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Editorial Team

Editor's Note

On 23rd November 2017, the Human Rights Committee (HRC), an international body which monitors the implementation of the International Covenant on Civil & Political Rights (ICCPR), posted its concluding observations to Pakistan's 1st State report to the ICCPR.[1] The previous volumes of this journal have highlighted various issues about the State honouring its human rights commitments to its citizens enshrined within the Constitution of Pakistan and various international instruments. The concluding observations of HRC, while acknowledging and appreciating various steps taken by Pakistan, stressed the continued need to protect and promote human rights. On the positive side, Pakistan has recently ratified the Optional Protocol on the Rights of the Child on the involvement of children in armed conflict. This will at least start the process of monitoring this much needed reform. Also appreciated was the Federal Ministry of Human Rights' drafting an 'Action Plan for Human Rights' and constituting a National Task Force to monitor the implementation of the Plan. The National Assembly passed the Hindu Marriage Act, 2017, a law which, among other protections, prohibits marriage of minors. Additionally, it grants protection to various cultural practices of the Hindu community. The Criminal law was also amended to address concerns relating to anti-rape laws and honour killings. However, at the same time, the concluding observations noted areas where Pakistan has historically failed to ensure the protection of rights. This volume covers some of those key areas.

Two articles discuss the issues confronted by people with mental health issues in Pakistan's criminal justice system. The first does a comparative analysis of fair trial standards in International law and Pakistani law whereas the second highlights problems with the definition of mental illness, its historical evolution and identifies a possible path forward. Another article focuses on the use of drone attacks for extra-territorial lethal action against individuals. The article discusses the legality of these actions in line with both international humanitarian law and international human rights law. Once again, Women rights are included in this volume. This time the progress Pakistan has made in particular aspects of female emancipation and protection from violence is mapped.

[1](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PAK/CO/1&Lang=En)

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MENTALLY ILL PRISONERS IN PAKISTAN'S CRIMINAL JUSTICE SYSTEM: ANALYSING FAIR TRIAL & DUE PROCESS STANDARDS

By Maryam Haq[1] & Noor Naina Zafar[2]

In Pakistan, the drivers of incarceration of the mentally ill are numerous. The absence of health care services and psychiatric facilities, legal and sociocultural attitudes and stigmas, and a general lack of empathy for the needs and rights of this vulnerable group all attribute to the endemic problem of increased incarceration. Trends in the criminal justice system point to practices of cruelty, ignorance and unlawful detention as opposed to rehabilitation. The mentally ill slip into the cracks of this system. In 2006, the case of Imdad Ali caused outrage amongst psychiatrists, lawyers and practitioners alike. Why did the Supreme Court of the country condemn a suffering prisoner to the gallows?[3]

This paper aims to unpack the legal and procedural provisions relating to the mentally ill in Pakistan. It will present a comparative analysis with international fair trial standards and norms regulating access to justice, conditions of detention and right to medical treatment in the criminal justice system.

Fair Trial & Detention Standards

When examining the fair trial protections of mentally ill prisoners in Pakistan, three different sources of law are taken into account: domestic law, human rights treaties ratified by Pakistan and the norms of customary international law.

The right to fair trial is a norm of international human rights law, "designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms,"[4] most significantly, the right to life and liberty. Within the international human rights landscape, fair trial standards were first expressed in the Universal Declaration of Human Rights ("UDHR") according to which everyone is

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[3] SCMR 2017 PLD 18
[4] Lawyers Committee for Human Rights, 'Basic Guide to Legal Standards and Practice for Fair Trial' (2000) 1 <https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf>

entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charges against.[5] Mentally ill prisoners are also benefactors of the principle of inherent and unalienable dignity of man, enshrined in the UDHR.

The UDHR is not legally binding, but is viewed as an essential instrument that lays the foundations for the tripartite of international human rights laws known as the International Bill of Rights, all impacting the rights of people with mental disabilities. The International Covenant on Civil and Political Rights[6] ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights[7] ("ICESCR") are legally binding conventions that have further built upon concepts of fair trial and right to dignity of prisoners with mental disorders. The ICCPR enshrines the concept of treating prisoners with humanity and dignity.[8] With regards to international fair trial standards, Article 14(2) of the ICCPR lays emphasis on the presumption of innocence and 14(3) lists bare 'minimum' fair trial guarantees applicable to all, irrespective of their class, creed, gender and mental or physical health:

> *a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
>
> *b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
>
> *c. To be tried without undue delay;*
>
> *d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

[5] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 10

[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) which Pakistan signed in 2008 and ratified in 2010

[7] International Covenant on Economic, Social and Cultural Rights (adopted 16 December1966, entered into force 03 January 1976) 993 UNTS 3 (ICESCR) which Pakistan signed in 2004 and ratified in 2008

[8] Article 10(1) ICCPR

e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g. Not to be compelled to testify against himself or to confess guilt.

A recent convention, within international human rights law, created to afford protection to the specific class of persons being examined in this paper is the UN Convention on the Rights of Persons with Disabilities[9] ("CRPD"). In particular, Article 14 of the CRPD, provides that all persons with disabilities have a right to respect for their physical and mental integrity on an equal basis with others. Other instruments which seek to ensure that mentally ill defendants undergo a trial that satisfies fair trial and due process standards include: the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[10] ("UNCAT"), Convention on the Elimination of All Forms of Discrimination Against Women[11] ("CEDAW"), and the Convention on the Rights of the Child ("CRC").[12]

Aside from the Bill of Rights, a whole body of internationally accepted principles, rules and standards have also been compiled by the UN as a guiding blueprint for the detention of prisoners in general, and the treatment and standards of care of the mentally ill; specifically, the UN Standard Minimum Rules for the Treatment of Prisoners[13] ("Mandela Rules") and the Principles for the Protection of Persons with Mental Illness[14] ("MI Principles"). The Mandela Rules are an internationally accepted standard for detention of prisoners. The MI Principles are another major human rights standard that provide guidelines to be referred to when formulating mental health law legislation and policy. These standards will be examined for the purpose of comparison with domestic

[9] UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 03 May 2008) 2515 UNTS 3 (ICESCR) which Pakistan signed in 2008 and ratified in 2011
[10] Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT) which Pakistan signed in 2008 and ratified in 2010
[11] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 03 September 1981) 2515 UNTS 3 (ICESCR) which Pakistan acceded to on 12 March 1996
[12] Convention on the Rights of the Child (adopted 20th November 1989, entered into force 02 September 1990) 1577 UNTS 3 (CRC) which Pakistan signed and ratified in 1990
[13] UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)* A/C.3/70/L.3
[14] UN General Assembly, *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, 17 December 1991, A/RES/46/119

legislation and procedural codes.[15]

In Pakistan, to enjoy the protection of the law and to be treated in accordance with law is the inalienable right of every citizen,[16] guaranteed by the Constitution of Pakistan 1973 and interpreted by the Superior Courts as implicitly personifying principles of fair hearing, natural justice and due process. The 18th Amendment however, explicitly incorporated the right to fair trial within the fundamental rights chapter in the Constitution. Applicable to all persons including the mentally ill, these rights are laid out in Article 10 and Article 10-A and may be broken up into the following:

a. Right to life and liberty – prohibition on arbitrary arrest

b. Right to be informed of grounds for arrest

c. Right to legal consultation

d. Right to a prompt appearance before a judge

e. Prohibition on illegal detention

f. Right to fair trial and due process

Also expressed as a fundamental right in the Constitution is Article 14, which embodies the central principle of the inviolability of dignity of man. In the context of the rights of mentally ill prisoners, this paper will examine whether these constitutional guarantees are effective in safeguarding the rights of this group of people. With regards to detention and medical care, the Criminal Procedure Code, 1988 and the Pakistan Prison Rules 1978 and provincial mental health legislations will be examined to assess their conformity with the aforementioned international principles and minimum standards of treatment.

Pre-trial: Entering the Criminal Justice System

It is argued that the right to fair trial does not only commence upon the formal lodging of a charge but rather "on the date on which State activities substantially affect the situation of the person concerned."[17] From an international law perspective, fair trial

[15] Other important instruments include: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Principle Code of Conduct for Law Enforcement Officials
[16] Article of the Constitution of Pakistan 1973
[17] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR commentary* (N.P. Engel, Kehl Germany, Arlington, Va., U.S.A, 1993)

guarantees are applicable to all criminal proceedings set into motion at the initiation of investigation all the way to the appellate stage. The distinction between "pre- trial procedures, the actual trial and post-trial procedures is sometimes blurred"[18] and within the jurisprudence on the trials of mentally ill people in Pakistan it is observed that, a violation in one of these stages has an indelible impact on a later stage.

In this paper, the fair trial guarantees of the mentally ill will be read in context of: pre-trial rights and procedures, trial proceedings, post-trial: appeal and mercy petitions, and detention.

Legal and Procedural Safeguards during Arrest & Physical Remand

There is a historical intersection between criminality and mental illness, with emphasis placed on protecting public order through the detention and deprivation of liberty of the mentally ill.

The Pakistani Constitution guarantees its citizens that no person shall be deprived of their life or liberty except where it is necessary to do so, in accordance with the law.[19] Article 10 lays out the framework for the legal protection of persons who are arrested and detained. The similarly worded Article 9(1) of the ICCPR, further states that in addition to the deprivation of liberty "no one shall be subjected to arbitrary arrest or detention."

In Pakistan, a police officer has the power to detain a mentally ill person found in a public space,[20] if they have reason to believe that the person in question might harm themselves or could be of danger to the public. The detained person must immediately be taken to a place of safety which can only be a government run psychiatric or health facility, or in the care of a relative. What often ends up happening is that such persons are arrested and detained in police lock-ups. According to the law, a mentally ill person may not be detained for a period exceeding 72 hours, the detention enabling "him to be examined by a psychiatrist or his nominated medical officer and for making any necessary arrangements for his treatment or care."[21] The law is certainly aspirational but overlooks the realities of Pakistan, where mentally ill people are not treated with care or afforded their due rights.

[18] *Supra* 2
[19] Article 9, Constitution of Pakistan 1973
[20] Sindh Mental Health Act ("SMHA") s 19
[21] SMHA s 19(2)

In practice, there is an observable triangulation of interests in terms of arbitrary arrest of the mentally ill. Firstly, there is a need to 'safeguard' the public and ensure their right to safety from the ostensibly dangerous behaviour in question. This is countered with the presumption of innocence and right to life and medical treatment owed to the alleged perpetrator. Secondly, the police have a duty to uphold and balance the rights of the public and the mentally ill, within the ambit of their powers. What so often ends up happening is that persons with mental illnesses are directed towards the criminal justice system as a punitive and preventative measure; in part due to the lack of accessible psychiatric health facilities that can provide timely treatment, but also due to the lack of sensitization and ambivalence.

The arrest of a mentally ill person, suspected to have committed a crime, marks their entanglement within the criminal justice process. In the following sections, the different pre-trial stages of arrest, detention, and physical remand have been discussed in terms of the formal domestic and international legal and procedural safeguards and the current practices. Fair trial rights enshrined within Article 14 of the ICCPR have been used for reference.

a. Right to be informed of grounds for arrest

In Pakistan, police officers have broad powers to conduct arrests,[22] which they are known to use liberally, without impunity. According to the Supreme Court, as long as the accused agrees to cooperate during the investigation, there is no statutory obligation to immediately detain and conduct the arrest of an accused, even in cases involving heinous offences.[23] In practice, it is common to arrest suspects immediately and illegally detain them for long periods subjecting them to custodial torture without being informed of the specific grounds of arrest as they are constitutionally entitled. This is also applicable to people suffering from mental impairments. Similarly, there are no additional legal or procedural safeguards regarding prompt notification for mentally ill persons. Miranda warnings are also not given to suspects, informing them of their right to remain silent; a safeguard against self-incrimination.

b. Right to consult a lawyer at time of arrest

[22] Code of Criminal Procedure 1898 s 54
[23] 2014 SCMR 1762

The right to consult a lawyer of choice, without delay, at the time of being taken into custody is crucial in cases where the accused is suffering from a mental disability. In practice, this constitutionally guaranteed element of fair trial is deemed to be the most commonly violated with lawyers being introduced to clients after the completion of the investigation process at the bail/trial stage. The right to counsel is an element of due process that needs to be emphasized. Firstly, a trained, competent and sensitized lawyer would be in a much better position to have the mental state of an accused assessed by a proper psychiatrist/medical officer. Secondly, as per the MI principles,[24] necessary medical intervention, if required, could be afforded to a person suffering from an illness at this stage. Thirdly, access to a lawyer would be significant for the purpose of collecting evidence regarding the mental state of the accused at the time of the alleged commission of crime.

c. Prohibition on incommunicado detention

Within the international fair trial rights framework,[25] there is a prohibition on incommunicado detention. A detainee is entitled to be visited by his lawyer, family, and a doctor. With regards to mentally unwell detainees, the right to be visited by one's family or guardian is significant, regardless of the spectrum of mental disorder, since being arrested and detained in an unfamiliar environment can be detrimental to a person with underlying psychological problems.

In Pakistan, there are no specific procedural codes explicitly governing this pre-trial right. Only the Juvenile Justice System Ordinance 2000 ("JJSO"), unambiguously specifies procedure to be carried out upon the arrest of a juvenile which involves informing the guardian of the child of the arrest and also the time, date, and name of the Juvenile Court before which the child is to be produced.[26] The JJSO, despite its shortcomings in terms of implementation, was created with the aim of protecting the rights of children involved in criminal litigation. Similar measures, not necessary in the form of new legislation, but in the form of other protections such as standard operating protocols or rules must be undertaken for the mentally ill.

[24] MI Principles art. 20(2)
[25] UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*: 9 December 1988, A/RES/43/173
[26] Juvenile Justice System Ordinance 2000 s 10(1)

d. Right to a prompt appearance before a judge

As per s. 61 of the Cr.P.C, an arrested person cannot be detained for more than twenty-four hours; however, if it appears that the investigation cannot be completed within that period, and there are grounds for believing that the accusation is 'well-founded', the investigating police-officer may seek an extension of the physical remand. According to the law, it is imperative that the accused is produced in court at this stage. The Magistrate, if authorizing further detention (a maximum of fifteen days), must provide a persuasive rationale for doing so, record the reasons and send a copy to the Sessions Court. Theoretically, the Magistrate is supposed to examine case diaries that the investigating officer is duty-bound to keep, recording and updating it with all proceedings on a daily basis. In practice, this constitutional fair trial guarantee is very often circumvented with the accused's detention exceeding the statutory 24-hour limit. Furthermore "it frequently transpires that remands are not given in courts and thus the accused cannot have access either to a lawyer or a friend to resist remand on his behalf."[27] During physical remand, custodial torture for the purpose of obtaining confessions from the accused is also very common; unfortunately, it is often disregarded and ignored by Magistrates at physical remand hearings.

e. Right to Inquiry into Mental Illness

The process of determining fair trial rights cannot and should not be absolute. It should be an evolving process in which rights protecting a specific class of people can be tailored to better suit their needs. The right to inquiry into mental illness is one such example.

In Pakistan's criminal justice system, the obligation to identify or report on the state of mind of a suspect or defendant begins with the Magistrate. Chapter 34 Cr.P.C (s. 464 to 475 of the Code) sets out the mandatory procedure that must be initiated when a Magistrate, Court of Sessions or High Court, holding an inquiry or trial, suspects that the defendant is of unsound mind. The Chapter outlines the nature of inquiry to be held.

At the pre-trial stage, the accused is expected to be brought before the court for the first time for the requisite remand hearing. According to s. 464 of the Cr.P.C, once the accused is brought before the court and if the Magistrate has reason to believe that the

[27] Hina Hafeezullah Ishaq, 'The Right to Fair Trial: Better Late than Never' (2013) 1 in Lums Law Journal <https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never> date accessed 15 Nov 2017

accused is of unsound mind,[28] and consequently incapable of making his defence, the Magistrate is legally obligated to inquire into this fact.[29] At this point, an inquiry is to be initiated. Subsequently, as part of this inquiry, a civil surgeon or any other medical officer 'must' examine the defendant. After said examination, the medical officer is to appear as a witness to provide expert testimony (discussed in detail below).

For a vulnerable person suffering from a mental illness, detention during police remand can be a distressing prospect. Actors from the criminal justice system vested with vast powers can play a significant role at this pre-trial stage. Firstly, it is essential that an arrested person have access to a competent lawyer who is able to raise the issue of illness if it is noticed by the Magistrate. Secondly, the Investigating Officer ("I.O") must ensure that the issue of the accused's mental health is flagged and properly documented in the police diaries. Thirdly, at the time of production of the defendant in court, the Magistrate must apply his judicial mind in assessing whether there is a convincing justification to remand a mentally ill person to police custody or whether he is better suited in a psychiatric facility, by means of inquiry. Practices in our courts show that Magistrates are quick to write off any need for an inquiry. If the Defendant states his name correctly, he is deemed to be completely competent to stand trial, circumventing any necessity for an inquiry.

An intervention at this pre-trial stage of detention by the Magistrate could have a substantial effect on re-directing a mentally ill person to seek medical help in a public mental health facility or be released on bail.[30] As per the law, bail may only be given on the sufficient security that the alleged offender shall be properly taken care of, prevented from doing injury to himself or to any other person, and appear before the Court as and when required.[31] In practice, it has been observed that courts lean towards denying bail as per s. 466(2), especially in cases where the Defendant has been charged with blasphemy.[32]

In terms of normative legislative safeguards at the pre-trial inquiry stage, only the JJSO 2000 mandates that a child who is thought to be suffering from a serious physical or

[28] Used in the Cr.P.C as an alternative to mentally disordered person
[29] Cr.P.C 1898 s 464
[30] Ibid s 466 (1)
[31] Ibid s 466
[32] Rana Tanveer, 'Despite medical board's recommendation, 'mentally ill' accused yet to secure bail' *Express Tribune*, 2014 <https://tribune.com.pk/story/936816/despite-medical-boards-recommendation-mentally-ill-accused-yet-to-secure-bail/>

mental illness is to be sent to a hospital/medical institution where treatment is to be provided at the expense of the State.

In practice, it very rare for a Magistrate to have a defendant (adult or juvenile) examined by a medical officer at this stage. The danger in detaining mentally unwell persons, for longer than required, is that they are susceptible to making false confessions of guilt if exposed to torture and ill-treatment.

An I.O also has the ability to afford protection at the pre-trial stage of investigation. It is crucial for the I.O to record the facts of the case in an objective manner, keeping a concise and clear account of the investigations in the case diaries. This is because this documentation feeds into a person's right to access evidence that is recorded objectively, without prejudice in addition to aiding the court during an inquiry or trial as they may prove essential in the judicial determination of the accused's mental fitness and competence to stand trial.

S. 161 of the Cr.P.C enables police officers conducting investigations to examine any persons acquainted with the facts and circumstances of the case. It is important that any evidence relating to the mental competence of an accused is properly recorded so that it may be used by the defendant to prove his state of mind during commission of offence for the purpose of inquiry and trial.

f. Prohibition on Torture during Pre-trial Detention

As discussed above, the police are constitutionally obliged to produce an accused in front of a Magistrate within a day. In reality, it is common for a defendant to be illegally detained before being entered into the system. Within this period of illegal detention, the use of custodial torture "in order to obtain confession, (and) to intimidate and terrorise is widespread, common and systematic."[33] The practice is so widely accepted that some lawmakers have explicitly advocated for police torture during physical remand.[34]

The dignity of man according to the Constitution is inviolable, but the prohibition on torture is narrowly curtailed to only extracting evidence.[35] The practice is criminalized

[33] International Federation for Human Rights, 'Slow march to the gallows: Death penalty in Pakistan' 2007 < https://www.fidh.org/en/region/asia/pakistan/Slow-march-to-the-gallows-Death> date accessed 20 Nov 2017
[34] Ibid 48
[35] Constitution of Pakistan 1973 Art14(2)

in parts but not specifically defined or prohibited under the Penal Code where the practice of torture is only dealt through grievous hurt sections.

Within the international human rights framework and *jus cogens* norms, the use of torture is strictly prohibited. Pakistan is a State Party to UNCAT which prohibits "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him…information or a confession"[36] by persons acting in official capacity.

In the case of a defendant suffering from a mental illness, manipulation through illegal use of torture may produce "false confessions, due to greater tendency for impulsivity, extreme compliance, and suggestibility."[37]Consequently, procedural safeguard becomes exceedingly important as the impact of torture can have far-reaching consequences in the form of illegal confessions, which remain the primary evidence for conviction and thus, one of the most problematic violations of fair trial guarantees. A complete overhaul of this systemic abuse of powers is required. This would entail both procedural and legislative modifications. Police stations, lock ups and interrogation rooms must be put under surveillance, with audio and video recordings taking place at the time of interrogation. An accused should be cautioned against self-incrimination, apprised of the right to a competent legal counsel, and in the case of a state-appointed council, the process should be facilitated. Additionally, the practice of torture by state officials needs to be explicitly criminalized and prohibited, with greater penalties put in place.

