions and the Constitution of India except relying on article 22 of the Convention on the Rights of the Child.

However, it is needless to say that this process of institutional decision making becomes expensive and time consuming. The recourse to law and legal institutions cannot be taken up by a large section of the society as they are illiterates and economically backward. Against this back drop, the establishment of the National Human Rights Commission and its role in the protection of the rights of the refugees and the displaced persons cannot be undermined.

### III NHRC and the rights of the displaced

India does not have a comprehensive national policy or legal framework relating to the internally displaced persons.<sup>83</sup> The National Policy on

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81. V.Vijayakumar, The Need for a National Legislation on Refugees, Refugees in the SAARC Region: National Legislation on Refugees, Roundtable Workshop Report, UNHCR, 1999 at 32.

82. 1998 (2) G.L.H. 1005.

83. The National Policy on Rehabilitation and Resettlement, 2007, addressed only the persons displaced by developmental projects and as such did not incorporate the policy relating to all types of displacement in the country.

Rehabilitation and Resettlement was again revised and adopted in 2007 and for that limited purpose, a Rehabilitation and Resettlement Bill was also introduced in the Parliament in 2007. However, even this development covers only the displacement in any of the development related projects and does not cover the internal displacement taking place due to natural or other man made disasters. Apart from this India does not want any international scrutiny and reserves its sovereign right to seek international humanitarian assistance even in the light of a large scale internal displacement. Indian government has gone to such an extent in allowing international NGOs to raise funds for any humanitarian emergencies in India, but specifically prevented the Office of the Coordinator for Humanitarian Affairs (OCHA) from doing so without the specific authorization from the Government of India.<sup>84</sup> The Supreme Court has interpreted the provisions of the Indian Constitution and the laws made by the union and state legislatures in a focused manner so as to provide relief to the affected parties over a period of time, even in the absence of a national policy on this issue.<sup>85</sup>

Against this backdrop of the statistics provided by CRED mentioned earlier, it should also be noted that India constructed about 3,300 big dams during the past 52 years. In the absence of any official statistics on the nature and extent of displacement as a result of these developments, the Government of India had acknowledged during 1994 that about 15.5 million were internally displaced and out of that about 11.5 were still awaiting rehabilitation.<sup>86</sup> Including this type of development based-displacement, four different categories of internal displacement have been identified in India. They are:

1. Political causes, including secessionist movements;
2. Identity based autonomy movements;
3. Localised violence; and
4. Environmental and development induced displacement.<sup>87</sup>

In relation to rehabilitation of the families affected by violence, NHRC made a number of recommendations appreciating the role of NGOs in the process of normalizing the situation; special drive to identify and assist destitute

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84. Available at: <http://ndmindia.nic.in/management/crfscheme.html> (accessed on 1st April, 2012).

85. *Jage Ram v. Union of India* (1995) Supp (4) SCC 615; *Damodar Valley Corporation v. Damodar Valley Corporation Displaced Employees Union* (1993) Supp. (3) SCC 524; *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664; and *Jalundar Improvement Trust v. Sampuran Singh* (1999) 3 SCC 494.

86. Profile of Internal Displacement: India, Compilation of the Information Available in the Global IDP Database of the Norwegian Refugee Council (as of 1 July 2001) at 10.

87. *Id.* at 11.

women, children and orphans, victims of abuse and rape as well as providing psychiatric assistance and counselling for the traumatized.<sup>88</sup>

Apart from this, the NHRC, in its annual report 1996-97 expressed its concern over the fate of those displaced as a result of the mega projects and recommended that a comprehensive examination be undertaken of prevailing rehabilitation policy, existing laws, rules and practices in the light of international instruments to which India is a party. The Government of India has initiated steps to finalise a national policy for resettlement and rehabilitation adopting a more holistic approach rather than cash compensation. This National Policy on Relief and Rehabilitation has been issued by the Government of India in early 2007,<sup>89</sup> but covers only those displaced by developmental projects.