Adherence to safeguards at the pre-trial stage are necessary in ensuring the fair trial and due process rights of mentally ill persons. Interventions at this stage of criminal proceedings can be critical in terms of diverting cases to psychiatric facilities or collecting proper evidence regarding competence to stand trial.

Trial

At the time of inquiry or trial, recourse for a mentally ill defendant can be found in s. 84 of the Pakistan Penal Code 1860 (PPC) and Chapter 34 of Pakistan's Code of Criminal Procedure 1898 (Cr.P.C). While Section 84 deals with the defence of

[36] UNCAT Art 1.1
[37] Justice Project Pakistan and A.K Lowenstein, 'A "Most Serious Crime:" Pakistan's Unlawful Use of the Death Penalty', 2016 <https://law.yale.edu/system/files/area/center/schell/2016_09_23_pub_dp_report.pdf> accessed on 5 Nov 2017

"insanity", Chapter 34 lays down the mandatory procedure to be initiated by a trial court where a defendant is suffering from mental illness. Both of these provisions are further explained in the sections to follow. However, before we begin to inspect these provisions, we must first understand how mental illness is defined under Pakistani law and instruments of international law to which Pakistan subscribes.

Determining mental illness

International Jurisprudence

The rights of mentally ill defendants are protected by a number of international human rights instruments, treaties and conventions, to which Pakistan is also a state-party and, as such, obligated to enforce. These instruments seek to ensure that mentally ill defendants undergo a trial that satisfies fair trial and due process standards and have already been discussed in detail earlier in this article. For the purposes of this chapter, we will be relying primarily on the UN Convention on the Rights of Persons with Disabilities (CRPD) and the International Covenant on Civil and Political Rights 1966 (ICCPR).

Recognizing the difficulty in defining a term like mental illness without limiting its scope, the World Health Organization states that "disorder is not an exact term, but it is used to imply the existence of clinically recognizable set of symptoms or behavior associated in most cases with distress and with interference with personal functions."[38] Similarly, in ensuring the term retains its flexibility and fluidity, the UN CRPD does not provide a definition of mental illness. Instead it explains in the preamble that "…disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full participation in society on an equal basis with others".[39] By keeping the terminology vague and imprecise, it ensures the protection of persons will all forms and degrees of mental illness, impairment, disorder or disability.

Article 1 of the CRPD further delineates that disability includes "…those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an

[38] World Health Organisation, 'WHO Resource Book on Mental Health, Human Rights and Legislation', 2005 pg 21
[39] UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

equal basis with others". The rights of such a person where they have been charged with an offence are encapsulated in Article 13 as the right to "effective access to justice". This also extends to the investigative and preliminary stages of criminal proceedings. It requires a state-party to not only guarantee uninhibited access, but also to "promote appropriate training" in the justice department, including police and prison staff.

> Articles 1 and 13 mentioned above must, of course, be read in conjunction with the minimum standards of fair trial and due process guaranteed under Article 14 of the ICCPR.

For the purpose of this chapter, it is the right to an adequate legal defence that we will be examining closely. In order to ensure complete realisation of the right "to have adequate…facilities for the preparation of [a legal] defence…"[40] mandatory mechanisms for an inquiry into the soundness of mind of the defendant must be in place. In Pakistan's justice system, a version of these mechanisms exist in Chapter 34 Cr.P.C and s. 84 PPC; the following sections will study each of these individually to understand how effective a mentally ill defendant's access to justice is.

Pakistani Law

In Pakistan's criminal justice system, mental illness or "unsoundness of mind" remain largely undefined, with references and varying terminology found scattered across several legal instruments. While s. 84 PPC and Chapter 34 Cr.P.C require proof of "unsoundness of mind" as a basis for determining competence to stand trial, the only definition that exists in relation thereto is of "mental disorder" provided in s. 2(1)(m) of the Punjab Mental Health Ordinance 2001 (MHO) and 2(1)(n) in the Sindh Mental Health Act 2013 (SMHA).

The definition of "mental disorder" is set out in very broad terms, thereby not limiting what the law recognises as mental illness and ensuring equal protection to persons suffering from varying degrees and forms of mental illnesses. Section 2(1)(m) of the Punjab Ordinance reads: "Mental illness, includ[es] mental impairment, severe personality disorder, severe mental impairment, severe personality disorder, severe mental impairment, and any other disorder or disabling of mind..". Comparatively, the Sindh Act is moderately limiting as it specifically excludes mental impairment and

[40] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR) art.3(b)

severe personality disorder as a mental disorder. Nevertheless, both provisions are leaps and bounds ahead of the previously primitive definition that was found in the now defunct Lunacy Act 1912,[41] which defined "lunatic" as an "idiot or person of unsound mind" and, even more reductively, a "criminal lunatic" as a person removed for safe custody through an order under Chapter 34 Cr.P.C.

Conversely, both mental health statutes describe a prisoner with mental illness as a "mentally disordered prisoner".[42] Perhaps inadvertently, by adopting consistent terminology, legislators have introduced a degree of legal certainty that was previously absent. However, this consistency does not carry on in the language of Chapter 34 and s. 84 which refer to the "unsoundness of mind" of a defendant, with no definition of "unsoundness of mind" provided under any law currently in force.

Over the course of this chapter we will see that while the foundation of these mechanisms has been set, great strides still need to be made in terms of policy and implementation to ensure effective access to justice as envisaged in Article 13 CRPD. Consider, for instance, the recent *Imdad Ali* case where the Supreme Court of Pakistan regressively ruled that "schizophrenia is not a mental illness",[43] wrongly relying on Indian Supreme Court judgments from the '90s that had since been reversed. This was despite the fact that Imdad had a pre-existing mental illness with years of jail medical records available as evidence.

Chapter 34: A trial within a trial

Under international law the obligation to protect the rights of mentally ill persons begins at the moment of arrest. Article 13 CRPD requires a state-party to train police and prison staff in mental healthcare. However, there is no provision for such a training or legal obligation in Pakistan's domestic legislation that requires law enforcement agencies to identify or report on the mental health of a person under arrest.

As discussed above, Chapter 34 of the Cr.P.C accords the Magistrate with the obligation to identify or report on the state of mind of defendant. The chapter further outlines the nature of inquiry to be held, judicial responsibility, and parameters of executive duty

[41] The Lunacy Act, 1912 (IV of 1912) repealed by The Mental Health Ordinance 2001 (VIII of 2001)
[42] The Mental Health Ordinance 2001 (VIII of 2001) s. 2(n)
[43] Reuters, 'Schizophrenia not a mental illness: SC paves the way for Imdad Ali's execution', *Dawn News*, 21 October 2016 https://www.dawn.com/news/1291384

that extends to the Home Department and IG (Prisons) vis-a-vis treatment of a prisoner found to be of unsound mind.

The first obligation for identification or treatment of mental illness falls on the Magistrate who does not have immediate contact with the suspect. Although a person must be produced before a Magistrate within 24 hours of arrest, in practice a sufficient amount of time has already passed in police custody where a person is most vulnerable to mistreatment (discussed in detail above). Nevertheless, by virtue of s. 464 the Magistrate has the first legal obligation to inquire into a defendant's competence to stand trial, when he "has reason to believe" that the defendant is of unsound mind.

By the time the trial begins, the defendant — already suffering from a mental illness — has been detained for up to a period of 15 days (or more if illegally detained) and subjected to rigorous interrogation and investigation. With the widespread use of torture by the police,[44] it is also likely that he has been forced to sign a false confession and torture-tainted information has been recorded against him. This is all in the absence of a lawyer, a psychological evaluation or adequate treatment and care with regards to conditions of detention; which is against the very spirit of Chapter 34 and a direct violation of the defendant's rights to fair trial and due process.

The next mandatory stage for Chapter 34 to be invoked is at the time of the trial itself, as also stipulated in s. 464 Cr.P.C. This can be at any stage of the trial, so long as the court has reason to believe that the defendant may suffer from a mental illness.

Chapter 34: Nature of inquiry

Once an inquiry under s. 464 is initiated, the defendant must immediately be submitted to a psychological evaluation by the Civil Surgeon or a medical officer. An inquiry shall thereafter ensue, as the findings of the medical examiner must not only be submitted in evidence but she/he must be deposed in court.[45] It is also at this stage that the defence counsel can enter further evidence and testimony as to the state of mind of the defendant. As a precautionary measure and to safeguard the interests of the mentally ill, the defendant may be released to the care of their family or in safe custody in a

[44] Committee against Torture 'Concluding observations on the initial report of Pakistan, 01 June 2017 (adopted by the Committee at its sixtieth session (18 April-12 May 2017))
[45] Refer to LHC Rules/Cr.P.C for status of medical expert in court

manner and place designated by the Magistrate or court[46] during the course of this inquiry.

The significance of the mandatory nature of the procedure under Chapter 34 is evident from the fact that the proceedings of the trial itself must be suspended until the inquiry is concluded, as the inquiry is a preliminary step before further evidence as to the charge can be adduced.[47] This has been further reinforced by the courts, which have held that omitting to initiate the inquiry could result in a mistrial and a retrial could be ordered as a result.[48]

If the defendant is subsequently found to be "unsound" and incapable of making his defence, the trial will be suspended (s. 466; s. 475). At this stage, the court's powers under s. 265(K) Cr.P.C may be invoked to obtain an early acquittal.

Once suspended, periodic assessments are to be conducted to determine whether the defendant is (now) capable of making his defence (s. 468); if so, the trial will resume and the defendant may take the defence of insanity under s. 84 PPC.

However, despite the apparent vitality in the framing of Chapter 34, in practice the procedure does not nearly fulfil the international minimum standards of a full and proper inquiry. Judges and lawyers alike are unaware of the nature of the proceedings, the extent to which evidence must be adduced and the criteria by which the determination of unsoundness is to be made. This is evident from the ruling in *Imdad Ali*'s case, where the Apex Court failed to assess the procedural flaws in his trial and subsequent appeal, which should have become the basis for a full and proper inquiry on his mental state according to UN experts.[49]

Section 84[50]: Act of a person of unsound mind

Upon resumption of trial, if the defence of insanity is taken the court must still determine the defendant's culpability both in terms of intention and the physical act itself (s. 470). So, even if a defendant is found not guilty by reason of insanity, he may still be sentenced for commission of the physical act (s. 471) or remanded to safe

[46] Code of Criminal Procedure 1898 (Act V of 1898) s.466
[47] 1997 SCMR 239
[48] PLD 1963 AJ&K
[49] 'UN rights experts urge Pakistan authorities to halt execution of man with disability', *United Nations News Centre*, 27 September 2016
http://www.un.org/apps/news/story.asp?NewsID=55142#.WiFMXrRdL58
[50] Pakistan Penal Code (Act No. XLV of 1860)

custody (s. 475). Note that, even where an order for detention in safe custody under s. 475 is given, the mentally ill defendant is not guaranteed any adequate facilities of treatment or care. This is a direct violation of the principle of "reasonable accommodation".[51]

According to international standards, in order to uphold the right to fair trial and due process of a person suffering from a mental disability, the fact of his disability must be treated as a factor determining culpability or mental responsibility.[52] While little guidance has been provided on how these standards are to be satisfied, the Rome Statute of the International Criminal Court[53] does list it as a complete defence; Article 31(1) of the Rome Statute enumerates the grounds for excluding criminal responsibility, where sub-clause (a) includes "mental disease or defect" as a complete defence.

With this in mind, it would appear that the effect of the defence of insanity defined in s. 84 are in line with international standards. Designed as a complete defence, it considers a defendant's state of mind at the time of offence and his ability to comprehend what is unlawful or wrong.

While the influence of the M'Naghten Rules is evident from the language of s.84, the latter is couched in much broader terms.[54] The terminology 'unsoundness of mind' is indicative of the legislature's deliberate intent to allow a broader spectrum of illnesses to fall within the parameters of the defence.[55] However, as noted earlier, the use of the term "unsoundness" in the absence of a corresponding definition leaves much to be desired in terms of certainty or transparency in its determination. This, again, is a violation of fair trial due process rights demanding effective remedies and justice.

Section 84 distinguishes between medical insanity and legal insanity, so that proving that a mental illness exists is not sufficient for the purposes of s. 84. As such, the conditions that must be satisfied under s. 84 are:

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[51] UN CRPD art. 2, 4 and 5

[52] Declaration on the Rights of Mentally Retarded Persons 1971, Principle 6

[53] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6

[54] 1843 10 C & F 200 (*M'Naghten's Case*): "the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."
NB: The *M'Naghten* test has also long been rejected by the UK, even though it is still applied in some US jurisdiction.

[55] PLD 2002 SC 92

A. An offence was committed by the defendant (contrariwise, if the prosecution fails to prove the defendant committed the act, he will not be guilty and his state of mind would become irrelevant); and

B. He was suffering from an unsoundness of mind at the time (as defined in the mental health laws); and

C. He was incapable of knowing the nature of the act/offence; **OR**

D. He was incapable of distinguishing between right and wrong.[56]

Therefore, in order to enter a successful insanity defence "it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind"[57], that he was incapable of understanding what he was doing was either wrong or against the law.

This final condition is a somewhat disjunctive concept: does the defendant need to know it was wrong, or contrary to law? It is a complex but crucial distinction; regrettably, not one that lawyers or judges reasonably understand. It permits a mentally ill person who may understand the nature of their act but not that it is wrong or against the law in order to be free of criminal liability. Hence, someone who suffers from delusions of grandeur, for instance, who may know what they are doing is contrary to law, but believe that their own particular act is not wrong would be considered legally insane under s. 84. It can be seen once more that the scope of the insanity defence is broad.[58] Nevertheless, the lack of any formal procedure to determine the nature of a mental disorder has caused considerable inconsistencies in judicial reasoning. While in some cases a mental disorder such as schizophrenia has resulted in an acquittal,[59] in another it has not even qualified as a mental illness. This level of inconsistency is a

[56] Ahmed I. Gilani, '*Psychiatric Health Laws in Pakistan: From Lunacy to Mental Health*' http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1215469/
[57] 1995 MLD 667
[58] PLD 1953 Lah 213, per Kayani J: **"**Applied to our law, the answers of Judges to the House of Lords in McNaughtan's case may thus be explained: If a person suffers from insane delusions, he has an unsound mind. It is assumed that notwithstanding such unsoundness, the cognitive faculty may not be impaired. If that be the case, he knows the nature of the act. But if he does not know it, as when he strikes a man's head, believing it to be ajar, he i3 not liable. If he knows that it is a man's head, but strikes it all the same because he believes that he is saving the man from sin, then if he knows at the same time that it is contrary to law, he is guilty; but if he does not know this, he is not guilty, because then he does not know that it is either morally or legally wrong."
[59] 1985 PCrLJ 2462 (Lahore High Court)

clear violation of a defendant's fair trial rights as envisaged in Article 10-A of Pakistan's Constitution.

Burden of Proof

The general principle on the onus of proof under the Qanun e Shahadat Order 1984 (QSO) is that the burden of proving a fact falls on the person asserting said fact. Ergo, if the prosecution asserts that the defendant committed a crime, it must prove the aggregate facts asserted in order to secure a judgment against the defendant from the court[60]. However, in the case of criminal proceedings, the burden of proof shifts on the assertion of alternative facts that create exceptional circumstances.[61]

The question now arises as to the nature of this burden. While evaluating the "weight" of the burden of proof under Article 117 QSO on the prosecution in any criminal proceedings, it is an established principle that the prosecution must prove its case against the defendant beyond reasonable doubt. In terms of the nature of this burden once the onus is reversed when a defence plea of insanity is taken, the law is ambiguous on whether it is to be proved on a balance of probabilities or beyond a reasonable doubt. The debate is pivoted on determining the purpose of discharging this burden: is it to cast a doubt on the prosecution's case, or merely to establish the existence of the fact (insanity) which is the basis of the exception under Article 121. In the landmark case of *Ghulam Yousaf vs. The Crown*[62], the Lahore High Court considers this at length; per Muhammad Munir, CJ (agreeing with Rahman J) while referring to a previous decision by a High Court bench:

> "The "reasonable possibility" as to the defence being true, contemplated in the judgment of the learned Chief Justice, appears to me to be different from a "reasonable doubt" as to whether the defence is true and is on a somewhat higher level of probability. In the one case a reasonable person will say: "I think it is quite possible that this happened". In the other case he should say: "I think it is doubtful whether this happened, but it may have happened". S.A. Rahman, J. Observed that the burden of proof on the accused person would naturally be lighter, "not because the Act

[60] Qanun e Shahadat Order 1984 art. 117
[61] *Ibid.* art 121
[62] PLD 1953 Lah 213

> provides for different standards of judgment…but because the proof is made to depend on the subjective conviction of the prudent man, "thus following the view taken in Sodeman v. R ((1936) 2 All E R 1138) that "the burden in cases ins which an accused had to prove insanity might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceedings", and in Rex v. Carr Briant ((1943) 2 K B 607) that the burden may be discharged by evidence satisfying the jury of the "probability" of that which the accused is called upon to establish…The difference to be bridged is thus the difference between "reasonable possibility" and probability and can, I am sure, be bridged by the elasticity of a prudent man's mind…
>
> "The burden of proof therefore remains where the Evidence Act intended it to be, where Lal Khan v. Crown has left it now…"

In *Lal Khan v. Crown*[63] it was contended that if the evidence produced by the defendant relating to the plea of insanity under s. 84 created a reasonable doubt as to the prosecution's case, the defendant would be entitled to an acquittal. To determine the guilt of the defendant, therefore, the Court "must have the entire evidence in mind, the evidence for the accused and evidence for the prosecution, and allow the one to face the other squarely, that you should not be too pedantic about the burden of proof…"[64]

Evidence

When preparing a defence of insanity under s. 84, the evidence gathered as proof of a "mental disorder" is pivotal; not only to establish the fact of its existence, but also to significantly challenge the prosecution's case. In taking the defence of insanity, the defendant must provide evidence establishing two claims:

A. Unsoundness of mind *at the time of commission of offence*; and

B. Unable to understand that the act was wrong OR contrary to the law[65]

[63] PLD 1952 Lah 502
[64] PLD 1953 Lah 213, per Munir CJ
[65] PLD 2002 SC 92

In order to establish that the defendant suffered from a mental illness at the time of commission of offence, his medical and social history is crucial evidence to substantiate the psychiatric evaluation of his current state of mind.

To ensure that the terms of reference of the inquiry under Chapter 34 fully satisfy international fair trial and due process standards, the previous medical history of the defendant must be considered when evaluating the defendant. The medical history should be packaged to include medical records; expert witness statements from doctors who have treated him or are familiar with his history; witness statements from family members, next-of-kin, friends or neighbours as circumstantial evidence. However, with Pakistan's poor mental health record[66], lack of public awareness , understanding about mental health, and limited resources[67] it is no surprise that a majority of defendants suffering from mental illness go undetected through the criminal justice system. In the absence of corroboratory evidence, courts are wont to dismiss the plea of insanity and hand down a conviction,[68] failing to protect the rights of mentally ill defendants.

Therefore, independent expert witnesses, such as a psychiatrist or doctor who has previously treated the defendant and can attest to the nature of his illness both generally and specifically, should also be summoned as part of the inquiry[69]. Both prosecution and defence must be afforded a full opportunity to lead evidence related to the defendant's state of mind[70]. This is rarely the case in practice, where courts and others in the field of administration of justice (police and prison staff) are inclined to reject the existence of a mental illness on the basis of "malingering". Judicial competence to understand the significance of medical evidence is critical at the trial level, a breach of which is in clear violation of fair trial rights. The case of Imdad is a prime example of this, where the judge did not bother properly inquiring into Imdad's state of mind at the time of trial.

The nature of the defence of insanity is set apart from other defences; whereas a legal defence is generally presented as a "justification", the defence of insanity is directed

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[66] M Javaid, 'Pakistan's mental health problem', *Al-Jazeera* (07 October 2017) http://america.aljazeera.com/opinions/2015/10/pakistans-mental-health-problem.html: "One report suggests that there are 15 million people in the country who need attention from mental health practitioners."