In relation to the disaster and environment induced displacement in the Phulbani district in the State of Orissa that resulted in the death of 400 people including 125 children during August-September 1993 as a result of malnutrition, malaria, chicken-pox and various water borne diseases, the NHRC recommended to the state to pay a sum of Rs. 6,52,000 to the affected families. However, when the state government requested to reconsider its recommendation, the same was considered and rejected by the NHRC.<sup>90</sup>

Again the NHRC took *suo motu* cognizance of the national calamity from a devastating cyclone in the State of Orissa and stationed a special rapporteur there to appraise the NHRC from time to time. Based on the feed back, NHRC issued series of directions and recommendations during 2000 for relief to cyclone affected people, including provisions for special feeding centers, food for work programme, special care for vulnerable groups, establishment of cyclone shelters and long term rehabilitation programme.<sup>91</sup> NHRC also stationed the secretary-general and the special rapporteur to oversee the relief and rehabilitation measures and report back to NHRC. During the Bhuj (State of Gujarat) earthquake in 2001, the NHRC appointed a special representative and stationed him in Ahmedabad. Apart from this, NHRC also monitored the rehabilitation and resettlement measures through its secretary-general and the special representative. NHRC issued a series of directions to the Government of Gujarat to prevent exploitation of children, adoption of the orphaned, long-term rehabilitation of those injured and incapacitated. Many

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88. *Human Rights Newsletter*, National Human Rights Commission, Apr. 2002 at 4.

89. "National Policy on Resettlement and Rehabilitation for Project Affected Families-2003" published in the *Gazette of India*, Extraordinary Part-I, Section 1, No. 46, dated 17 Feb. 2004. See also the revised and approved policy of 2007.

90. *Human Rights Newsletter*, National Human Rights Commission, Oct. 2001.

91. *Human Rights Newsletter*, National Human Rights Commission, Jan. 2001 and *Annual Report*, 2001 – 2002, 97-99 (National Human Rights Commission).

other recommendations on the role of NGOs, creation of Ham radio clubs and others were also given.<sup>92</sup>

A review of the work done by NHRC in the last ten years very clearly indicate the impact it has created both on the public policy, laws and their implementation. It may be said that the NHRC has really acted as an effective and meaningful ombudsman in India and made its presence felt. The following propositions do sum up the positive efforts taken by the NHRC in the past as well as the plan of action for the future:

1. The effort of NHRC in employing the United Nations technique of appointing special rapporteur, special representative and the like for its fact finding operations. These techniques helped the commission to inquire into human rights violations and get the reports from them in order to issue appropriate directions and orders to the respective governments and agencies in India;
2. Even in the absence of a specific law on rehabilitation and resettlement of displaced people, the commission was able to award compensation and proactively work with the Government of India and the states in drafting the national policy on the issue. Many of the actions taken by the commission helped the affected people immensely as such relief would not have been possible in the existing governmental machinery;
3. The work done by the commission in the last ten years has even made the Supreme Court depend upon its services for fact finding on the situations of human rights violations including the one on Salwa Judum in the State of Chattisgarh;
4. The commission has built steady and ongoing smooth relations with the Government of India and the states not only in respecting its decisions and directions, but also in fulfilling its role as facilitator of policy guidelines in implementing India's international obligations;
5. The commission has been extremely successful in protecting the rights of the refugees in the absence of any international obligations undertaken by India in this regard as well as in the absence of any specific legislation on the rights of the refugees or the displaced people. The commission also exercised the legal obligation imposed on it by the Protection of Human Rights Act, 1993 in moving the constitutional courts for getting the appropriate remedy in cases of the violations committed against the refugees and the displaced people;

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92. *Annual Report, 2001 – 2002*, 99 – 101 (National Human Rights Commission) and *Annual Report, 2000 – 2001*, 58 – 59 (National Human Rights Commission).

6. The commission kept its doors open constantly in facilitating the access to the people in need, like the Kashmiri pandits or the Chakama refugees in securing their protection and their rights;
7. The commission has successfully and effectively utilized its *suo motu* power so far in protecting the dignity of various vulnerable groups in India;
8. The commission has become a part of the network with other similar institutions in Asia-Pacific region. In August 2000, the Asia Pacific Forum for National Human Rights Institutions expressed support for a greater role for those bodies with the internally displaced and during the Sixth Annual Meeting, held in Sri Lanka in September 2001. The forum members specifically discussed the relevance of the guiding principles to their work.<sup>93</sup> This networking of the human rights institutions across the borders would certainly go a long way in understanding the hurdles in implementing the human rights instruments in the developing countries in particular and allow them to devise mechanisms through which the protection of human rights becomes more meaningful and relevant in the globalised era.
9. The NHRC also works as an apex human rights institution in India as per the status provided to it under the Protection of Human Rights Act, 1993. Accordingly, the NHRC has the chairpersons of other constitutional and statutory human rights bodies as members and can certainly approach the problems of human rights in India collectively and take a holistic approach.
10. Most important among the functions of the NHRC is creating awareness among the people on the importance and relevance of human rights. Apart from working with various educational institutions in India including the establishment of the National Institute for Human Rights at the National Law School of India University in Bangalore, the commission also works with the NGOs in spreading the message of human rights in India.