[67] World Health Organization, '*WHO-AIMS Report on Mental Health System in Pakistan*', 2009 http://www.who.int/mental_health/pakistan_who_aims_report.pdf

[68] 2009 PCrLJ 1062

[69] PLD 1980 Peshawar 103

[70] 1997 SCMR 239

towards a key element of a crime: criminal intent or *mens rea*. Criminal liability cannot be established without criminal intent. Hence, if a defendant cannot develop criminal intent by virtue of a mental illness, then an essential ingredient of criminal liability is absent and the offence is not made out. Here, the difference between "medical insanity" and "legal insanity" must be distinguished.

For the purpose of "legal insanity" to be established, it is not sufficient to merely present evidence as to the existence of a "mental disorder" at the time of commission of offence. In fact, a person suffering from any mental disorder will not be exempted from criminal liability *ipso facto* if he can understand that his act is contrary to law[71]. It must also be established that the defendant was suffering from "substantial impairment"[72] or "labouring under such defect of reason as not to know the nature of the act he was doing or that even if he knew it, he did not know it was either wrong or contrary to law"[73]. It is the incapability of distinguishing between right and wrong as a result of an impairment of mental faculties[74] that is necessary to demonstrate legal insanity.

It is important to note that the courts have occasionally viewed the onus of proving substantial impairment to be on a balance of probabilities.[75] But there is gross lack of clarity on the subject, leaving a Magistrate or trial court shooting in the dark.

Chapter 34 & Section 84: A catch-22 situation

Whereas the safeguards for "mentally disordered" defendants attract scrutiny in light of international fair trial and due process standards, one major drawback of the procedural mechanisms in place is evident in s. 465 of the Cr.P.C.

When Chapter 34 proceedings are invoked under s. 464 of the Cr.P.C, a finding of unsoundness of mind will result in suspension of trial if the defendant is also found to be "incapable of making his defence".[76] Conversely, when the defendant enters a plea of insanity under s. 84 of the Cr.P.C is taken, Chapter 34 proceedings will be invoked and the trial will be suspended if the defendant is found incapable of making his defence. It's a classic 'did the chicken come before the egg?' scenario, so that despite procedural safeguards for mentally ill defendants, they risk being stuck in a legal lacuna

[71] 2005 PCrLJ 1864
[72] 1972 PCrLJ 1041
[73] PLD 2002 SC 92
[74] 1995 MLD 667
[75] 1972 PCrLJ 1041
[76] Code of Criminal Procedure (Act V of 1898) s. 465

that could result in prolonged detention without trial, in violation of their right to fair trial.

Even in cases where a retrial[77] should have been ordered on the basis of compelling evidence as to mental illness discovered at a later stage, the courts have not been wont to do so. This has been demonstrated in *Kaniza Bibi*'s case[78] who is severely mentally ill and languishing in a mental health institute. In 1989, Kaniza was sentenced to death for murder on six counts, but her trial lawyer never raised concerns of mental illness. Even though the medical officer stated in her jail medical records that she "cannot be executed due to her poor mental condition", her sentence has not been set-aside and she has been in detention of a government mental health institute by executive order.[79]

Appeals & Mercy Petitions

Commensurate with international law and fair trial standards,[80] a person convicted of a crime must have the right to a first appeal against conviction. The core features of this right have been explained by the UN Human Rights Committee in its General Comment No. 32 on Article 14 of the ICCPR[81] and entail:

A. A substantive review of the evidence, conviction and sentence

B. Effective access to a review without undue delay[82]

While the right to appeal under Pakistani law[83] has unequivocally been granted, access without delay and substantiveness of the review remain suspect, given the country's

[77] 1996 PCrLJ 1366 (Pesh. High Court); PLD 1963 AJ&K
[78] Zahid Gishkori, 'Walking the tightrope: Kaniza Bibi among 47 women on death row in Pakistan', *The Express Tribune*, 15 November 2015 https://tribune.com.pk/story/989444/walking-the-tightrope-kaniza-bibi-among-47-women-on-death-row-in-pakistan/
[79] *Ibid.*
[80] Int'l Covenant on Civil and Political Rights (ICCPR) 1966 art. 14(5): Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
[81] Peter D. Marshall, 'A Comparative Analysis of the Right to Appeal', *Duke Journal of Comparative & International Law Vol 22:1*, 17-22 https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1014&context=djcil
[82] Section VII (Paras 45-51, Pg 14) General Comment No. 32 on Article 14: Right to Equality before courts and tribunals and to a fair trial, UN Human Rights Committee Ninetieth Session, 23 August 2007 (CCPR/C/GC/32)
[83] Code of Criminal Procedure 1898 s. 408, 410 and 411-A

poor rule of law record.[84] Permission for a second review or appeal (leave to appeal) may be sought from the Supreme Court of Pakistan under Article 185 of the Constitution of Pakistan 1973.

According to the typical rules of procedure, a defendant must submit his defence at the beginning of a trial when he is required to enter his plea. Similarly, under Chapter 34 Cr.P.C the question of unsoundness of the defendant's mind must be raised at the first instance.[85]

Although the High Court is mandatorily obligated to determine unsoundness of mind 'at the first instance', the power of an appellate court to adduce new evidence at the stage of appeal is discretionary under the Criminal Procedure Code, as can be seen by s. 428 thereof.

It is commonly understood that the superior judiciary is reluctant to exercise their discretionary powers to hear new evidence; this is especially so in criminal cases. It has been explained, rather reductively, that the reason why these discretionary powers are exercised so restrictively is so that "a guilty person should not escape due to carelessness or ignorant proceedings of the trial Court".[86] In the same vein it is stated that "an innocent person should not be wrongly accused, when the Court due to some carelessness or ignorance omits to record the circumstances essential to explain, or reach at the truth".[87] As such, the powers exercisable by an appellate court under s. 428 Cr.P.C are subject to two overriding conditions:

A. That the additional evidence is considered to be necessary by the appellate court in the interest of justice; and

B. That the accused is not denied his right of a fair trial.[88]

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[84] M. Ali Nekokara, 'Access to justice and legal aid', *Dawn News*, 12 December 2016 https://www.dawn.com/news/1301948: "The World Justice Project report 2016, on the Rule of Law Index ranked Pakistan's criminal justice system as being at 81 out of 113 countries, above Bangladesh (97) but below India (71) and clearly way below most of the 113 countries surveyed. In the civil justice system, the same report ranked Pakistan even worse (106/113), below Bangladesh (103), Sri Lanka (96) and India (93). On 'accessibility and affordability', Pakistan scores slightly better than India; however, it lags behind Sri Lanka and Bangladesh."

[85] Code of Criminal Procedure 1898 s.465

[86] 2008 YLR 1672

[87] *Ibid.*

[88] 2005 YLR 3280

Despite the restriction on submitting new evidence, evidence as to unsoundness of mind has been considered paramount to fair trial proceedings by the superior judiciary. In *Afzal Khan vs. The State*[89], the Peshawar High Court considered evidence as to unsoundness at the stage of appeal, even though the same evidence was available at the time of trial but not presented in court. The appellate court invoked Chapter 34 Cr.P.C proceedings, found the defendant to be of unsound mind and incompetent to stand trial; trial proceedings were declared null and void, and a retrial was ordered.

After a defendant has exhausted his right to appeal, he has one final remedy to seek reprieve: his right to pardon. However, unlike the right to a fair trial and due process that applies across the board to all legal proceedings, the right to seek pardon is only guaranteed under international law for those facing the death penalty. The right is an extension to the right to life protected by Article 6 of the ICCPR, where paragraph (4) guarantees the right to seek pardon to anyone sentenced to death.

In its Draft General Comment on Article 6, the UN Human Rights Committee clarifies that the purpose of Article 6 — specifically paragraphs 2 to 6 — is to provide specific safeguards in countries that still retain the death penalty.[90] Although the right to seek pardon cannot act as a substitute for judicial discretion[91], no sentence of death can be carried out without the request for pardon being "meaningfully considered and conclusively decided upon".[92] As such, the mechanism for pardon must offer the following guarantees:

A. Legal certainty with a fixed substantive criteria;

B. Right to advance information about consideration of request;

C. Right to make representations as to relevant circumstances; and

D. Right to be informed promptly of the outcome.[93]

This clearly indicates that the system of official pardons set-up by a state party must have clearly identifiable terms of reference.

[89] 1996 PCrLJ 1366 (Pesh. High Court)
[90] Draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (120th Session of the Human Rights Committee, July 2017) para 5 http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf
[91] *Ibid.* para 41
[92] *Ibid.* para 51
[93] *Ibid.*

In Pakistan, while no death sentence is carried out without consideration for presidential pardon, seeking mercy is not postulated as a right but rather a constitutional power of the president under Article 45 of the Constitution of Pakistan 1973.[94]

The procedure for submission of a mercy petition has been detailed in the Pakistan Prisons Rules 1978[95] (hereinafter 'Rules'), where Rule 101 states that every prisoner must be informed of their "liberty to submit" a mercy petition.

Special consideration has been given under the Rules to prisoners suffering from a mental illness. Most notably, Rule 107(iv) stipulates that where a petitioner is of unsound mind, copies of his medical reports shall be submitted with the mercy petition. A note to Rule 101 also states that a second mercy petition for the same prisoner may be considered where "fresh grounds" to seek mercy have arisen; this would allow for special consideration of a prisoner's case who may have become mentally ill in prison. Rule 104(ix) grants the jail superintendent to stay an execution under exceptional circumstances, seeking further instructions from the government. It can be inferred that unsoundness of mind of a condemned prisoner is such an exceptional circumstance to halt his execution. However, this is not the case in Pakistan, as is evident from the case of *Kaniza Bibi* and *Imdad Ali* whose mercy petitions have been rejected despite government medical records confirming their mental illness.

Whereas the procedure for submission of a mercy petition by or on behalf of a prisoner has been laid out, no rules of procedure regulate the review process itself. Without any degree of clarity, the process is arbitrary and has resulted in mass summary dismissals[96] without proper consideration. Needless to say, therefore, that the review process is hardly meaningful and barely certain.

Detention in Prison Facilities

Conditions in Pakistani prisons are woefully inadequate and amount to inhuman and degrading treatment.[97] Not only do they breach domestic provisions protecting prisoners under the (albeit outdated) Prisons Act 1894 and Prison Rules 1978, but also

[94] A similar power to grant remittances or commutations has also been granted to provincial governments in Chapter 29 of the Code of Criminal Procedure (Act V of 1898), but in a manner that does not "interfere with the right of the President…to grant pardons…". *See s. 401 to 402-C*
[95] Pakistan Prison Rules 1978 — rules for the superintendence and management of prisons in Pakistan
[96] 'President rejects mercy appeal of 17 death convicts', *Dawn News*, 18 December 2014 https://www.dawn.com/news/1151600; 55 convicts to be sent to the gallows in a few days, *Dawn News*, 22 December 2014 https://www.dawn.com/news/1152432
[97] Also a violation of Article 9 under Constitution of Pakistan 1973

violate internationally established Mandela Rules and MI Principles[98]. Inferior quality of food, inadequate medical services[99], poor conditions of hygiene, extreme over-crowding and rampant use of torture remain chronic issues and amount to inhumane and degrading treatment. In 2014, the excess of prisoners in Punjab was around 130% with some prisoners having to stand while others slept.[100] These harsh conditions are life-threatening in some cases.[101] It is not uncommon for prisoners to develop psychological problems after long periods of detention and solitary confinement. In such an environment, prisoners already suffering from mental illnesses before incarceration are at an increased risk of becoming even more unwell. This section will look at the international and domestic standards of detention and treatment of mentally ill prisoners.

In 2015, the General Assembly updated the U.N. Standard Minimum Rules for the Treatment of Prisoners 1955 and established the Mandela Rules which have amended and created new standards for health care, treatment of the disabled and use of solitary confinement in prison with regards to the mentally ill.

The rules mandate prisons to provide health-care services tasked with evaluating, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation[102]. Additionally, physicians are to monitor a prisoner's mental health and report to the prison director if they consider that a prisoner's psychical or mental health will be injuriously affected by continued or any other condition of imprisonment[103]. Most importantly, the rules call for health care services to be provided for the psychiatric treatment of all prisoners who are in need of treatment.[104] The Mandela Rules also discourage the exercise of disciplinary sanctions for conduct attributable to a prisoner's mental illness.[105] Solitary confinement is also prohibited in the case of prisoners with mental or physical disabilities when their conditions would

[98] UNCAT & Article 9 and 14(2) of constitution
[99] Supreme Court Pakistan, Human Rights Case 52-L/2006 http://www.supremecourt.gov.pk/HR_Cases/8th%20final/52-Lof2006.pdf accessed on 20.11.17
[100] Human Rights Commission Pakistan, State of Human Rights in 2014, 2015 < http://hrcp-web.org/hrcpweb/data/HRCP%20Annual%20Report%202014%20-%20English.pdf> accessed on 25.11.17
[101] ibid and Supreme Court Pakistan, Human Rights Case 2760/2006 http://www.supremecourt.gov.pk/HR_Cases/4rth%20final/2760of2006.pdf accessed on 24.11.2017
[102] Mandela Rules 25(1)
[103] ibid 33
[104] ibid 110
[105] ibid 39(3)

be exacerbated by such measures.[106]

In Pakistan, the procedural framework and standards relating to the treatment of prisoners are laid out in the provincial 'Jail Manual', a compendium of legislative enactments and prison rules.[107] The manual contains provisions on the management of prisons including confinement, treatment and transfer of mentally unwell prisoners, and use of discipline etc.

Upon admission into prison (of an under-trial prisoner ("UTP") or convicted prisoner) the manual mandates the registration of a prisoner. Within 24 hours of admission, the prisoner is to undergo a medical examination by a Medical Officer where the prisoners: age, height, weight and state of health is recorded, specifying where it is "good, indifferent or bad."[108] Observations regarding physical and mental condition and unexplained conditions may also be noted "if considered necessary".[109] The Manual remains silent on what procedure is to be followed if the prisoner appears to be mentally ill or suffering from a developmental disability at the point of assessment. The unfortunate reality is that this physical examination is a superficial, visual assessment where emphasis is placed on physical symptoms or ailments; the mental state of a prisoner, which if not chronic or on the extreme end of an observable spectrum, can be difficult to identify and subsequently not examined properly. Medical Officers are ill-equipped and inadequately trained in identifying such prisoners. There are no psychiatrists employed by the prison authorities. The Karachi Central Jail for example, is currently serviced by 12 doctors out of which there is only one psychiatrist who visits once a week.[110]

A poor method of assessment at the admission stage affects a prisoner's right to be treated with dignity and breaches their right to receive adequate treatment as per the Mandela Rules and fundamental rights guaranteed under the Pakistani constitution.[111]

Treatment of Mentally Ill in Prison

Prisoners are broadly classified into convicted and under trial prisoners. Chapter 18 of

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[106] ibid 45(2)
[107] In this paper the following are of relevance: Prisons Act 1894, Prisoners Act 1900, Prison Rules 1978
[108] Pakistan Prison Rules 1978 r 18
[109] ibid
[110] Haya Emaan Zahid, 'Mental Health and the Incarcerated', *Legal Aid Society* < http://pp.lao.org.pk/wp-content/uploads/2013/07/Mental-Health-in-Prisons.pdf> accessed on 10.11.17
[111] Constitution of Pakistan 1973 Art 9 and 14

the Pakistan Prison Rules 1978 deals with "mental patients." Within the category of mentally unwell detainees, the Manual differentiates between the treatment of criminal and non-criminal detainees.

As per S. 440 of the Prison Rules 1978, the class of "criminal mental patients" detained in prison has been divided into the following categories:

(i) Defendant sent to prison for mental health assessment[112]

(ii) Defendant whose trial/investigation has been suspended due to incapacity; detained indefinitely pending orders from the Government[113]

(iii) Mentally ill prisoner who has been acquitted on account of plea of insanity but is detained in "safe custody" pending the order of the Government[114]

(iv) A convicted prisoner who become mentally unwell in prison

Mental patients and prisoners belonging to the first class *may* in the discretion of the Medical Officer, be detained in the prison hospital or in a ward set apart for the purpose;[115] wards severely lacking in equipment and are highly under-resourced to accommodate prisoners with mental health issues.

Fair trial and due process violations are common for prisoners in the second category. On account of the suspension of their trials, these prisoners fall between the cracks of the criminal justice system. As per Prison Rules 1978[116], the Superintendent is tasked with applying for the prisoner's transfer to a mental hospital (discussed below), unless and until the trial is resumed. What is observed is that these prisoners suffer the most as they are usually detained in prison until their illness is exacerbated to the extent of requiring serious medical intervention. Due to prolonged detention sans necessary medical attention, prisoners suffer years of such abuse, forgotten and suffering, without proper rehabilitation.

The Mandela Rules provide for prisoners to be kept separately taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their

[112] Cr.P.C 1898 s 464
[113] ibid s 466;
[114] ibid s 471
[115] Pakistan Prison Rules 1978 r 442 (ii)
[116] ibid r 441

treatment.[117] Generally, laws regulating prisons in Pakistan also provide for the segregation of prisoners based on similar classifications[118], emphasizing on the separation of females and juveniles. However, due to severe over-crowding of prisons, the rules relating to segregation are not fully abided. It was observed by the HRCP in 2016 that, "without proper care or a strict treatment regimen, cognitively impaired prisoners, both violent and non-violent, were housed in the same barrack separated from the rest. Cognitively impaired female prisoners were kept in the female barracks without segregation."[119]

As per Rule 435 of the Prison Rules 1978, prisoners who are suspected and have been declared to be mentally unwell are to be kept separate from other prisoners. This separation seems to emanate from the need to protect other prisoners as "mental patients (are) to be considered dangerous until certified harmless" by a Medical Officer.[120] The language used in the Jail Manual is discriminatory towards prisoners with mental illnesses, all painted with the same brushstroke of being hazardous, dangerous and requiring "proper guarding."

As discussed, fair trial guarantees set into motion at the time of the investigation and shield a defendant till the stage of appeal. Convicted prisoners who become mentally unwell in prison must be mentioned with regards to their fair trial guarantees. As prisoners with pending appeals, the right to adequate health services and a proper examination from a medical professional cannot be seized. In reality, they are subjected to abuse and cruel treatment. According to Sultana Noon, mentally ill prisoners "are often kept together in on cell. In one jail in Punjab, there are forty of them and they all have one arm chained to the wall. Only one hand is free. They are kept like this all day."[121]

Detention & Solitary Confinement

Disciplinary sanctions, according to the Mandela Rules, which amount to torture or

[117] Mandela Rules rule 11
[118] Section 27 and 30 of Prison Act 1894; Pakistan Prison Rules 1978 224-249
[119] Human Rights Commission Pakistan, State of Human Rights in 2016 <http://hrcp-web.org/hrcpweb/wp-content/uploads/2017/05/State-of-Human-Rights-in-2016.pdf> accessed on 25.11.17
[120] Pakistan Prison Rules 1978 r 436
[121] Sultana Noon, revision notes to DPW Pakistan, Doc. REV-1, Nov. 8, 2010 <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Pakistan#f54-3> accessed on 18.11.17

other cruel, inhuman or degrading treatment or punishment are illegal.[122] Solitary confinement, especially if indefinite or prolonged, is strictly prohibited in the case of prisoners with mental disabilities, especially if their condition would be exacerbated by such measures. Unfortunately, solitary confinement is disproportionately used for prisoners with severe psychiatric symptoms even though it is well-established that solitary confinement for juveniles and adults living with serious mental illnesses "serves no appropriate purpose in terms of discipline, protection of the individual or others, or the individual's overall functioning in general prison settings," instead this form of segregation "causes extreme suffering, has adverse long-term consequences for cognitive and adaptive functioning, disrupts treatment and exacerbates illness."[123] In Pakistani prisons, it is a common practice to consign mentally ill prisoners to solitary confinement for days, weeks and years on end. This is especially applicable to mentally ill defendants being tried under blasphemy laws.[124]

Other than the aforementioned sections from the Prison Rules, there are no guidelines for the standard of care and treatment of prisoners with mental illnesses within prisons in the Cr.P.C or the Jail Manual.

Assessment of Mental Illness & Process of Transfer to Mental Hospitals

As mentioned above, the MI Principles are a major human rights standard directly applicable to mental health**.** Adopted by the United Nations General Assembly in 1991, the MI Principles are used as an "authoritative interpretation" of obligations emanating from legally binding conventions such as the ICESCR[125], and by states as guidelines to be referred to when formulating mental health legislation.

The MI Principles are premised on the fundamental notion that all persons have the right to the best available mental health care, integrated into their health and social care systems.[126] Additionally, all such persons have the right to exercise their civil, political, economic, social and cultural rights as recognized in the Bill of Rights and in other

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[122] Mandela Rules r 43
[123] Firoz Qureshi, 'Human rights and legal aspects of mental ill patients' https://www.slideshare.net/FIROZQURESHI/human-rights-and-legal-aspects-of-mental-ill-patient accessed on 18.11.17
[124] Al Jazeera 'Protest against Pakistan's blasphemy arrest' 26 August 2012 <http://www.aljazeera.com/news/asia/2012/08/201282519543103674.html>
[125] World Health Organization, 'WHO Resource Book on Mental Health, Human Rights and Legislation', 2005 < https://ec.europa.eu/health/sites/health/files/mental_health/docs/who_resource_book_en.pdf> accessed on 5.11.17
[126] MI Principles 1

relevant instruments.[127] Principle 20 is directly concerned with the rights of criminal defendants detained in the course of proceedings, or serving sentences of imprisonment. According to this principle, criminal offenders should receive the best available mental health care and treatment[128] to the fullest extent possible; restriction to this principle should not prejudice the persons' rights mentioned above.

The general health and treatment of prisoners is regulated by the Prisons Act. According to S. 37, the prisoners appearing "out of health in mind or body shall, without delay, be reported by the officer in immediate charge of such prisoners to the Jailer." The Jailer is then obligated to call the attention of the Medical Subordinate who examines such patients, and also to fulfil the written recommendation.[129] The Jail Manual also dictates that wards are set apart for the purpose of confining prisoners sent for medical examinations.

Rules 444 - 445 of the Prison Rules describe the procedure to be followed in case a prisoner appears to be of unsound mind. First, the prisoner is to be kept under observation by the Medical Officer for a period of ten days; subsequently the Medical Officer reports the results to the Superintendent. If the patient is found to be of unsound mind, a report regarding the case is submitted to the Inspector- General ("IG Prisons") for obtaining the orders of the Government for removal of the prisoner to a mental hospital. On receipt of said order, the Superintendent is to transfer the defendant to the mental hospital specified. 'Mental hospital' has not been defined in the Prison Rules, but in practice this has come to encompass forensic inpatient units in public hospitals and public psychiatric hospitals, of which there are only five.[130]

Although the procedure seems simple on paper, the reality is quite different. Firstly, most Medical Officers in jail are not experienced or trained in identifying mental disorders, especially if they are not visibly detectable e.g. autism. Secondly, due to the under-resourced and overcrowded nature of jails, medical interventions for mentally disordered prisoners are not on a list of high priority. Unless there is a direct intervention from a Magistrate/Judge or the prisoner's lawyers files a separate motion, it takes several months for these processes to be fulfilled. This leads to mentally disordered prisoners being kept in isolation in prison cells, with no access to medical

[127] MI Principles 1(5) (such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention)
[128] MI Principles 20(4)
[129] Prisons Act 1894 s 37
[130] WHO-AIMS, Report on Mental Health System in Pakistan, 2009 < http://www.who.int/mental_health/pakistan_who_aims_report.pdf> accessed on 10.11.17

care and treatment.

In practice, a general lassitude and resistance has also been observed in the attitudes of psychiatric facilities in accepting mentally disordered prisoners for treatment and care. This is partially due to the fact that such facilities are already over-crowded and lacking in funds. According to the WHO, in 2009, there were only 0.02 beds for persons with mental disorders in forensic inpatient units.[131] Another reason for such attitudes is the responsibility attached to accepting such prisoners: surveillance over and security of the prisoners and other patients must be provided for, and forensic prisoners must be kept in separate wards; consequently, mentally disordered prisoners face discrimination and are unable to receive the requisite medical care in the proper facilities as per the laws.

Detention & Medical Care in Psychiatric Facilities

Medical Health Legislation

The Mental Health Ordinance of 2001, drafted in consultation with British Pakistan psychiatrists, borrowed heavily from the UK Mental Health Act 1983. The Federal Ordinance however, lapsed in April 2010 as the subject of health was devolved to the provinces.

The provincial mental health legislations (Sindh 2013, Punjab 2014, Khyber Pakhtunkhwa 2016) regulate matters relating to mentally disordered persons with respect to their care, treatment, and management of property. The provincial legislations all call for a Mental Health Authority tasked with myriad functions including developing new standards of care, recommending measures to improve existing mental health and forensic services, and prescribing codes of practice to be followed by all mental health personnel involved in the care of patients, including mentally disordered prisoners. The Authority is also required to, in consultation with the government, establish a board of visitors (known as visitors in the Jail Manual and Cr.P.C.) The Sindh Mental Health Authority was notified after a lapse of 5 years in 2017. Punjab and Khyber Pakhtunkhwa have not formed any authority whereas Balochistan has yet to pass any legislation regulating mental health.

The Board of Visitors in Sindh for example, requires a current or former Judge of the High Court, two psychiatrists, a prominent citizen of good standing; two medical

[131] ibid

practitioners, and the Director General Health Services Sindh to be involved[132]. Within the criminal justice system, the ambit of duties and powers of the Board of Visitors could lead to an overhaul of the fair trial and due process violations of mentally disordered prisoners. They are mandated to enter and periodically inspect psychiatric facilities, examine mentally disordered prisoners, and review records and documents relating to mentally disorders prisoners[133]. The effectiveness of the board of visitors and the authority under the new laws remains to be seen.

In terms of the examination of mentally disordered prisoners, there are two protocols to be followed depending on the location of prisoners. If detained in a psychiatric facility, the Board or any two members of the Board "may" visit the prisoner to assess his state of mind. If detained in prison, the IG/or officer in charge of the prison along with two members (minimum) from the Board may visit the prisoner. An inspection is mandatory every six months, by the aforementioned personnel. Based on the mandatory inspection, the requisite members are expected to write up a report as to the state of mind of the person[134]. If the Board is unsatisfied by the treatment of a patient in a psychiatric facility or in prison, they may make recommendations for improvements of facilities to the Authority which has the powers to issue directions to the medical practitioners in charge. The responsibility of independent oversight at prison facilities is one of integral importance and could play an effective role in monitoring conditions of detention of mentally ill prisoners.

Under the law, the legislature has granted the government the power to establish or maintain psychiatric facilities for the assessment, admission, treatment, rehabilitation, and of mentally disordered patients, with optional separate units maintained for convicted persons who are mentally disordered for whom special security measures would be required[135]. Additionally, special security forensic psychiatric facilities should also be developed."[136] No such facilities have been created under the new provincial legislations.

A fundamental reason for the poor standards of care and treatment of mentally disordered prisoners is that practitioners including psychiatrists, doctors, lawyers and judges' level of awareness and familiarity with the respective provincial mental health

[132] Sindh Mental Health Act 2013 s 3(2)
[133] ibid S5
[134] ibid s 54
[135] ibid s 6
[136] ibid s 55(1)

legislations is very poor. Recently, this lack of familiarity with the law became abundantly clear when a motion to allow for an examination of a client under S. 49 of the PMHA 2014 was argued in court, according to which it is mandatory for a person who has attempted suicide to be assessed by an approved psychiatrist. The Sessions Judge refused to grant the request and stated that the legislation was not applicable to criminal cases! Such misnomers will only be eradicated if the judiciary and legal community are made familiar with the relevant legislations and rules pertaining to the rights of mentally ill prisoners.

Inspections

Under the Mandela Rules, internal and external inspections are suggested to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and corrections services, and that the rights of prisoners are protected.[137]

Indeed, inspections in prison and mental health facilities can play a positive role in monitoring the conditions of detention and mental capacity to resume trial. These inspections are necessary for two reasons. Firstly, they provide an oversight of the conditions of detention and necessary medical treatment of prisoners. Secondly, they are crucial in terms of bridging gaps in cases where trials are suspended under S. 466.

Under Pakistani law, when mentally unwell prisoners are confined in prison they are to be visited by the Inspector-General of Prisons[138]. The IG, or two visitors from the Medical Board, are also mandated to visit a prisoner placed in an institution every 6 months and formulate a report for the Government regarding the state of mind of the prisoner. However, this procedure is habitually disregarded and prisoners are not monitored as frequently as dictated by the Manual.

In a criminal case involving a schizophrenic prisoner, it was argued that due to schizophrenia's complexity of symptoms and potentially deteriorating course, the defendant had very little chances of recovering and it was abnormal to desire him to do so. In order to ascertain the defendant's mental state, he was supposed to be examined periodically and the reports were to be sent to court. However, there were no systematic reports or re-assessments taking place to assess his mental condition. Due to this reason,

[137] Mandela Rules 83(2)
[138] Rule 94 (iv) and section 420 Cr.P.C and S. 54 of MHA

it was difficult to evaluate any improvement, if at all, in the mental health of the prisoner and his trial remained suspended. Not only was he subjected to prolonged detention, a violation of his fair trial guarantee, but he was also not being monitored properly.

Way Forward: Normative Standards

Given Pakistan's existing mental health laws and procedures examined in this article, it is evident that while some fragmented safeguards are in place, most remain cursory and far from effective or adequate. The purpose of these protective mechanisms is to "promote the full realisation" of the rights and freedoms of persons with disabilities; however, upon examining the relevant laws governing the various stages in the criminal justice system it is clear that the rights of mentally ill persons — an already vulnerable group — are consistently violated without much recourse.

Policy and legal reform must be implemented at each stage in Pakistan's criminal justice system. In order for any protective mechanism to be effective, an institutional understanding of the rights and duties enforced by it must be cultivated. First, therefore, training and sensitisation for judges, lawyers, medical practitioners, police and jail staff alike would be an integral part of any reform framework. The trainings must be mandatory (with a set minimum number of hours) and create an understanding of mental illness, domestic legislation, international best practices and fair trial standards in relation to mentally ill persons. It must have specific components for the police on investigation, judiciary on judicial mechanisms, defence counsel on international best practices, prison staff on detention.

Further, Pakistan's police force "requires more training in triaging detainees and offenders who may have a mental illness and (they) need to know how to divert offenders who are mentally disordered to psychiatric hospitals. The existing liaison between the legal and psychiatric professions must be enhanced."[139]

The protective mechanisms already in place must be strengthened. It is appalling that, despite Pakistan's international obligations, no procedural safeguards for mentally ill persons exist at the pre-trial stage when an individual is under arrest and in police custody. Formal and mandatory procedures to improve identification of mentally ill prisoners in police custody must forthwith be introduced. Such procedures must reflect

[139] Tariq Hassan, Asad Tamizuddin Nizami, and M. Selim Asmer, 'Forensic psychiatric service provision in Pakistan and its challenges' BJPsych Int. 2017 May; 14(2): 40–44 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5618814/> accessed on 25.11.17

international fair trial standards for safeguards as to arrest: existence of Miranda rights; surveillance of police interrogation proceedings; no interrogation in the absence of a lawyer. Having defence counsel present at this stage will improve identification of mental illness at an early stage in the process, and also reduce risk of manipulation of a mentally ill person in custody.

These mechanisms must be carried on to the trial itself and conditions of judicial remand once the investigation period is complete. Under the existing prison rules, when a defendant is remanded to prison, a medical examination is conducted. This examination must mandatorily include a psychiatric evaluation for identification of any mental disability; if a mental disability exists, the requisite prison staff — medical officer, superintendent of jail and IG Prisons — must be legally obligated to immediately report this to the trial court. Thereafter, periodic assessments and inspections should be conducted and reported to the court.

Once the trial court is cognizant of the existence of a mental disability, it is essential that judicial proceedings or an inquiry to determine competence to stand trial are initiated without delay. The terms of reference of such an inquiry must be laid out clearly. The governing rules of procedure must embody rules of evidence and criteria of review along with the legal duties of judges, lawyers and prosecutors. Adequate provisions must also be introduced to ensure that evidence as to mental illness will be meaningfully considered at the stage of appeal, notwithstanding whether or not such evidence was available at the time of trial.

These reforms must, of course, be in addition to general safeguards as to arrest and detention: anti-torture laws in compliance with the UN Convention Against Torture criminalising torture; laws regulating prison conditions prohibiting solitary or prolonged confinement of the mentally ill must also be enacted. Moreover, it is challenging for international bodies such as Amnesty International to monitor the conditions of detention in Pakistani Prisons, since our domestic laws do not provide for such oversight "making it difficult to assess compliance with the ICCPR and the…Nelson Mandela Rules)."[140] Perhaps external mechanisms of oversight can be introduced.

For reform to be holistic and effective, it must also regulate executive powers to grant

[140] Amnesty International, Submission for the UN Universal Periodic Review, 28th Session of the UPR Working Group, 2017 < https://www.amnesty.org/en/documents/asa33/6513/2017/en/> accessed on 16.11.17

pardons, reprieve and commutations. Similar to the *Shatrugan Case*, guidelines are necessary to determine the parameters of this heretofore unfettered power, particularly the criteria for judicial review. This will eliminate arbitrary exercise of power and introduce an element of legal certainty and transparency.

Similarly, the use of the death penalty for mentally ill persons must also be prohibited. The UN Safeguards guaranteeing protection of the rights of those facing the death penalty specifically states that a mentally ill person cannot be executed.[141] Therefore, in order to ensure full protection of the rights of mentally ill persons, in and complete compliance with Pakistan's international obligations, a special law — similar to the JJSO for juveniles — must be enacted to enable specific protection.

With regards to mental health legislation, it is important to remember that it is an ongoing process which should constantly be monitored, and updated if need be. The Mental Health Authorities and Board of Visitors need to be properly equipped to carry out their mandate and enabled to prescribe codes of practice to be followed by all involved in the detention, incarceration, legal recourse and medical care of mentally ill prisoners. Pakistan's prison staff and psychiatric profession "must work together to develop a streamlined service for the assessment and rehabilitation of offenders who are mentally ill (including) the establishment of psychiatric services inside prisons"[142] and a diversion away from criminal liability.

Till date, the fault lines in our criminal justice system and attitudes towards the mentally ill have continued to ensure their exclusion from claiming their fundamental rights of due process as citizens of the country. We must ensure that normative standards, in line with social justice and internationally accepted principles of fair trial and treatment of the mentally ill are introduced and implemented.

[141] UN Safeguards guaranteeing protection of the rights of those facing the death penalty (approved by Economic and Social Council Resolution 1984/50 of 25 May 1984) art 3
[142] Tariq, Nizami, Asmer, (n 134)

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CHILD MARRIAGES IN THE CONTEXT OF INFORMAL JUSTICE SYSTEM: AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

By Maira Khan[143] and Shahnaz Faqiri[144]

Introduction

The custom of female child marriages in the context of informal justice system is very widespread in both Pakistan and Afghanistan. This paper addresses the human rights violations of female children through these customs and challenges the liability of states in this regard. The essay addresses the issue at hand through the lens of The Convention on the Rights of the Child ("CRC") and The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), to which both Pakistan and Afghanistan have ratified. Firstly, the obligations of both countries with respect to prohibition of child marriages will be examined in light of these international conventions. Secondly, the paper will assess whether the states parties have shown compliance towards their respective international obligations with a comparative perspective. In this process, several legislative and judicial measures of the countries will be examined. It is argued that both Pakistan and Afghanistan have taken legislative and judicial measures in order to prohibit child marriages from informal justice system however, evidences of weak implementation of laws and unsuccessful domestication of international treaty provisions are apparent. This will lead to many insights on enforcement and accountability mechanisms of international human rights regime.

Background Information

In both Pakistan and Afghanistan, an overwhelming number of communal disputes are resolved through an informal justice system.[145] The informal justice system comprises

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[144] The co-author Ms. Shahnaz Faqiri is currently working at Afghanistan Research and Evaluation Unit (AREU) as Publications and Communications Officer. She shares keen interest and experience working in the fields of journalism and mass communication and has studied law from American University of Afghanistan (AUAF)
[145] UNDP reports that 80 percent of communal disputes in developing societies are resolved through informal justice mechanisms. See Inquest into Justice of the Pakistani Customary "Panchayat Justice System" in the Context of International Human Rights Law (September 14, 2012) <http://sas-space.sas.ac.uk/4780/1/1143204.pdf> accessed 9 December 2016

of councils of elder and religious members of the society known as *Jirga(s)*.[146] One frequently used dispute resolution by *Jirga(s*) is giving away female children/women in marriage as a compromise between the disputing families. For example, where a member of one family has murdered a member of the other family, the first family is asked by the *Jirga* to give away their female child in marriage to a member of the aggrieved family. That female child, is considered a payoff and a compensation which the aggrieved family very satisfactorily and favorably accepts. In Pakistan, such custom is popularly known as "*swara*". It is also known as *"wani", khoonbahai*" and "*sangchatti*" in certain regions of the country whereas, in Afghanistan, the custom is called "*baad"*. These practices involve both female adults and children, however, in most situations, a female child is married away and thus it constitutes child marriage. The primary reason for this traditional dispute resolution custom is murder, however, children are also exchanged for crimes of adultery, revenge between the families and sexual (honour) crimes.[147]

In Pakistan, *swara* marriages are widespread in Khyber Pukhtunkhwah, Sindh and Baluchistan provinces of the country.[148] In the year 2013, under a household survey of 5000 women, conducted in cities of Dera Ghazi Khan, Muzaffargh, Jacobabad, Kashmore, Jafferabad and Naseerabad of Pakistan, the Rutgers World Population Foundation found that more than 77percent of marriages were settled under *swara*.[149] In the same year, government figures showed that only nine *swara* cases were registered in which 65 suspects were arrested by the police.[150] On the contrary, human rights activists believed that the actual number of *swara* cases was much higher and many cases went unreported.[151] As far as situation in Afghanistan is concerned, *baad* is mostly practiced by Pashtuns and is prevalent in rural and tribal regions of the country.[152] Although no statistics exists on exact number of *baad* marriages, the Human Rights Watch report shows regular occurrence of such marriages in Afghanistan.[153]

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[146] Ibid.
[147] Ethno Media and Development, *Swara-the Human Shield*, p. 83-85
[148] Sindh Judicial Academy, Karachi, *Study on Informal Justice System in Pakistan* (Funded Project) <http://www.waterinfo.net.pk/sites/default/files/knowledge/Report%20Informal%20Justice%20System%20in%20Pakistan.pdf> accessed 9 December 2016
[149]SehrishWasfi, 'Survey finds 77 % of marriages made in traditional exchanges' *Express Tribune* (Sunday 10 July 2016)
[150] Human Rights Commission of Pakistan, *State of Human Rights in 2013* (2014)
[151] Ibid
[152]LandInfo, *Report Afghanistan: Marriage*, (2011) <http://www.landinfo.no/asset/1852/1/1852_1.pdf> accessed 9 December 2016
[153] Human Rights Watch, '*Afghanistan: Stop Women Being Given as Compensation – Implement Elimination of Violence Against Women Law'* (March 8, 2011)

Furthermore, more than 80 percent of communal disputes are resolved through the informal justice system in Afghanistan.[154]

These statistics indicate widespread existence of female child marriages within the informal justice systems of both countries. These cultural practices not only reflect patriarchal mind-set of *Jirga* leaders, but also promote humiliation of female children as well as reaffirm the custom of how girls can be exchanged as commodities. Violation of basic human rights in such practices in the form of child marriages is very apparent. Although both Pakistan and Afghanistan also suffer child marriages outside the informal justice system, the focus of our paper are those customary female child marriages which occur as dispute resolution in the informal justice systems of the countries.

PART-I: State Obligations under International Human Rights Law

Both Pakistan and Afghanistan are states parties to CRC and CEDAW. Pakistan has made a general reservation to CEDAW that nothing inconsistent with either the Constitution or the Islamic Injunctions shall be adopted.[155] It has made a declaration to CRC that all provisions of the Convention shall be interpreted in light of Islamic principles.[156] While Afghanistan has made no reservation to CEDAW, it has made declaration to CRC that it reserves the right to express reservations on all provisions of the Convention that are incompatible with the laws of Islamic *Sharia* and the local legislation.[157] It is worth noting that neither Pakistan nor Afghanistan has ratified the Optional Protocol to CEDAW.

Both CRC and CEDAW protect female children against customary child marriages in the context of informal justice system in two forms. Firstly child marriages are prohibited under the provisions of both conventions. Secondly, child marriage as a form

<https://www.hrw.org/news/2011/03/08/afghanistan-stop-women-being-given-compensation> accessed 9 December 2016

[154] United States Institute of Peace (USIP), 'Rule of Law in Afghanistan' <http://www.usip.org/programs/projects/rule-of-law-in-afghanistan> accessed 9 December 2016

[155] Convention on the Elimination of All Forms of Discrimination against Women, 'Declarations, Reservations and Objections to CEDAW' <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> accessed 9 December 2016

[156] United Nations Committee on the Rights of the Child, 'Reservations, Declarations and Objections Relating to the Convention on the rights of the child: Note by the Secretary-General' (11 July 1994) CRC/C/2/Rev.3 < http://www.refworld.org/docid/3ae6aeda4.html> accessed 9 December 2016.