These efforts would go a long way in the establishment as well as the implementation of the rule of law in a country that is having the second largest population in the world with all perceivable diversities. The NHRC is only the beginning towards establishing a human rights culture in India within the constitutional and legal framework and hope that other institutions of the government provide necessary support to make NHRC a much more meaningful institution towards implementing rule of law. It is submitted that the purpose of the preamble to the Constitution of India that seeks to protect the dignity of every individual becomes a reality within the limited context in the working of NHRC.

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93. Specific Groups and Individuals: Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary-General on Internally Displaced Persons, E/CN.4/2002/95, dated 16 Jan. 2002, para. 33.

NHRC is not a substitute to the constitutional courts in India that have the primary constitutional mandate to protect the fundamental rights, including equality, of all and with human dignity. Yet, the NHRC can supplement the work of the constitutional courts to a great extent in protecting the rights of citizens and aliens alike, within the territory of India.

In the recent years the Supreme Court has also placed greater reliance on the NHRC's reports on various issues affecting the human rights of individuals, thus making them come together in upholding the human dignity of individuals in India as mandated in the preamble to the Constitution of India. This meaningful relationship between the judiciary and the NHRC can certainly be beneficial to the vulnerable population in general, as well as that of the refugees and the displaced in particular. It is submitted that the NHRC has to enhance its focused actions towards the protection of children both from within as well as those coming into India and work with other commissions and governments.

#### IV Concluding observations

A collective survey of all the developments mentioned above and other developments taking place in India in the protection of children in humanitarian emergencies will reveal that there is no clear policy of the Government of India, except in the case of development induced displacement. *Ad hoc* policies and actions taken from time to time have given some recognition to India in international relations. From the lessons learnt over all these crises, it is time to evolve a general consensus in relation to the protection of children in humanitarian emergencies and provide necessary legal framework for effective implementation.

In this regard, the Government of India has taken necessary steps in ratifying the First Optional Protocol to the Convention on the Rights of the Child on the Use of Children in Armed Conflict on November 30, 2005.<sup>94</sup> India has also ratified the Second Optional Protocol to the Convention on the Rights of the Child on 'Sale of children, Child Prostitution, and Child Pornography' on August 16, 2005 without any reservation. There are more than 123 states parties to the first and 129 to the second protocol. India has also adopted the Millennium Development Goals and a World Fit for Children and thereby reaffirmed its commitments to the protection of children.

In realising these objectives, a new Ministry of Women and Child Development has been created in the Government of India with the primary

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94. India has expressed its reservation to art. 3 (2) of the Protocol. India had signed the protocol earlier on Nov. 15, 2004

responsibility for planning, implementation and coordination of child protection services. The Government of India also introduced the National Charter for Children in 2003 in which the duties of the state and community as well as a National Plan of Action are provided for. The Ministry of Women and Child Development had commissioned a sub group to report on the 'Child Protection in the Eleventh Five Year Plan (2007–2012)'. In this report, specific mention has been made to the children in both man made and natural disaster situations. The report observed that 'India is one of the world's most vulnerable countries in terms of disasters both man made and natural. *Due to the geographic and demographic structure of the country, the people of India are vulnerable to floods, droughts, cyclones, earthquakes, communal riots, conflicts, epidemics, fires throughout its states and union territories. The physical loss and devastation caused by these disasters is often accompanied by emotional suffering. Survivors are left without near and dear ones, source of livelihood, their life's savings and assets and most severely, hope for the future.*'<sup>95</sup>

This report also observed that in the tsunami of December 2004, about 200,000 homes were destroyed or damaged in India alone. Citing the estimate made by the officials carrying out aid work at the venue, this report observed that one in every three killed during tsunami was a child. Thousands of children lost their lives in the disaster. In Karaikal region, Pondicherry, 251 out of 490 total casualties were children, of which 148 were girls. In the State of Tamil Nadu, children account for 40 per cent of the casualties. According to a UNICEF official, an estimated 2.5 million children have lost their safe havens – their homes and schools in Gujarat earthquake of 2001. This report clearly identified the developments taking place at international level in child protection issues. The vulnerability of children, physical loss, emotional suffering, loss of livelihood, hope for the future and the drastic proportion of the children affected by these disasters have been clearly identified. The report also identified the lack of accountability on the part of the central and state governments, absence of law and absence of any specific scheme for the protection of children affected by disasters.<sup>96</sup>

Some of the recent developments in India have addressed these issues. The Disaster Management Act, 2005 was enacted by the Parliament.<sup>97</sup> A review of this enactment would reveal that it centres around the vulnerability of geographic areas and not on the vulnerability of the people in general and the

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95. Child Protection in the Eleventh Five Year Plan (2007 – 2012), Sub Group Report, Ministry of Women and Child Development, Government of India, New Delhi, 2007 at 50. (Emphasis added).