[157] United Nations Committee on the Rights of the Child, 'Reservations, Declarations and Objections Relating to the Convention on the rights of the child: Note by the Secretary-General' (11 July 1994) CRC/C/2/Rev.3 < http://www.refworld.org/docid/3ae6aeda4.html> accessed 9 December 2016.

of dispute resolution is considered a generally harmful practice against female children in many respects and violates rights of female children provided under the conventions. Before we delve into analysis of CRC and CEDAW with respect to prohibition of child marriages, it is important to note that CRC has defined a child as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier".[158] CEDAW on the other hand, does not define a child, however, the CEDAW Committee, as recommended by its General Recommendation 21 also considers that the minimum age for marriage should be 18 years for both males and females.[159]

The Convention on the Rights of the Child (CRC)

There is no particular provision in CRC which prohibits child marriages. However, a holistic understanding of the convention indicates that this practice is a violation to it. According to the Committee on the Rights of the Child, many provisions of the convention should be considered applicable to the issue of child marriage. Firstly, empirical data has revealed that girls who marry early are exposed to abandonment and domestic violence very frequently in their lives as compared to other girls.[160] This leads to violation of their right to survival and development. [161] Secondly, sexual relationship in early marriages constitutes a form of sexual abuse since the child's consent cannot be said to be given. This violates a child's right to be protected from sexual abuse and sexual exploitation saved under CRC. [162] Thirdly, forced sexual relationships and domestic violence eventually affects a girl's health. It is no doubt that child marriage is one of the traditional practices harmful to the health of the child. This leads to the violation of Article-24 of CRC which protects children from traditional practices harmful to their health.[163] In addition, early marriages prevent females from completing their education as education is seen as a hindrance towards marriage. It also forces girls to be separated from their parents against their will, eventually leading to violations of

[158] Convention on the Rights of the Child, art 1
[159] UN Committee on the Elimination of All Forms of Discrimination against Women, 'CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations', Violence against women', 1994, <http://www.refworld.org/docid/48abd52c0.html> accessed 9 December 2016
[160] UNICEF Division of Policy and Planning, Child Marriage and the Law, (Legislative Reform Initiative Paper Series, Working Paper, 2008
[161] Convention on the Rights of the Child, art 6
[162] Ibid, art 34
[163] Convention on the Rights of the Child, art 24

the right to education and right not to be separated from their parents against their will respectively. [164]

According to the United Nations Population Fund (UNFPA), due to child marriage, the following rights saved under CRC are denied "right to education[165], right to be protected from all forms of physical or mental violence, injury or abuse including sexual abuse and all forms of sexual exploitation[166], the right to the enjoyment of the highest attainable standard of health[167], right to educational and vocational information and guidance[168], right to seek, receive and impart information and ideas[169], right to rest and leisure and to participate freely in cultural life[170], right not to be separated from their parents against their will[171] and the right to be protected against all forms of exploitation affecting any aspect of the child's welfare[172]".[173] In light of violations of the mentioned rights, child marriages cannot be seen as being in the best interest of the child, a consideration that is paramount for the CRC.[174]

The provisions of CRC prove that child marriages and all cultural practices which promote child marriages are prohibited under CRC. Thus, Pakistan and Afghanistan by virtue of their ratification to it are required to abolish such practices from their societies. Furthermore, since the responsibility of protection of a child's best interest lies towards states parties under CRC, governments of both countries are responsible to take appropriate and effective steps in this regard.[175]

The Convention of Elimination of All Forms of Discrimination against Women (CEDAW)

The issue of child marriage can be understood from four different aspects within the context of CEDAW. Firstly, unlike CRC, CEDAW explicitly prohibits child marriage

[164] Ibid, art 28, 9
[165] Ibid, art 28
[166] Ibid, art 34
[167] Ibid, art 24
[168] Ibid, art 28
[169] Ibid, art 13
[170] Ibid, art 31
[171] Ibid, art 9
[172] Ibid, art 39
[173] UNICEF Division of Policy and Planning, *Child Marriage and the Law*, (Legislative Reform Initiative Paper Series, Working Paper, 2008)
[174] Convention on the Rights of the Child, art 3; See also Convention on the Rights of the Child, art 19.1
[175] UNICEF Division of Policy and Planning, Child Marriage and the Law, (Legislative Reform Initiative Paper Series, Working Paper, 2008; Convention on the Rights of the Child, art 3. See also Convention on the Rights of the Child, art 19.1

under Article-16(2) by stating that "the betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage".[176] In its General Comment to Article-16(2), the CEDAW Committee has urged states parties to repeal existing laws and those traditional practices which discriminate against female children.[177] Secondly, one issue concerning child marriage is that of full and free consent of an individual to marry. When a girl child is exchanged for settling a dispute or as compensation for crimes, the girl's choice and consent is completely neglected. This violates Article-16(1)(b) of CEDAW which provides a female right to freely choose the spouse and to enter into marriage with her full and free consent.[178] Thirdly, given that child marriage negatively affects health of a female child particularly her sexual and reproductive health and leads to severe consequences such as high mortality rates, infant morbidity, early motherhoods and pregnancy related complications, it violates Article-12 of CEDAW which provides protection to a female's right to health.[179] And lastly, the fact that child marriage affects girls disproportionately than boys makes it a discrimination against women and a form of gender based violence which is prohibited under CEDAW.[180] Moreover, under Article-5 of CEDAW, states have obligation to take effective action to abolish those customary practices from the society which discriminate against women.[181]

In addition, the principle of "best interests of the child" expressed by CRC has also been accepted by the CEDAW Committee.[182] While CRC does not explicitly prohibit child marriage, reading it together with CEDAW and along with its relevant provisions provides an urgent rationale to abolish child marriages. It is therefore clear, that both Pakistan and Afghanistan are under legal obligations to take steps for abolishing customs of *swara* and *baad* from the society. It is because of the reason that such practices tend to violate rights of female children saved under the ratified international conventions.

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[176] Convention on the Elimination of All Forms of Discrimination against Women, art 16(2)
[177] UN Committee on the Elimination of All Forms of Discrimination against Women, 'CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations', Violence against women', 1994, <http://www.refworld.org/docid/48abd52c0.html> accessed 9 December 2016
[178] Convention on the Elimination of All Forms of Discrimination against Women, art 16(1)(b)
[179] Ibid, art 12
[180] Under General Recommendation No. 19 of the CEDAW Committee, violence against women has been defined as gender-based violence that is violence directly affecting the women disproportionately than men.
[181] Convention on the Elimination of All Forms of Discrimination against Women, art 5
[182] UN Committee on the Elimination of All Forms of Discrimination against Women, 'CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations', Violence against women', 1994, <http://www.refworld.org/docid/48abd52c0.html> accessed 9 December 2016; See also General Comment to Article16(1)(d) and (f)

PART-II: Compliance towards Treaty Obligations: Comparative Perspective

The compliance and efficacy of human rights treaties depends essentially on incorporation of their provisions in domestic legal framework of the country and government's efforts in successfully implementing them within the domestic legal system. However, in plural legal systems such as that of Pakistan and Afghanistan, their incorporation becomes very difficult. It is because of the fact that informal justice systems do not even consider the domestic law, the applicability of international human rights law is a far more complex task. Under such a situation, it is the responsibility of governments to bring their municipal laws in conformity with international principles as well as to ensure the extent of their applicability to informal justice systems. The related question arises whether Pakistan and Afghanistan have made the relevant amendments with respect to prohibition of child marriage from the informal justice mechanisms.

Pakistan

In Pakistan, The Child Marriage Restraint Act 1929 (CMRA) is most relevant with regard to the question at hand. It defines a child as "a person, who if a male is under eighteen years of age, and if a female, is under sixteen years of age".[183] This definition is inconsistent with the requirements and recommendations of both CRC and CEDAW due to the fact that it defines a female child under sixteen years of age, instead of eighteen years of age. Moreover, the fact that a different age has been kept for male and female children is indicative of its discriminatory approach towards women which is a clear violation to CEDAW. The Sindh government under its new provincial law, Sindh Child Marriages Restraint Act 2013, has kept eighteen as minimum age for marriage for both girls and boys.[184] Furthermore, Pakistan Penal Code (PPC) criminalizes underage marriage of girls and forced marriages.[185] Moreover, under section-310A of Pakistan Penal Code, it has been stated that a female in marriage shall not be considered a valid compensation for settlement of a civil dispute or a criminal liability (*badl-e-sulah*)[186] and punishment for giving away a female in marriage or otherwise, is

[183] The Child Marriage Restraint Act 1929, s 2(a)
[184] Sindh Child Marriages Restraint Act 2013, s 2(a)
[185] Pakistan Penal Code, s 338 E and 498
[186] Badl-e-Sulah means consideration of compromise.

"rigorous imprisonment which may extend to ten years but shall not be less than three years".[187] These provisions were introduced in PPC under Criminal Law (Amendment) Act of 2004 due to an increasing number of *swara* and *wani* marriages. They provide protection to female children against traditional practices which are harmful to them.

In addition to these legislative reforms, Pakistani judiciary has taken many positive steps to abolish customary child marriages from the society and have successfully implemented laws against child marriages. One significant case in this regard is the famous Samar Minallah judgment,[188] concerning several cases of *swara* and *wani* marriages. In this case, the Supreme Court of Pakistan, while relying upon section-310A of PPC[189], explicitly declared that such practices are unlawful. The case also noted that it is the duty of the police to report all such marriages and take effective action against them. Furthermore, the court declared *Jirga(s)* altogether illegal and decrees made by *Jirga(s)* unlawful. This was adopted further in a recent case law of 2016[190], where the Sindh High Court of Pakistan stated that "Every participant of *Jirga* must be dealt with in accordance with the law not only for such illegal acts, but also for those offences which the illegal and unauthorized decrees dictate". Both case laws have emphasized that it is the duty of state and law enforcing institutions to protect women and children against unjust decrees of *Jirga*. In particular, police officers are responsible to stop execution of *Jirga* decisions in their territories and any such failure of the police officer will make him or her liable to prosecution. In another case of *Muhammad Sultan and another v. The State and another*[191], the court while holding *swara* unlawful declared that "Handing over a woman without her consent and in such a humiliating manner is against fundamental rights and liberty of human beings as enshrined under the Constitution of Pakistan". Therefore, it can be argued that Pakistani courts have not only discouraged *swara* marriages and penalized those involved but have also declared such customs as sheer degradation and humiliation to a woman's dignity and liberty.

[187] Pakistan Penal Code, s 310(A)
[188] Const. Petition No.16/2004
[189] Punishment for giving a female in marriage or otherwise in badal-i-sulh
[190] *Mst. RahamatBibi and another v Station House Officer, Karan Sharif and 8 others* (PLD 2016 Sindh 268)
[191] P Cr. LJ 950; See also *HameshGul v. Mst. BakhtManaand another* (2001 CLC 557) and *The State v. Sultan Ahmed and others* (PLD 2007 SC 48)

Afghanistan

The government of Afghanistan has also kept the age of marriage for a female at sixteen while keeping eighteen years the age for a male.[192] Like Pakistan, Afghanistan uses a discriminatory approach towards females and is in violation of the provisions of CEDAW and CRC. Under the Afghanistan Civil Code of 1977, fathers of a girl have complete liberty to decide marriage of their daughters from 16 to 18 years of age of their daughters and even at 15 years of age with the consent of guardian or through the competent court.[193] While such laws are clear violations of Afghanistan's international obligations, one positive legislative step of the government was the passing of the Elimination of Violence against Women ("EVAW") Act 2002. The Act lays down twenty-two offences which are defined as violence against women including selling and buying women for the purpose of or under pretext of marriage[194], *baad*[195], forced marriage[196] and marriage before legal age.[197] Furthermore, it provides strict punishments for persons found guilty of committing such offences and instructs both courts and prosecutors "to give the case of violence priority and act on it expeditiously".[198] This clearly indicates that any form of female forced or child marriage, though existent in whatever manner, is considered a form of violence against women and is strictly prohibited under the law of Afghanistan. One drawback of the law is that it requires the victim or her relative to file a complaint otherwise the state is prevented from undergoing any investigation on its own. There are many instances where women/female children do not file complaints or withdraw their complaints due to societal pressure. Under such a situation, there exists no protection to them under law. Similarly, no protection has been provided to children who run away to escape the offences. The United Nations Assistance Mission in Afghanistan ("UNAMA") and the Office of the United Nations High Commissioner for Human Rights ("OHCHR") have reported numerous instances where girls fled their homes to avoid forced marriage.[199]

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[192] Civil Law of the Republic of Afghanistan (Civil Code) – Official Gazette No. 353, published 1977/01005 (1355/10/15 A.P.), art 70, <http://www.asianlii.org/af/legis/laws/clotroacogn353p1977010513551015a650/> accessed 9 December 2016

[193] Ibid, art 71

[194] The Elimination of Violence against Women Act, art 24

[195] Ibid, art 25

[196] Ibid, art 26

[197] Ibid, art 28

[198] UNAMA and OHCHR, *A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan*, (2011) <http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf> accessed 11 December 2016

[199] Ibid.

Another positive step taken by the government of Afghanistan is formation of "Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils" by the Ministry of Justice.[200] This policy aims to formalize and regulate the informal justice system of the country with the assistance of Dispute Resolutions Councils and in accordance with the Constitution of Afghanistan, other Afghan laws and international human rights standards. International human rights law has specifically been given attention and the policy clearly declares that practices such as *baad* should be eliminated from the informal justice system of the country.

There have been several cases where courts of Afghanistan have applied EVAW, indicating Afghanistan's judicial commitment to protection of women rights. A report by the United Nations Assistance Mission in Afghanistan (UNAMA) has indicated that, prosecutors in 28 out of 34 provinces across the country opened 594 cases of violations under the EVAW law in the first full Afghan year of the EVAW law's existence.[201] The report also shows that prosecutors filed only 155 indictments from the total 594 cases and primary courts relied on the law as the basis for their decisions in at least 101 of these cases.[202] In the case of H, S and F, which was brought before the EVAW unit in Kabul, the court sentenced a man for imprisonment of six years since he was responsible for marrying his daughters as retribution of murder.[203] In another case where a twelve year old girl was decided to be married to a seventy year old man, the judge warned him that he cannot force the child to marry him.[204] In another case at North-Eastern Takhar province, where the police arrested several people in connection with a *baad* marriage, the prosecution officer issued an arrest warrant for the clergy who celebrated the *baad* marriage, two witnesses and two mediators, thus, indicating that such a marriage is not allowed under law.[205] These judicial decisions indicate

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[200] Islamic Republic of Afghanistan Ministry of Justice, *Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils* (2009)

[201] UNAMA and OHCHR, *A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan*, (2011) <http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf> accessed 9 December 2016

[202] Ibid.

[203]FatmaBoggio-Cosadia, *An Analysis of the use of the Elimination of Violence against Women Law (EVAW Law) in Medica Afghanistan legal aid cases* (Analysis Report, 2014) pp. 20 <http://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/Dokumente/English/Documentations_studies/Analysis-Report_Use-of-EVAW-Law_November-2014_CR-Medica-Afghanistan.pdf> accessed 11 December 2016

[204] UNAMA and OHCHR, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, (2010) <https://unama.unmissions.org/sites/default/files/harmful_traditional_practices_english.pdf> accessed 9 December 2016

[205] UNAMA and OHCHR, *A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan*, (2011) < http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf> accessed 11 December 2016

Afghanistan's commitment to prohibition of *baad* marriages and its commitments to respective international obligations.

It can be observed that both Pakistan and Afghanistan have prohibited child marriage under their respective laws. In addition, judicial decisions indicate governments' commitment to effectively apply the law. Furthermore, the Samar Minallah case and the 2016 Sindh High Court judgment of Pakistan can be seen as breakthrough to abolish harmful practices against women/female children within the context of the informal justice system. The fact that *Jirga(s)* have been declared unlawful by the court indicates applicability of law in informal justice system of the country. Similarly, the National Draft Policy of Afghanistan which regulates the informal justice system and *Jirga* decisions in accordance with international human rights standards is an extremely positive initiative on behalf of the government of Afghanistan.

Evidences of Weak Implementation and Non-Compliance

Despite these legislative and judicial reforms, there is serious evidences that such laws are barely implemented and thus the states have failed in their compliance obligations with international treaties. Firstly, it cannot be said with certainty whether state parties have undergone due diligence as obligated under CRC and CEDAW. Due diligence refers to the obligation of states to not only prevent child marriages through passing of legislation and judicial decisions, but also making sure there is effective implementation through additional measures of investigation, prosecution, punishment of those involved and providing reparation to the victims.[206] These additional measures are equally important to prohibit unjust dispute resolution practices as legislative provisions and judicial decisions are since the latter alone cannot lead to elimination of bad cultural practices. In *Ms. Goekce v. Austria*[207] and *FatmaYildrim (deceased) v. Austria*[208], the CEDAW Committee held authorities responsible for violation of the Convention on failure of exercising the duty of due diligence. Similarly, in two separate

[206] UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), 'CEDAW General Recommendation No. 19: Violence against women' 1992, in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1, <http://www.refworld.org/docid/52d920c54.html> accessed 9 December 2016.

[207] *Ms. Goekce v. Austria* (6 August 2007) Communication No. 5/2005 U.N.Doc. CEDAW/C/39/D/5/2005.

[208] *FatmaYildrim (deceased) v. Austria* (1 October 2007) Communication No. 6/2005 CEDAW/C/39/D/6/2005.

cases of *M.C v. Bulgaria*[209] and *Aydin v. Turkey*[210], the European Court of Human Rights held respective states responsible for failure of exercising due diligence on mere reason of not conducting proper investigations. Under such a situation, it is established that mere passing of legislations does not fulfill the requirements of the international treaty regime. Proper investigation, prosecution and reparation to the victims are also mandatory steps in the duty of due diligence, the failure of which may account to non-compliance with the international treaties. While on one hand, there are instances in both Pakistan and Afghanistan where law-enforcing institutions have freed young girls from entering into forced marriages,[211] on the other hand there exists lack of sufficient investigation in the process of prosecution at the hands of police and other law-enforcing institutions. Furthermore, widespread occurrence of *swara* and *baad* marriages shows failure of the governments of Pakistan and Afghanistan to properly exercise due diligence. This clearly indicates that states of Pakistan and Afghanistan can be held liable for failure to exercise due diligence with respect to elimination of child marriages from the informal justice system.

Secondly, the fact that both Pakistan and Afghanistan have entered into reservations and declarations to the international treaty regime is another evidence of weak implementation and non-compliance. These general reservations and declarations have been made on the basis of Islamic principles (*Sharia*). However, they neither define what states mean by Islamic principles or *Sharia* nor do they clarify whether or not the scope of such reservations extends to prohibition of child marriages. As Elizabeth Mayer has argued, such undefined and vague statements reduce the effectiveness of international human rights treaties within the domestic spheres.[212] They not only provide leverage to states parties to not fulfil their obligations but are also meant to be deconstructive towards the international human rights framework. Another consequence of these undefined reservations is a severally discriminatory version of Islamic law which denies rights of female children as in the case of *swara* and *baad*

[209] Case T-39272/98 *M.C. v. Bulgaria* [2003] ECHR 646.
[210] Case T- 57/1996/676/866 *Aydin v. Turkey* [1997] ECHR.
[211] For example, in one instance at Muzaffargh district of Punjab, where a 9 year old girl was decided to be given to a 30 year old man as compensation in a deadly pawn of adultery and revenge, local police freed the girl and returned her to her family and arrested several adults who were involved. Reported in: Palash Ghosh, 'Swara: The Horrors of Marrying Off Young Girls In Pakistan To Older Men To Settle Debts and Disputes' (2 February 2014) <http://www.ibtimes.com/swara-horrors-marrying-young-girls-pakistan-older-men-settle-debts-disputes-1556721> accessed 9 December 2016
[212] Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions: A Critical Assessment' (1998), pp. 25-45 <http://www.verenigingrimo.nl/wp/wp-content/uploads/recht15_mayer.pdf> accessed 11 December 2016

marriages.[213] This ultimately raises question on treaty bodies of why do they allow undefined reservations at the first place.

Thirdly, neither Pakistan nor Afghanistan has ratified the Optional Protocol to CEDAW. Through Optional Protocol, individuals can bring their complaints to the CEDAW Committee and can directly hold the states parties liable for violation of their rights. However, non-ratification to the Optional Protocol by Pakistan and Afghanistan shows lack of political will. This is because of the reason that if states parties do want to be bound and held accountable under international treaties, they would also have ratified the Optional Protocol to CEDAW. Without individual complaint mechanisms, the international treaty seems to lose its sanctioning power over the states parties. In their state reports, the CEDAW Committee has called upon both Pakistan and Afghanistan to ratify the individual complaint mechanism.

In order to determine the true compliance and implementation of law, it is necessary to evaluate the overall social aspects including religion and patriarchy which govern traditional child marriages in Pakistan and Afghanistan.[214] All of the mentioned reasons collectively raise questions on enforcement and accountability mechanisms of international human rights legal framework. It also leads us to ask what steps can be taken in order to fully comply with international treaties and for prohibition of child marriages from informal justice systems.

Conclusion

This essay attempted to analyze child marriages within the context of international human rights law. By examining the overall steps of both the governments of Pakistan and Afghanistan with respect to prohibition of child marriage, the essay evaluated both good and bad practices of governments. This paper has argued that if on the one hand, states parties have taken positive legislative and judicial measures, on the other hand, their implementation remains uncertain. Both Pakistan and Afghanistan can be held liable before the international committee for keeping marriageable age 16 for girls, for

[213] Ibid.

[214] "Most representative positions in *Jirgas* are filled by men who work to reinforce patriarchy using selective interpretation of culture, religion and tradition . . . one major cause of child/early marriages is gender inequality (patriarchy – a social structure where men hold power and women are largely excluded from it) which manifests in notion of family honour, women as the carriers of culture and the dangers inherent in female sexuality." Women Living Under Muslim Laws, *Child, Early and Forced Marriage: A Multi-Country Study (*A Submission to the UN Office of the High Commissioner on Human Rights (OCCHR), 2013) <http://www.wluml.org/sites/wluml.org/files/UN%20report%20final.pdf> accessed 11 December 2016

not exercising due diligence and for the overall customary child marriages prevalent in their societies as indicated through statistical evidence. One limitation of the paper is that it does not delve into social and cultural aspects which govern customary child marriages and has understood the issue with a legal perspective. However, this legal analysis provides an insight to understand the issue through perspective of international human rights law and urges the reader for further investigation into the matter.

Recommendations

In light of our analysis in the essay, it is highly recommended to states parties to amend the marriageable age to 18 for girls in national as well as provincial laws. Secondly, state parties should comply with their duty of due diligence. This requires not just passing of legislations but also making sure implementation of laws is done properly and whether law enforcing institutions are undergoing proper investigation and prosecution. Thirdly, states parties should define the scope of their reservations in precise and specified language and clarify what exactly they mean by Islamic principles. This is necessary in order to understand the stance of both governments on prohibition of child marriages as a form of dispute resolution through the Islamic standpoint. Fourthly, it is recommended to the states parties to ratify the Optional Protocol to CEDAW and submit reports to CRC and CEDAW Committees regularly. In addition to these steps, cultural reforms and awareness raising campaigns with the help of media and non-profit organizations are needed. Additionally, there is a dire need to formalize the informal justice system in both Pakistan and Afghanistan. Moreover, lawyers and journalists of both countries should be made aware on international human rights legal principles so that it leads to establishment of a domestic human rights culture in line with international principles.

As far as the international human rights regime is concerned, it is recommended to treaty bodies to enforce more stringent enforcement and accountability mechanisms for the states parties. Both the CRC and CEDAW Committees should demand Pakistan and Afghanistan clarify their stance on reservations made on Islamic grounds. It should be noted that implementation of the conventions can only be ensured if there are more effective methods of holding states accountable in cases of non-compliance towards treaty provisions. To conclude, it can be stated that when a state ratifies any international treaty, it gets duty bound to formulate domestic laws in accordance with that particular treaty and to properly implement the provisions within the domestic

framework. This requires not only passing of laws and judicial decisions, but also their proper implementation and due diligence. Failure to do so will make state parties liable before the international community. It reflects failure of both state parties as well as the international human rights enforcement regime.

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EXPLORING PRECEDENT FOR INTERNATIONAL HUMAN RIGHTS IN SHARIA: A RECONCILIATION?

By Rana Adan Abid[1]

Abstract

Against the well-documented rise of Islamophobia in contemporary Europe and North America, this research paper seeks to understand the seemingly irreconcilable positions of Islam and International Law on the question of human rights. In doing so, the author presents a comparative analysis of the legal discourse within Sharia, and the body of international treaties and conventions that constitute International Human Rights Law. The author shall limit discussion to the first two generations of human rights with a particular focus on the rights of religious minorities, Intersex/Trans individuals, prisoners of war, civilians during wartime, the economically disadvantaged and the rights of dependents. The discussion shall navigate through Islamic and international legal jurisprudence, with references to Quranic verses, Hadith and events in Islamic history on the hand and the UN Charter, ICCPR/ICCSOR, the Geneva Conventions and Western scholarship on the other. Towards the end of this comparative analysis, it shall be demonstrated that there are in fact notable points of convergence between Islamic and Euro-centric legalities on humanitarian issues, and that the understanding of the former as antithetical to human dignity is not empirically sound.*

Is Islam antithetical to the modern conception of human rights? Does Sharia lack an alternative framework to protect the rights of the vulnerable, underprivileged and marginalized sections of society? And most importantly, when it comes to the hard questions concerning legal principles, norms and philosophies that lie at the very

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foundation of the human rights discourse; to what degree can Sharia and International Law ever be reconciled?

These are the salient questions addressed in this paper within a framework that is based on six distinct groups of individuals: non-Muslim minorities in Muslim majority States, the Intersex/Trans* community, prisoners of war, civilians during wartime, the economically disadvantaged and the dependents. Conceptually speaking, the paper shall limit its scope to the first two generations of civil, political, social, economic and cultural human rights as enshrined in the ICCPR and ISECR, respectively. In terms of the methodology used to substantiate claims, this piece of research has employed a vast range of materials to find sound legal precedent, including but not limited to, international treaties and conventions (most notably, ICCPR, ICESCR and the four Geneva Conventions), U.N. State practice, Western and Islamic scholarship, Quranic verses, sayings of Prophet Muhammad recorded in the six authentic books of Sahih Bukhari and well-documented events from early Islamic history.[2] The use of such an integrated and interdisciplinary pool of knowledge has ensured this works commitment to the bigger picture.

It is pertinent to appreciate at the beginning that the thematic focus of this paper lies at the highly dynamic interface of law, morality and religion - a troika that together stands at the foundations of human civilization. However, to contain this comparative within a predominantly legalistic structure, it is important to define beforehand the parameters of our understanding of Law. These parameters must be applicable in contexts across civilizations. What universal quality makes Law what it is? And how does Law change over time? We proceed with an understanding of Law as that which can bind and direct behavior through firstly, a *subjective* element of belief and, secondly, the psychological *fear of* punishment. Theoretically, we remain close to John Austin's positivistic understanding of Law with its twin elements of Duty and Sanction. Now, to apply this understanding to the theory and practice of International Law, let's have a look at the way *opinion juris* is best understood as the *subjective* belief of a given State as to whether it reckons a certain course of action (or inaction) is legally binding upon itself. This element of belief is subjective and psychological and may be identified within foreign office statements, UN General Assembly resolutions and other diplomatic correspondencees. As for the *fear* of punishment it comes with the variety of reprisals that exist on the international level, such as reputational damage, monetary loss, loss of

[2] Al-Tabari, Ab Jaffar, 'The History of the Kings and Prophets'

moral standing, international trade embargos or diplomatic isolation. A *fear* that altogether accounts for the overwhelming compliance of UN Member States to International Law despite the absence of a international police or government.

The same definition is also applicable to Sharia – a body of laws that is for the great number of Muslims around the world, the foremost source of all worldly obligations. Here, we have the *subjective* belief manifest in the deep conviction of Muslims that God is the ultimate source of Law. The element of *fear* is evident upon a cursory look through the text of the Quran where divine retribution and the punishment of Hell are one of the most recurring themes. Both these bodies of Law contain a *subjective* element of belief and the sense of *fear* that mark the parameters of our understating of Law.

In the interest of intellectual integrity, as a preliminary activity it is important to identify and trace the origins of International Law within the broader historical context within which it developed through the ages. Copious amounts of interdisciplinary research during the 20th century pointed to the idea that the norms and principles found at the basis of contemporary human rights and humanitarian law are deeply rooted in Biblical traditions. Max Stakehouse, author and theologian, has identified serious concerns about an understanding of the human rights agenda without an understanding of its '*ultimate roots and legitimations'*[3]. For him and the present writer, the key task is to '*identify where, in the depths of all these traditions, that residual capacity to recognize and further refine the truth and justice of human rights insights lies, for this is necessary in order to overcome what, otherwise, is likely to be a "clash of civilizations'*'[4].

By way of an example, the linear evolution of the 'Just War Theory' is one case in point in order to demonstrate the influence of Christian doctrine on Western legal philosophy. The historical predecessor of the two Latin maxims: *Jus In Bello* and *Jus Ad Bellum*. Beginning with the fourth century writings of Saint Augustine, a prominent Catholic priest and scholar of his time who was the first to coin the term 'Just War' – a concept that has, ever since, informed and redefined international legality on the use of force.

Centuries later this inspired Saint Thomas Aquinas to build upon the authority of Augustine's arguments to define the practical conditions under which a war could be deemed just. For his philosophical contribution, he was later given the title of the

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[4] Same as above.

Doctor of the Church by the Roman Catholics during the thirteenth century. The framework Aquinas proposed later culminated into one of the foundational treatises of modern International Law *'The Law of Peace and* War' by Hugo Grotius who relied heavily on citations from the Old and New Testament to demonstrate a universal Law on the quintessential questions concerning Armed Conflict. Wthin his work Grotius employs a multilayered mode of argumentation resorting to religious edicts among arguments from utility. Widely seen as the first systematic study of the subject from a legalistic angle, the work earned Grotius his status as the 'father of modern International Law'.

These theo-philosophical works handed down through history by the pioneers of International Law have been developed today into elaborate legal frameworks: International Law of Armed Conflict, International Human Rights Law and International Humanitarian Law. Therefore, as a matter of historical fact, it can be proven that an understanding of the human rights movement, or for that matter International Law, without addressing the religious context of its making belies the trajectory of events through which International Law itself came into being.

On the other hand, Sharia - representative of the Islamic discourse - is a body of divine commandments that find their starting point in the Holy Book of Muslims. The Quran is believed by Muslims to be the largely unchanged Word of God carrying the force of Law in their lives. The second source of Law under Sharia comprises of all the collections of Hadith and Sunnah detailing the everyday conduct of Prophet Muhammad (although, unlike Quran the content of Hadith and Sunnah is more likely to be challenged for its lack of authenticity).

However, due to the rise of new, complex and ever-changing circumstances of human life, great need for law-making was identified in Muslim societies. These declarations of law (say, *Fatwas*) seek to fill the gaps left so by resorting to the ancillary sources of Ijma (Consensus of Opinion) and Aql (Reason) for legal interpretation. Even within the two major sects of Islam (Shiite/Sunni) there is an ongoing lack of consensus as to the circumstances under which these sources of Islamic Law are applicable. Sentient to this deadlock the present writer shall deliberately circumvent any discussion of *Fiqh* (or Islamic legal science), instead choosing to browse through good and valid precedent established by Quran, Hadith/Sunnah and early Islamic State practice.

THE RIGHTS OF RELIGIOUS MINORITIES

The rights of religious minorities were first codified in Islamic State practice with the signing of the Charter of Medina that laid down a comprehensive code of conduct to govern over various religious denominations of the Arab World at the time. The Charter is a series of legal documents; only consolidated into one text after the death of Prophet Muhammad.

Read in tandem with the two primary sources of Islamic jurisprudence (Quran and Hadith/Sunnah) various clauses of the Charter stipulate substantial measures to uphold the equal and fair status of non-Muslim citizens. They do so through a comprehensive framework of civil, political, cultural, social and economic human rights. In a modern sense the rights under the Charter of Medina are comparable to the guarantee under Article 18 of ICCPR: '*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'*

The following clauses from the Charter of Medina particularly serve to establish precedent against discrimination non-Muslims:

- No Jew will be wronged for being a Jew (Right to Equal Treatment before Law).
- The security of God is equal for all groups (Right to Security of Life, Person and Property).
- The Jews must bear their own expenses and the Muslims bear their expenses. (Right to Self-Determination)
- The Jews of are a community along with the Believers. To the Jews their religion and to the Muslims their religion. (Right to Freedom of Religion)

Moreover, under the political authority of Prophet Muhammad, Muslims also signed a covenant with the Christians of Narjan. The covenant lays down practical guidelines for Muslim armed forces based on the teachings of Sharia in order to protect the civil rights of non-Muslims to life, property, places of worship and the freedom to practice their own religion:

> *"To the Christians of Najran and neighboring territories, the security of God and the pledge of his Prophet (s) are extended for their lives ,their religion and their property… to the present as well as the absent and others besides (a) there shall be no interference with the practice of their faith or their observances, nor any changes in their rights and privileges; (2) no bishop shall be removed from his bishopric nor any monk form his monastery, nor any priest from his priesthood and (3) they shall continue to enjoy everything great and small as heretofore, no image or cross shall be destroyed; they shall not oppress or be oppressed.''*

As a matter of general legal principle, at various points in the Quran, it is reiterated that there must always be justice in one's dealings with others, regardless of religious beliefs. In clear words, the Quran impresses upon Muslims that when it comes to matters of faith, the use of violence or coercive force is not the answer. For Muslims, this prohibition is codified by the Quranic verse: *'Let there be no compulsion in religion'* (2:256).[5] The same sentiment is echoed in Article 18(2), ICCPR, '*No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'*

Similarly, another Quranic reference establishes the rights of non-Muslims to a fair trial, '*When you judge between them, judge with justice (5:42).*[6] The rights of non-Muslims to special protection for their places of worship is also enshrined in Quran in the following words, *'And were it not that Allah checks the people, some by means of others, there would have been demolished monasteries, churches, synagogues, and mosques in which the name of Allah is much mentioned'* (22:40)[7].

Individual sayings attributed to Prophet Muhammad (PBUH) further point to the great importance attached to just and humane treatment of non-Muslims. On one occasion, as recorded in the Sahih Bukhari books, he is reported to have said:

> *'Whoever committed any act of injustice towards a person who has a treaty with the Muslim, took away part of his rights, charged him with something he could not do (labor or other things) or took from him*

[5] (Chapter 2: Verse 256)
[6] (Chapter 5: Verse 42)
[7] (Chapter 22: Verse 40)

anything without his consent then I will be his complainant on The Day of Judgement.'

Principles that underlie Article 18 of ICCPR, Art. 18 of UDHR and Art. 9 of the ECHR, find themselves echoed in the comprehensive Islamic precedent for protection of religious minorities in Muslim majority areas. At the time the Charter of Medina, signed over a millennium ago, might even have been one of the first written declarations in history to lay down religious freedom as a fundamental constitutional right.[8] However, the only challenge for contemporary Muslim legal systems is to adapt that precedent by make it more responsive to the needs of contemporary society. The gross violations of minority rights across Muslims countries have led to discriminatory treatment afforded by the State, widespread misuse of local blasphemy laws and the death penalty for apostasy. These practices challenge Sharia's legitimacy as a framework containing adequate safeguards in place for non-Muslims. If so, perhaps there might be an opportunity to introspect and reform Sharia as well as Islamic State practice to a different and changed world?

THE RIGHTS OF CIVILIANS DURING ARMED CONFLICT

During Armed Conflict an extensive body of international law classically known as *jus in bello* (now International Humanitarian Law) operates to regulate lawful conduct vis-à-vis treatment of civilians during wartime. Where both international law and Sharia acknowledge this inevitable possibility of war as a human condition, they also go on to prescribe limitations with the aim of minimizing and preventing human rights violations against civilian parties. Upon scrutinizing both frameworks, the author finds remarkable similarity between the two within this branch of law.

To start with, the distinction between a *civilian* and *non-civilian*; it seems that across these two bodies of law the wartime rules apply to precisely the same category of people. Article 3 in the general section of the Geneva Conventions states that each Party to the conflict shall be bound to apply, as a minimum, the following provisions to *"persons taking no active part in the hostilities"*. Despite the use of the term non-combatant to include military personnel (doctors/nurses) within international law, the term is used interchangeably with civilians for present purposes. While the author acknowledges this nuanced distinction between 'non-combatant' and 'civilian', the

[8] Khan, Ali, The Medina Constitution. Understanding Islamic Law, 2006. Available at SSRN: https://ssrn.com/abstract=945458

decisive criterion used under international law to determine whether certain rights of protection be granted to an individual is only contingent upon whether he/she has taken an active part in the hostilities.

Likewise, Sharia endorses the same distinction among people during times of armed conflict. This distinction between civilians and non-civilians was, as per Islamic jurists, a product of the Sunnah of the Prophet Muhammad (PBUH). In the Hadith, Muslims are repeatedly forbidden from harming women, children and old persons during times of Armed Conflict.[9]

Moreover, one of the most prominent chapters of the Quran lays down in vivid terms: '*Fight against those who fight you but do not transgress limits'* (2:191). The principles embodied in this verse not only identify and enforce the distinction between civilian and non-civilian, it also confirms self-defense as the only legitimate exception to the prohibition on the use of force by a State in much the same way as Art. 51, Ch. VII of the United Nations Charter preserves *'the inherent right to individual or collective self-defense'.* However, an in-depth comparison of the laws of armed conflict under international law and Sharia, while an insightful exercise on its own, falls outside the scope of this paper (See more). [10]

In a set of panel findings,[11] Senior Research Fellow at the Research Society of International Law – Pakistan, Oves Anwar presents the evidence of humanitarian rules within prominent addresses of the early Caliphs on the basis of the following words of then Caliph and political leader of the Muslim community, Abu Bakr:

> *"You shall not engage in treachery; you shall not act unfaithfully; you shall not engage in deception; (1) you shall not indulge in mutilation; (2) you shall kill neither a young child nor an old man nor a woman; (3) you shall not fell palm trees or burn them; (4) you shall not cut down [any] fruit-bearing tree; (5) you shall not slaughter a sheep or a cow or a camel except for food. (6) You will pass people who occupy themselves*

[9] (Sahih Bukhari V. 4, Book 52, 257 & 258)
[10] Abid, Adan., '*Reflections on the Legality of War under Islam and International Law'*, Courting The Law http://courtingthelaw.com/2015/12/01/commentary/reflections-on-the-legality-of-war-under-islam-and-international-law/
[11] Panel organized by the Network for International Law Students titled, 'Human rights in Islam and International Law: A Reconciliation?. Online Panel Report available at: http://courtingthelaw.com/2016/03/15/news-events/nils-panel-discussion-to-reconcile-human-rights-under-islam-international-law/)

in monks' cells; leave them alone, and leave alone what they busy themselves.'[12]

Principle	***Early Islamic practice***	***Modern State practice as codified by Additional Protocol I (1977) to the Geneva Conventions***[13]
Protection of children.	*'...you shall kill neither a young child nor an old man nor a woman...' (Caliph Abu Bakr)*	*Art 77. Protection of children* *(1) Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.*
Protection of women.	*'...you shall kill neither a young child nor an old man nor a woman...' (Caliph Abu Bakr)* *'Do not do harm against any woman, even if they utter abuse against your honour' (Caliph Ali)*[14]	*Art 76. Protection of women* *(1) Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.*

[12] (Tabari 1996: X, 16)
[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[14] (Tabari 1996: XVII, 30)

	It is narrated by Ibn 'Umar that a woman was found killed in one of these battles; the Messenger of Allah (may peace be upon him) forbade the killing of women and children. (Hadith)[15]	
Protection of civilian property,	*''If you reach their abodes, do not tear aside a curtain, enter a dwelling without permission, or cease any of their property apart from what you find in the army camp'*[16] *(Caliph Ali)*	*Article 51 - Protection Of The Civilian Population* *2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*
Protection of places of worship.	*You will pass people who occupy themselves in monks' cells; leave them alone, and leave alone what they busy themselves with. (Caliph Ali)*	*Article 53 - Protection of cultural objects and of places of worship* *'...it is prohibited:* *(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual*

[15] (Book 019, Hadith No. 4320)
[16] (Tabari 1996: XVII, 30)

		heritage of peoples…'
Protection of animals.	*(5) you shall not slaughter a sheep or a cow or a camel except for food. (Caliph Abu Bakr)*	*Article 54(2) provides:* *It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population*
Protection of plants.	*(3) you shall not fell palm trees or burn them; (4) you shall not cut down [any] fruit-bearing tree (Caliph Abu Bakr)*	*Article 55* *Protection of the natural environment* *2. Attacks against the natural environment by way of reprisals are prohibited.*

Table 1

Table 1 above illustrates the extensive precedent in Sharia for the principles underlying modern rules and regulations for the special protection of civilian life and property, women, children and places of worships during the time of Armed Conflict.