96. *Id.* at 51.

97. Act No. 53 of 2005. It received the assent of the President on Dec. 23, 2005 and was immediately notified in the Gazette of India, Extra., Part II, s. 1, dated Dec. 26, 2005.

children in particular. In all the 79 different sections of this enactment, there is only one casual and indirect mention about the women and children. Section 12 of this Act provides that the national authority shall recommend guidelines for the minimum standards of relief to be provided to persons affected by disaster, which shall include 'special provisions to be made for widows and orphans'.<sup>98</sup> The lessons learnt by international organizations and the NGOs in the protection of children are not reflected in this enactment. Thus, the gaps in the policy and the law continue to exist in relation to the protection of children in humanitarian emergencies. Although the experiences of the international organizations and the NGOs may be reflected in the guidelines to some extent, it is rather desirable to have something specifically provided for in the law for effective implementation of child focused relief, rehabilitation and resettlement in any of the disasters. Towards this end, an amendment has to be introduced to the Disaster Management Act and the same must be clearly mandated at the national, state and district level authorities in the larger interest of children specifically.

Another important development is the enactment of the Commissions for Protection of Child Rights Act, 2005.<sup>99</sup> Based on this enactment, the National Commission for Protection of Child Rights (NCPCR) was set up in March 2007. This commission had already directed the Gujarat Government to provide psychological counselling to overcome trauma of the children affected by bomb blasts in that state.<sup>100</sup> Section 2(b) of the Commissions for Protection of Child Rights Act, 2005 defines child rights as the rights provided under the Convention on the Rights of the Child, which prescribes major standards for children. Such prescriptions include respect for the rules of international humanitarian law applicable to children in armed conflict as well as promotion of physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse. It is also interesting to note how this commission would undertake the responsibility of protecting refugee children under article 22 of the Convention on the Rights of the Child. It will be equally interesting to note as to how this commission would play a meaningful role during any of the humanitarian emergencies in the years to come as may be taken up under the Disaster Management Act. To facilitate the work of this commission, the Protection of Human Rights Act, 1993 needs to be amended so as provide the chairperson of this commission to be an *ex officio* member of the National Human Rights Commission.

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98. S. 12 (ii) of the Disaster Management Act, 2005.

99. Act No. 4 of 2006.

100. *1Infocus*, National Commission for Protection of Child Rights 12( No. 5, 2008).

In doing so, the lessons learnt by international community and as reflected in the policies of the UNICEF whose objective is to play a 'role in emergencies to protect the children and women, ensure the rigorous application of international standards covering their rights and provide them with assistance', may be considered positively.<sup>101</sup> Towards this goal, there is a dire need to create awareness on child protection issues among various stakeholders in India, civil servants, judges, the civil society as well as the NGOs. At the second level, there is equally an important aspect of child protection in training civil servants, NGOs and if possible the non-state actors as well.

It would be better if the National Human Rights Commission, the various state human rights commissions, national and state commissions for women and the national and state commissions for the protection of child rights work together in strengthening the capacity building among various organizations and others to face any humanitarian disaster meaningfully and effectively. There is also a meaningful role to be played by the national, state, district and taluk legal services authorities in this regard. A regular institutional arrangement needs to be in place to monitor and report on such humanitarian disasters to enable the institutions and organizations involved to further strengthen their work in minimising the effect and pave for speedy recovery. It should be always remembered that when a child is neglected in any such humanitarian emergency, it creates conducive atmosphere for that child to become a refugee or being forcibly recruited as a child soldier.

What is important under all these situations and the follow up actions to be taken is to keep the 'best interest of the child' in mind and in actions which is the central theme of the Convention on the Rights of the Child that is based on earlier declarations. Although it may be difficult to portray the exact meaning of the phrase 'best interest of the child', one may keep the three major specifications identified by Everett M Ressler. According to him, the best interest of the child standard has three main specifications for states, agencies and individuals during emergencies. They are: (a) protect and assist the child at all times; (b) put the child's welfare ahead of all other considerations; and (c) meet the child's developmental needs.<sup>102</sup> If done on these lines, India could certainly contribute to the global aspirations of making the world a fitter place for children.

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101. Details available at: <http://www.unicef.org> and CCC\_EMERG\_E\_revised7 (accessed on 1st April, 2012).

102. *Supra* note 55.