THE RIGHTS OF PRISONERS OF WAR

Across civilizations, prisoners of war have been afforded special protection despite their status as former enemy combatants. Once the duration of active hostilities has elapsed and war has officially ceased, the applicable sections of IHL provide guidelines for the just and humane treatment of prisoners of war. A general position endorsed by the Quran is one that repeatedly ordains Muslims to provide for the basic material needs of those held in captivity, in much the same way as the following rules under the Third Geneva Convention (1949):

A) *HUMANE TREATMENT OF PRISONERS - Article 13: Prisoners of war must always be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest'*

B) FOOD - Article 26: '*The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners… Sufficient drinking water shall be supplied to prisoners of war…''*

C) CLOTHING – Article 27: 'Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power…'

The verses of the Quran recognize and encourage the act of freeing a captive as an act of charity. The basis for this is found in a verse from the Quran which states:

> '*Zakat expenditures are only for the poor and for the needy and for those employed to collect [Zakat] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveler - an obligation [imposed] by Allah . And Allah is Knowing and Wise'*.

From the eight categories of persons named eligible for the mandatory duty of Zakat, prisoners of war fall under the category known as '*Riqab'* (the Arabic word for those captives who make an agreement with their master to pay a certain ransom for their freedom). Another Quranic reference reiterates this commandment to ensure there is humane treatment of prisoners of war, '*And they feed from what they love for themselves the indigent, the orphan, and the prisoner of war.*' [8-9][17]

As a matter of fact, the Quran not only strongly adheres to the distinction between combatants and non-combatants as defined under international law for the protection of civilian life and population, it also encourages a practical framework for the emancipation of war prisoners. It does so by stipulating practical conditions under which it may be possible to grant them freedom,

> *'When you meet the unbelievers in the battlefield strike off their heads and, when you have laid them low, bind your captives firmly. Then grant them their freedom or take a ransom from them, until War shall lay down her burdens.'* (47:4)[18]

The Quran further delineates a formal procedure through the formulation of a contract of emancipation for those held in captivity,

> '*And those who seek a contract for eventual emancipation by purchasing their freedom from their owners for a price agreed upon] from among whom your right hands possess — then make a contract with them if you know there is within them goodness.*' (24:33)

During the early years of Islam, a well-known practice allowed prisoners of war to regain their freedom by teaching ten Muslim children how to read and write. This general prohibition on the inhumane treatment[19] of prisoners of war was put to practice by the early Caliphs. Caliph Ali gave the following orders to Muslim armies,

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[17] (Chapter 8: Verse 9)
[18] (Chapter 47: Verse 4)
[19] Nigosian, S. A. (2004). Islam. Its History, Teaching, and Practices. Bloomington: Indiana University Press. p. 115.

> *'If you fight them and defeat them, do not kill the fugitives, do not finish off the wounded, do not uncover their nakedness, and do not mutilate the slain.'* (Al-Tabari: 1996)

Based strictly on above verse, to execute a prisoner of war would be an un-Islamic practice. However, within the overall context provided by Sunnah as well as early Islamic history it becomes clear that such a prohibition has not in fact been followed on the ground. While there is wide disagreement among the Islamic schools of thought on the legality of executing an adult male prisoner, there is also general precedent under Sharia for protection of vulnerably placed prisoners of war – one that must be updated to cater to the exigencies of international relations and the modern rules of warfare.

THE RIGHTS OF THE ECONOMICALLY DISADVANTAGED/POOR

This section of the paper focuses on the rights of the economically disadvantaged. Within the human rights discourse, these are reminiscent of the rights that fall under the scope of one of the core human rights conventions, the International Convention on Economic, Social and Cultural Rights (ICESCR). Here, the aim of the author is not to delve into a discussion of which ideology is more egalitarian, but to identify and compare legally binding precedent within the two that commonly recognizes the rights of the economically disadvantaged/poor to the basic material amenities of life such as food, housing and clothing.

It bears to note that one of the foremost criticisms against human rights conventions in specific, and instruments of International Law at large, is for their lack of enforcement mechanisms. In other words, what has been identified only as a matter of individual right under ICESCR, has been given more binding value under Sharia through the mandatory practice of Zakat and other voluntary donations derived from Hadith and Sunnah, such as *Sadaqat, Kaffara, Sadaqa-e-Jariah, Awkaf.*

Upon a closer understanding of the legal philosophy underlying the diabolical relationship between Rights & Duties[20], it can be shown that the discourse on social and economic human rights is in fact more binding and enforceable under Sharia. Coppens describes rights and duties as 'correlative and inseparable'[21]. As the corresponding obligation to a right, it is duties that allow moral values and social norms

[20] Coppens, Charles S.J. (1895) A Brief Text-book Of Moral Philosophy, New York: Catholic School Book Company.
[21] Same as above.

declared in the language of rights to be practically implemented. In this way, the ways of Sharia can be seen attaching the weighty force of divine rule towards the practical implementation of the human right to social and economic well-being. It does so by providing specific mechanisms (aforementioned) on an individual and State/communal level that oblige the redistribution of wealth as a matter of practice.

Zakat is one of the five fundamental duties of individual Muslims in possession of a certain amount of money for a period of one year (*Nisab*). Various Quranic verses serve to reiterate the status of Zakat as the individual's primary obligation to the economically disadvantaged sections of his/her community. According to the Quran, '*[prescribed] charitable offerings are only [to be given] to the poor and the indigent, and to those who work on [administering] it, and to those whose hearts are to be reconciled, and to [free] those in bondage, and to the debt-ridden, and for the cause of God, and to the wayfarer. [This is] an obligation from God. And God is all-knowing, all-wise.'* (9: 60)[22]. On other occasion, it has been made clear that the failure to perform one's individual duty of Zakat is worthy of punishment according to Sharia. In this way Sharia practically works to promote the same egalitarian values and ideas of social justice that lie at the philosophical basis of the modern welfare state. National constitutions around the Islamic testify to the fact that the tenets and laws of Islam are sensitive to the social and economic rights of the poor.

THE RIGHTS OF DEPENDENTS

Another class of people who are afforded special protection under Sharia are those who may depend on others for sustenance, employment and patronage. For instance, members of house staff, non-earning family members, employees in offices and others in a subordinate position to oneself in terms of wealth and privilege. This category of persons for whom one may carry individual liability in different legal capacities in the modern world is also well-established in Shariac literature.

Beyond the scope of the legal framework under ICESCR, the Cairo Declaration of Human Rights (date) adds '*dependents'* as a social group entitled to protection. Strong precedent for rights of dependents can be found in Prophet Muhammad's last sermon wherein there is clear indication of this responsibility/duty upon all Muslims: *'Oh people! Be mindful of those under you. Feed and clothe them as you feed and clothe*

[22] (Chapter 9: Verse 60).

yourselves'[23]. Moreover, in the Quran, there are repeated references to act in a just and friendly manner towards those who fall under one's realm of authority in one way or the other: "*Allah has favored some of you over their provisions to those whom their right-hand controls so that they become equal partners in it. Would they thus disclaim Allah's favor?"* (16:71)[24]?

In this way, the commandments of Sharia extend to both an individual's position in life as a guardian of minors, dependent relatives and disabled persons within family as well as the collective responsibility of the State or community towards vulnerable groups such as senior citizens, homeless and orphans. In the last two sections of this paper, it has been demonstrated that the Islamic discourse on human rights is fully conscious of the legal responsibility of individual citizens and the State to materially act for the implementation of social and economic rights.

CONCLUSION

While there is certainly room for this comparative analysis to develop further, it does manage to lay down significant precedent for human rights within Islam. It contributes to existing literature for the following reasons. Firstly, by highlighting legal precedent under Sharia that may be construed as similar or comparable to the standards of International Human Rights Law, this research critically questions the popular perception of Islam as a religion with no respect for the fundamental and inalienable dignity of human beings. Secondly, this paper revisits the understanding of Sharia by driving attention back to fundamentals while advocating for an open mind to incorporating lessons from international best practices. Lastly, by contributing to arguments for similarity as opposed to conflict, the author offers an alternative to the presumably inevitable 'Huntingtonian' clash of our times. In doing so this research contributes to a discourse of reconciliation by highlighting shared precedent in order to build common ground for the understanding of key questions that continue to polarize our world.

[23] The Last Sermon. Full text available at: http://hadithoftheday.com/the-last-sermon/
[24] (Chapter 16: Verse 71)

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MISUSE OF A PURISTIC ISLAMIC SHARIAH PRINCIPLE: PAKISTAN'S BLASPHEMY LAW

Muhammad Hamza Haider[1]

Introduction

The purpose of this article is to provide an insight into Pakistan's current blasphemy law with reference to Islamic Shariah law.

Current Law of Blasphemy in Pakistan

Under Section 295-C of the Pakistan Penal Code, the "Use of Derogatory Remarks, etc., in respect of the Holy Prophet" may be a capital offence:

> *Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with DEATH, or imprisonment for life, and shall also be liable to fine.*

According to data compiled by nongovernmental organizations (NGOs), a total of 695 people were accused of blasphemy in Pakistan between 1986 and April 2006.[2] The Pakistani daily newspaper *Dawn* has reported that out of some 5,000 cases which were registered between 1984 and 2004, 964 people were charged with blasphemy. These numbers reflect the increased application of the law following amendments during General Zia's regime. In recent times, these amendments have stirred much academic debate and have also been the cause of misuse of the blasphemy law.

History of the Law

The Penal Code was enacted in the sub-continent in 1860, and renamed Pakistan Penal Code (PPC) after the partition of the subcontinent. Chapter XV (fifteen) of the PPC contains the blasphemy laws and consists of four sections (295 to 298). The initial purpose of Chapter fifteen was to provide punishments for anyone who injured the

[1] The writer is the founding partner at QHM Legal Consultants in Lahore, Pakistan
[2] Bureau of Democracy, Human Rights, and Labor, "Pakistan," in International Religious Freedom Report 2006 (Washington, DC: U.S. Department of State, September 2006), www.state.gov

religious feelings of any citizen of the land. The punishments ranged from one to two years in jail, and targeted the *mens rea* (bad intention) for the offence.

Under s.295 of the PPC, the act of defiling a place of worship with the intention of insulting the religious feelings of any group was an offence punishable by two years' imprisonment or fine or both. The offence was non-cognizable, bailable and non-compoundable. Similarly, under s.296 of the PPC, to disturb a religious assembly (including worship or ceremonies) was an offence with a punishment of one year or a fine or both. Legislators at the time also made trespassing on any burial place or the humiliation of a dead body an offence, punishable by a one year sentence and/or a fine. (s. 297 of the PPC) Section 297 of the PPC was also non-cognizable, bailable and non-compoundable. Lastly, the act of wounding the religious feelings of any person was declared an offence under s. 298 PPC, with a punishment of a one year sentence or fine or both. This offence was non-cognizable, bailable and compoundable.

With the passage of time, religious tensions led the colonial rulers to make the blasphemy laws harsher. In 1927, s. 295 was declared cognizable, bailable and non-compoundable. The act of outraging or insulting the religious feelings of any person was declared a crime carrying a punishment of ten years imprisonment and/or a fine under, s. 295A PPC. This offence is non-cognizable, non-bailable and non-compoundable. It is also an offence against the state, meaning a private person cannot initiate proceedings against the accused. Under s. 196 of the PPC, only the state or provincial government can take such a case to the court.

Decades later, during the military dictatorship of General Zia-ul-Haq, a number of other sections pertaining to blasphemy were added into the Pakistan Penal Code. Blasphemous remarks against the companions (Sahaba) or family members of the Prophet were criminalized in 1980 under s. 298-A, carrying a three year jail sentence. In 1982, defiling or desecrating the Holy Quran was declared an offence punishable by life imprisonment (25 years) via s. 295B. In 1984, certain activities and practices of the Qadyani group were declared unlawful via s. 298B & 298C, both carrying three year sentences. In 1986, s. 295C was introduced, which made defiling the name of the Prophet Muhammad (P.B.U.H.) in any way or form, an offence punishable by death or life imprisonment. The cognizance of these two sections is still debated.

These changes have brought the blasphemy laws to their current state. Although their initial purpose was to prevent injury of the religious sentiment of any group, this final

form focuses mainly on punishing those who are seen as offending Islam. Unfortunately, these laws have often been misused to settle personal scores.

Misuse of Blasphemy Law

While nobody would or should accept gratuitous insults levelled at any religious group, the abuse of blasphemy laws has been on the rise. Blasphemy laws are frequently used by a complainant to "get back" at someone in a local dispute. Rather than calming religious tensions, this results in exacerbating problems between religious communities. The misuse of s. 295C is of particular concern. The rise in the use of these laws started off gradually but has suddenly increased exponentially. Only 11 blasphemy cases were registered in the 31 years from 1948-1979 (one every three years); only 3 were registered between 1979-86 (one every two years); 44 were registered between 1987 and 1999 (a little over three a year); and then there were 52 cases in the year 2000, alone. In *Mehboob*[3], the Court noted that nine cases (18%) were registered against non-Muslims, but "the law was being abused more blatantly by Muslims against the non-muslims to settle their scores." A recent report suggests that in the year 2013, there were 16 prisoners facing death sentences and over twenty more facing life sentences or a term of years under the blasphemy laws.[4] There is, however, some suggestion that these figures may be an underestimation, particularly with regards to prisoners still under trial.

Indeed s. 295C of the PPC in particular, is susceptible to great abuse. The malice of some complainants is reflected by the fact that in 90% of blasphemy cases the accused has ultimately been acquitted. However, the politicisation of the issues surrounding blasphemy injects a danger that harsh sentences will be imposed where the compassionate nature of Shari'a law has been ignored. It is therefore important that the law be fully and fairly applied.

a) Personal Grudge, Enmity and Disputes

Sadly, a vast number of cases have shown that personal enmity has been the root cause of blasphemy accusations. In the late 1980s, in the district of Larkana, there was a feud between two tribes with a history of old enmity. In the conflict, one tribe attacked the

[3] Muhammad Mehboob v The State, PLD 2002 Lahore 587
[4] United States Commission on International Religious Freedom, "Annual Report for 2013", April 2013 (Washington D.C: U.S.C.I.R.F), http://www.uscirf.gov.

other with deadly weapons, causing firearm injuries, set their houses on fire and snatched valuable goods from them. The police registered cases against 79 nominated accused and 30 unidentified accused under the offences of attempt to murder, burning houses and dacoity. Even though it later appeared that no act of blasphemy was actually committed, s. 295 was added to the charges.[5]

Similarly, there was a dispute between the caretaker of the Auqaf Department, Government of Pakistan and a claimant of a Gaddi-Nasheen of a shrine in Jhang over the distribution of money from the shrine's saving box. The claimant registered a criminal case of blasphemy against the caretaker. The Supreme Court of Pakistan declared this to reflect nothing more than personal enmity.[6]

In Lahore, for instance, there was a criminal case involving two Christians, N and A. N and his father were the accused in the criminal case and A was a witness against them. N converted to Islam and registered a blasphemy case against A. This case was obviously false, apparently because N was angry at A for being a witness.[7]

Nobody is immune from the misuse of the blasphemy laws. A serving Major General of the Army exchanged hot words with the employees at WAPDA on the completion of the Tarbela Dam Project. He was accused of blasphemy and sacked from his job. Ultimately, the Lahore High Court exonerated him.[8]

Unfortunately the law has also been abused by law enforcement officers. In Nawab Shah, Sindh, the police were conducting a search picket on the street. An angry exchange took place with some people being searched. Apparently, acting on a grudge, the police registered cases of illegal arms possession and obstructing police officials from their duty, and added blasphemy under S.295-A. The Sindh High Court acquitted all the accused with stern remarks against the Police Officials regarding their ill will.[9]

b) Misapplication of Law & Procedure

Misapplication of Shari'a law is also one of the causes of misuse of the blasphemy provisions. A criminal case can only be registered by an authorized officer of the Provincial or Federal government under s. 295-A of the PPC. A private person cannot be the complainant or informant for the offence, yet this rule is often not respected in

[5] *Muhammad Usman v Meer Khurshid* 1990 PCrLJ 609.
[6] Ghulam Mohi-Ud-Din Shah v Hafiz Muhammad Ramzan 2007 SCMR 1931
[7] *Anwar Masih v The State* 2005 PCrLJ 1636
[8] *Major-General Fazal-I-Raziq, Chairman, WAPDA, Lahore v Ch. Riaz Ahmad* PLD 1978 Lahore 1082
[9] *Zahid Hussain v The State* 2005 PCrLJ 1683

practice. See for example *Mohsin Raza v The State* 2010 YLR 987, *Pawan Kumar v The State* 2010 MLD 253, *Abdul Razzaq v The State* PLD 2005 Lahore 631, and *Fayyaz Ahmad v The State* 2003 YLR 3137.

In the city of Pasroor, Sialkot, a blasphemy case was registered where the police arrested the accused and sent him to jail without proper investigation. The entire process was completed in less than 24 hours, in the heat of the moment. The Lahore High Court declared the whole investigation and process null and void and acquitted the accused. (*Saleem Masih v The State* 2003 YLR 2422).

Similarly in September 2006, the police refused to register a case of alleged theft by Shahid Masih and Mohammad Ghaffar due to insufficient evidence provided by the complainant, Arshad Khan.[10] According to the Asian Human Rights Commission (AHRC), they instead advised Khan to lodge a complaint of blasphemy. He therefore filed a police report alleging that the two men had stolen and burned an Islamic religious text. Despite knowing that the charges were fabricated, the police arrested Masih and Ghaffar for blasphemy under Chapter XV of the PPC without following proper procedure. Both men were eventually acquitted of the charges and released.

Blasphemy and Mental Illness

In recent years, a number of cases have raised national and international interest in the issue of mental illness as it relates to blasphemy cases. There have been no studies specifically aimed at assessing the relationship between these two things. However, as discussed in a recent article by Dr Muzaffar Husain, there are a number of indications that mental illness and blasphemy cases are closely linked.[11] In particular, a pattern appears to have emerged from a number of the cases reported in the media. In 2012, for example, at least three high profile cases of people with mental health disorders hit the headlines; including the case of Rimshah Masih, a teenage girl reportedly suffering from Down syndrome. The apparent link between blasphemy and mental health is not all that surprising given that some of the things that people say – cited in blasphemy cases – are strong evidence of mental illness. For example, persons suffering from insanity sometimes claim to have some kind of divine status. Any reasonable, sensible

[10] Masih is a common Pakistani Christian surname. Bureau of Democracy, Human Rights, and Labor, "Pakistan," in 2007 Country Reports on Human Rights Practices (Washington, DC: U.S. Department of State, March 2008), http://www.state.gov.

[11] Dr Muzaffar Husain, "Blasphemy Laws and Mental Illness in Pakistan", The Royal College of Psychiatrists, Psychiatric Bulletin Feb 2014, http://pb.rcpsych.org/content/38/1/40.full.pdf .

person knows that this cannot be true. Thus, the simple fact that someone makes such a statement must be seen as strong *prima facie* proof of a mental disorder. Unsurprisingly, then, issues of mental health arise very frequently in blasphemy cases, even if they are not fully appreciated. An inquiry into the accused's mental health must therefore play a key role in the majority of blasphemy cases to be raised with the authorities.

a) Insanity

The most extreme loss of mental abilities is termed as insanity. Insanity may be caused by several factors: it could be a long term illness or it could be a temporary psychological state. In either case where a person is unaware as to the nature of his act, he shall be considered 'insane'. Thus PPC s. 84 reads:

> '*Act of person of unsound Mind.* Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.'

This section is a *complete defence* to **all** offences in the PPC. The elements required to be proved under this section are:

1. Did not know what he was doing or, if he knew this;
2. Did not know it was wrong to do; O
3. Did not know it was contrary to law.

Again, it is important to consider the logical consequences of various claims of divinity: by definition, such claims are the fruit of a delusional mind. At the same time, if a deluded person believes such a claim to be true, it is equally obvious that the unfortunate person will not know that it is contrary to law.

It is important to understand that brilliant people may meet the insanity defence, at least at certain times – there may be a thin line between genius and insanity. For example, many famous people have suffered from the illness that is variously called bipolar disorder or manic depression. Such people have included the artist Vincent Van Gogh (who painted brilliantly when in the throes of his disorder), and even British Prime Minister Winston Churchill. Winston Churchill was perfectly sane for most of his life, but when a person who suffers from such an illness plunges into a manic episode, he might very well lose perspective on the difference between right and wrong.

This unsoundness of mind must exist at the time of commission of offence. Thus, if the accused is said to be suffering from bouts of insanity, then it must be shown that he was suffering from such a bout at the time of commission of offence. Importantly, a plea that the accused was insane at the time of occurrence does not mean that he has to be insane at the time of trial, since the one does not necessarily flow from the other.

Just like science and medicine, the law develops with time as well. The standard governing the insanity defence has been refined over time. In *Mehrban alias Munna v The State* (PLD 2002 SC 92), the court held that "in coming to such a conclusion [of insanity] the relevant circumstances like the behaviour of the accused before the commission of the offence and after the commission of the offence should be taken into consideration." In other words, often the very acts that lead to the accusation of an offence is strong evidence of a mental disorder.

In *Abdullah v The State* (1972 PCrLJ 1041), the court held that "if accused is able to prove substantial impairment to his mental responsibility due to even partial or borderline insanity so as to affect his knowledge as provided in section 84 PPC, he would be entitled to a favourable verdict on the plea of insanity... The fact need not be proved as scientifically certain but can be established on a balance of probabilities."

In most of the cases where the plea of insanity was accepted, while the conviction and sentence was set aside, the accused is directed to be admitted to a Mental Hospital. However, this is not logically required in all cases, as a transient moment of insanity may pass. Thus, in *Syed Muhammad v The State* (1995 MLD 667), the court not only accepted the insanity plea and acquitted the accused, but ordered his release. This was a blasphemy case where the man had been convicted by the lower courts. The man was not aware of his actions whilst committing the offence, thus fell within the ambit of s.84 of the PPC, but his period of insanity was over.

b) Mental Health issues in Shariah Law

The ability of the accused clearly to reason, and understand verses of the Quran and Sunnah that set down the limitations on ones conduct, are of great importance when convicting someone of a crime. According to *Ahmad Ibn Naqib Al-Misri* in Umdat al-Salik wa Uddatal-Nasik (*Reliance of the Traveller and Tools for the Worshipper*)[12]the

[12] 'Umdat al-Salik wa 'Uddat al-Nasik (Reliance of the Traveller and Tools of the Worshipper) is a Sunni manual of Fiqh (Islamic jurisprudence). It is based mainly on the fiqh conclusions of Imam al-Nawawi, the great Hadith master (hafiz) and Shafi'i scholar of jurisprudence (mujtahid). The

"eligibility to perform" coupled with the ability to reason is what constitutes a criminal offence. He states the following:

> *'(1) A person could completely lack or lose eligibility for performance, like a young child during his childhood or an insane person during his insanity (regardless of his age), neither of whom has eligibility for performance because they lack human reason, and for neither of whom are there legal consequences entailed by their words or actions. Their agreements and legal dispositions are null and void, the limit of which is that if either of them commits a crime against another's person or possessions, he is responsible for paying the indemnity out of his own property, but not subject to retaliation in his own person. This is the meaning of the scholars' expression, "The intentional act of a child or insane person is an honest mistake."' (p. 18)*

> *"(2) A person could have partial eligibility for performance, an example of which is the child who has reached the age of mental discrimination (def: f1.2) but not puberty (k13.8), or the retarded person, who is not disturbed in intellect nor totally bereft of it, but rather is weak-minded and lacking in intellect, so that the Sacred Law treats him as it does the child with discrimination. Because each of these two possesses the basis of eligibility for performance by the fact of having discrimination, those of their legal actions which are absolutely beneficial to them, such as accepting gifts or alms, are valid without their guardian's permission."(p. 18)*

There is explicit evidence in the Holy Quran regarding the principle that an individual will only suffer criminally for the act or acts by which he has "earned" that suffering:

> *'On no soul doth Allah Place a burden greater than it bear; It gets every good that it earns And it suffers every ill that earns' (Chapter 2: 286)*

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appendices form an integral part of the book and present original texts and translations from classic works by al-Ghazali, al-Nawawi, al-Qurtubi, al-Dhahabi, Ibn Hajar and others, on topics of Islamic Law, faith, spirituality, Qur'an exegesis and Hadith sciences, making the work a living reflection of Islam as understood by some of its greatest scholars. (From <http://www.masud.co.uk/ISLAM/nuh/reliance.htm>) This book is a translation of the classical manual of Islamic Sacred Law (Shari'ah) `Umdat as-Salik by Ahmad ibn Naqib al-Misri (d. 769/1386), in Arabic with facing English text, commentary and appendices edited and translated by Nuh Ha Mim Keller, first published in 1991.

The Quran also differentiates culpability on the basis of *mens rea*. It says about the offender who erroneously commits the offence without the intention to violate the law:

> *'And there is no blame on you concerning that wherein you made a mistake, (what counts is) the intention of your hearts.' (33:5)*

Hadith of the Prophet also bolster the framework of Shari'a Law set out in the above verses of the Quran. The following is a saying of the Prophet regarding unintentional offences,

> *It is reported on the authority of Abu Huraira "(The Prophet said:) Our Lord, punish us not if we forget or make a mistake… He (the Lord) said: Yes." (Sahih Muslim Book 001, Number 0228)*

In his book *Foreign Psychiatry in Islamic Jurisprudence*, Dr. Kutaiba S. Chaleby[13] writes about the importance of formulating the requisite intent during the commission of a criminal offence, under Shari'a in order to be punished for the crime. He observes the following;

> *'The concept of mens rea, guilty intent, is well accepted under Islamic Law. There is no crime if there is no intention to commit it. Under Islamic Law, the insane are recognised as lacking, or unable to have, an intention because of disturbed reasoning; therefore, they are not liable for the crimes they commit.'*

Chaleby also goes on to cite the reasoning given by Islamic scholars about the nuances of insanity, and defines it as three different states of being:

> *'the impairment of the mind, where it prevents action and speech from operating on reason, except rarely'*
>
> *'impairment of the power which distinguishes between fair and foul [good and evil] and conceives the consequences of those things. This power is no longer in evidence or it cannot do its function'*
>
> *'the impairment of the power in which the concept of the whole is achieved'*

Chaleby states that:

[13] Dr. Kutaiba S Chaleby MD practices forensic psychiatry and psychiatry in Tuba City, Arizona. Dr. Chaleby graduated with an MD 42 years ago. (from <http://www.healthgrades.com/physician/dr-kutaiba-chaleby-xb6sx>)

> *'there is no such disagreement about insanity and criminal responsibility in Islamic Law, namely that an insane person is not culpable for any action that he might commit.'*
>
> *'Islamic law rules that there is "no duty or punishment for the insane" and "the pen is withheld from the insane person till he recovers".*

Therefore, Islamic law provides protections against culpability to those who are suffering from mental illness.

Elements of the crime

Blasphemy was declared a *hadd* offence by the Federal Shariat Court in *Qureshi v Pakistan* (PLD 1991 FSC 10). In order to fully establish any *hadd* crime the prosecution must establish both the *actus reus* and the *mens rea*. The ***actus reus*** consists of all elements of a crime other than the state of mind of the defendant. This would include incitement of religious sentiment, and utterances in contempt of the Holy Prophet (p.b.u.h.) under s. 295-C. The ***mens rea*** is the state of mind that the prosecution must prove that a defendant had at the time of commission of the offence. Intention must include malice; the intent specifically to enrage religious sentiment under s. 295-C. However, the *mens rea* must also include a mental state that is not clouded by mental illness.

a) Actus Reus

The Federal Shariat Court in *Muhammad Ismail Qureshi v Pakistan* (PLD 1991 FSC 10) sets out the offence of contempt of the Holy Prophet (p.b.u.h.). The court looked at an Arabic dictionary and Islamic scholarly opinions to define the *actus reus* of the offence. The words used in the Holy Quran and Sunnah mean to suffer, to harm, to molest, to contemn, to insult, to annoy, to irritate, to injure, to put to trouble, to malign, to degrade, to scoff.[14] There must be an action to insult, to abuse, to revile, to scold, to curse, to defame.[15] However, the danger in merely citing these words is that they can be inherently vague. In order to ensure clarity in something as serious as blasphemy, there must be further elaboration in the definition.

[14] Arabic English lexicon, E.W. Lane, Book-I, Part-I, p. 44.
[15] Ibid, pp. 212, 249

Therefore the Federal Shari'a court quoted Allama Ibn Taimiyyah's definition of the *actus reus*. It means someone who "curse[s] the Prophet, prays for any difficulty for him, or refers to him such a thing which does not behove with his position or uses any insulting, false and unreasonable words or imputes ignorance to him or blames him with any human weakness etc."

In determining whether an act constitutes an offence of the contempt of the Holy Prophet (p.b.u.h.), close attention must be paid to the circumstance of the occurrence, as well as custom and usage of the present day – an act that may be considered deeply offensive in one circumstance may be deemed less offensive in another; similarly the same act may be more or less offensive according to local or individual custom.

As the court noted, "[s]ometimes a word in a situation may amount to injury and insult while such a word may not amount to injury and insult on another occasion. This shows that the interpretation of the words which bear different meanings and senses changes with the change of circumstances and occasions. When [the concepts of insult or contempt] has neither been defined in Shariah nor in the dictionary, custom and usage is relied upon in determining its interpretation. So what is considered contempt and insult in the custom and usage, will be considered contempt and insult in Shariah as well and vice versa."

b) Mens Rea

Mens rea is a crucial element of all *hadd* crimes under Islamic law. After all, the law cannot punish someone who does not harbour the clear intent to commit a crime. As the Federal Shari'a Court has declared blasphemy a *hadd* offence, intention has become an element of this crime and therefore *actus reus* alone is insufficient for a conviction under this offence.

Islamic Scholars on Blasphemy

a) Imam Abu Hanifa on Non-Muslims Committing Blasphemy

Imam Abu Hanifa said:

> "A *non-muslim will not be killed on the basis of shatam-e-rasool. The crime of shirk that he is already committing, that in itself is a much bigger crime*." (Narrated by Imam Khatabi in his book *Ma`alim al-sanan `ala sunan Abi Dawud*).

Imam Abu Hanifa believes that a non-muslim Shatam-e-Rasool – the one who commits blasphemy against Prophet Muhammad (p.b.u.h.) – will not be killed in punishment. '(Quoted by Imam Ibn e Taimiyyah in *Assarim Maslul*).

Imam Abu Hanifa and his students believe that *Sabb o Shatam* (Blasphemy against Prophet Muhammad p.b.u.h.) does not result in breaking of the (dhimmi) contract and will not result in his death. However, public blasphemy will result in a punishment like other prohibited acts (like reading their own books loudly). Imam Al-Tahawi narrated the same opinion from Sufian Thauri. However, it is permissible to extend punishment to death as a punishment if the subject repeats the offense repeatedly (habitual offense) and the hakim-e-wakt feels it is necessary to give the death penalty." (Quoted by Imam Ibn e Taimiyyah in *Assarim Maslul*).

"Imam Abu Hanifa, Imam Thauri and the people of Kufa are of the opinion that dhimmi (non-muslim) who commits blasphemy against the Prophet Muhammad PBUH will not be killed. The shirk that he is already committing is a much bigger crime (and we don't kill him for that). However they can be punished in a tazeeri manner (a punishment that is not a hadd) in order to teach him better manners" (Allama Qazi Ayyaz Malik in Ash-Shifa Batareef Huquq Al-Mustafa).

b) Imam Abu Yusuf on Muslims Committing Blasphemy

Abu Yusuf writes in Kitab al-Kharaj, "[i]f a Muslim abuses the Prophet (sws), calls him a liar or ascribes blemishes to him he becomes kāfir of the Almighty Allah. His wife is permanently separated from him. If he repents [he will be spared]. Otherwise he will be executed. The same is the ruling regarding such a woman. However, Abū Ḥanīfa [differs on this issue and] says that woman will not be killed. Rather she will be forced to re-enter Islam."

This book, *Kitab al-Kharaj*, was written as an extended letter to Haroon Al-Rashid and therefore is written as a consultation to the State.

c) Imam Thauri and Imam Tahawi

Imam Nawawi in his book 'al-Majmu' sharh al-Muhadhdha' writes that: "Imam Al-Tahawi wrote in favour of his teachers' opinion on the issue of sabb-e-rasool using the Hadith narrated by Syedna Anas (RA) for istidlal. Prophet Muhammad PBUH did not kill those who said Assam o Alaikum (instead of Assalam o Alaikum as a way of abuse).

Imam Al-Tahawi further states that if a Muslim commits such blasphemy, he will be committing an act of apostasy. However, non-muslims are already committing greater crime in the form of their kufr. This is the reason Prophet Muhammad PBUH did not kill them."

Imam Tahawi wrote in Muktasar Al-Tahawi (also quoted in Rasael Ibn Abidin by Imam Ibn Abidin) that "those non-muslims with whom there is a contract, if they commit blasphemy against the Prophet Muhammad PBUH, it does not result in the breaking of their contract. They will be asked to not repeat this offense again. If they do it again, then they will be punished but not killed."

d) Imam Ibn Abidin

Imam Ibn Abidin is one of the most important authorities in Hanafi Madhab, after the first generation of scholars. His book *radd-ul-mukhtar* is seen as an authority in issuing fatwas and investigating the popular opinions in hanafi madhab over various issues. He has discussed the matter of sabb-e-rasool in great detail in this book and in Rasael-Ibn-Abidin.

Imam Ibn Abidin explains that, the first Hanafi Scholar who claimed repentance of one who commits sabb-e-rasool will not be accepted was Bazazi, in the 15th century AD. There is not a single Hanafi Scholar before him that has said something along the same line. Imam Ibn Abidin further explains that even Bazazi seems to have misinterpreted the legal opinions of other scholars.

In Majmua-Rasael-Ibn Abidin, explains that a non-muslim can only be killed in the Hanafi Madhab if the subject is a habitual offender and in a rebellious manner persistently tries to set himself against the Muslims as a sarkhish.

Al-Haskafi's stance in Durr al-Mukhtar was refuted and elaborated on by Ibn Abidin. Ibn Abidin was a great admirer of Al-Haskafi in general but refutes the idea that the blasphemy of Prophet Muhammad (p.b.u.h.) in itself demands a punishment as Prophet's own right. For Muslims, he believed, this was a matter of apostasy. He believed that Prophet Muhammad (p.b.u.h.) forgave a number of people who had abused and injured him before accepting Islam, like Abu Sufyan and others. This meant that the criminal will not be punished as a result of carrying out the right of Prophet Muhammad (p.b.u.h.). Ibn Abidin explains that an opinion in Al-Bazzaziya and Al-Shifa has been misunderstood. He claimed that blasphemer can only be killed in the

case where he refuses to repent. For Muslims, Imam Ibn Abidin explains that the Hanafi Opinion is that he is to be given a chance to repent as in the case of apostasy. (Rasael Ibn Abidin)

e) Consensus/Ijma of 450 Hanafi Scholars in the 19th Century

Maulana Mansoor Ali wrote a series of legal opinions clarifying the Hanafi Positions in the midst of criticism from Wahabi circles. These opinions were validated by 450 Hanafi Scholars and are one of the most beautiful examples of Ijma, within a legal Madhab. He writes in this book Fatah-al-Mubeen and I paraphrase that the phrase 'Kanaat Tashtimu', where in the past continuous grammar tense has been used, is a proof that only habitual offenders in blasphemy may be killed on the orders of the judge. One time offenders are not to be killed as per the authentic Hanafi Position.

Conclusion

It is quite evident that Pakistan's current blasphemy law is both openly misused and abused, and has evolved into a law that is not in conformity with the Shari'ah. This divergence from its original intention would have merited a reform in the law especially considering the devastating effect of the misuse, however Pakistan's blasphemy law still continues strong, wreaking havoc amongst the lives of the various religious minorities. The Law in itself may stand but reforms are necessary to counter its misuse.

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LEGALITY OF THE USE OF DRONES FOR LETHAL PURPOSES: CAN THE USAGE BE CONFINED WITHIN THE LIMITS OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW?

By Tehreem Khalid[1]

Introduction:

The idea of drones is a relatively 'new' concept, new in the sense that they have not been mentioned in the ***Geneva Conventions 1949,***[2] nor is there any international document that prohibits them. There is a deficiency of legal paradigms that can analyze the use of drones, which generates two views: either the present approach, the international humanitarian law and international human rights law have to be moulded to incorporate the idea of drones, or a new international regime must be formulated altogether to encompass the legality of these unmanned aircrafts. Before trying to evaluate the present status of drones, one needs to grasp an understanding of what are drones.

Air warfare has now been prevalent in the world for more than 120 years since the Italian Invasion of Libya in 1911. Ranging from 'air torpedoes' during the World War I to 'Refitted B-24 Bombers', which the pilots flew for some distance, the use of drones has been evident in combat. A drone can be simply defined as an unmanned air vehicle (UAV), which may be remotely controlled or can fly autonomously through software plans operating in conjunction with the GPS.[3] Initially used for air surveillance, the function of drones has gradually expanded to areas of search and rescue, air defense, and direct attacks against selected targets. This latter use of drones is not just limited to the United States, but states such as the United Kingdom and Israel are also reported to have contributed to armed drone attacks.[4]

The use of drones by the US started mainly after the 9/11 attacks for precision killing under the Bush Administration, but their use more than doubled under the Obama Regime.[5] For instance, 408 drone strikes were reported in the Pakistani territory, in

[1] The author is a lawyer and is currently teaching at University College Lahore.
[2] International Treaties divided into four sections.
[3] The Department of Defense, 'Dictionary of Military and Associated Terms 579' (*Joint Publication 1-02*) (12 April 2001) (amended October 17, 2008).
[4] securitydata.newamerica.net, "World Of Drones" (2016) <http://securitydata.newamerica.net/world-drones.html> accessed 8 February 2016.
[5] BBC South Asia (31 January 2012).

which 2410 to 3902 people were killed, amongst which 959 civilians were victimized.[6] Similarly, in Yemen, up to 128 confirmed drone strikes have occurred which have killed 101 citizens amidst 729 targets. It should also be borne in mind that there is evidence of the possible extra drone strikes that have occurred, killing between 338 to 490 targets, and 26 to 61 citizens.[7] This initiative by the United States to carry out targeted killings of 'suspected terrorists' has attracted the most legal attention. The US finds itself situated against the weight of legal opinion. For instance, Christof Hens, the UN Special Rapporteur on extrajudicial killings addressed a conference in Geneva that '*President Obama's attacks in Pakistan, Yemen and elsewhere, carried out by the CIA, would encourage other states to flout long established human rights standards*'.[8]

On the other hand, Israel has remained the most secretive about its use of drones and has never actually acknowledged that it has used armed drones.[9] There has been a lack of evidence as to whether the missiles in Palestine are fired from the helicopters or deaths have been caused via drones.

The primary aim of this article is to evaluate the legal implications of the usage of drones for extra judicial killings of the suspected terrorists. International law provides for the right to life, right to a fair trial, but the usage of drones to specifically kill the 'enemy combatants'- a term coined by Israel and US for its enemies- snatches these rights from the terrorists as well as the civilians. This is the primary method that is being used to combat terrorism due to its various advantages. That said, the general silence by the international community on the issue is indicative that such practice may be accepted as part of the international law in the future. This is a strong reflection of the idea that the presumption of 'innocent until proven guilty' only applies to citizens of strong military powers. Such are the matters which will be debated in this article. The global community has also generated international humanitarian law and the author will focus on its various elements that may help determine a connection with the usage of drones. Thus, the drone attacks have not only been on those who have been killed, but on the system of international law itself. Sadly, the legality of the drone attacks, both in terms of human rights law and international humanitarian law, has been overlooked by the states who are so attached with their rights of self-defence. If the underlying aim

[6] The Bureau of Investigative Journalism, "Monthly Updates On The Covert War- US Drone War: 2014 In Numbers" (2015).
[7] Vice News, 'US Drone Strikes In Yemen Have Killed More Civilians Than Al-Qaeda' (2015).
[8] Bowcott O, 'Drone Strikes Threaten 50 Years Of International Law Says UN Rapporteur' *The Guardian* (2012).
[9] Katz Y, 'IDF Believed To Be Using Armed UAVs' *Jerusalem Post* (2012).

is to kill the terrorists with one attack of a robotic plane, states do not focus much on the collateral damage that occurs. Similarly, the principle of national sovereignty, something really dear to the international community is being considered inferior in light of achieving the aim of 'greater good'.

The first part of this article will cover the *Geneva Conventions*[10] which recognize various weapons as illegal, and it will be established that drones definitely fall into this category. After which, the fundamental idea of 'extra judicial killings' will be discussed, these are considered synonymous to targeted killings or precision attacks, in this paper. The human rights aspect will be dealt with here which would involve a debate about whether the right to life as granted under the *American Convention on Human Rights*[11], and the *European Convention on Human Rights*[12], is being violated or not, in terms of the discussion of its derogatory/non-derogatory nature. Due process would then be argued in depth.

The next part of the research will focus on the prohibition on the right to use force under the *United Nations Charter,* and whether the US's employment of drone attacks for extra judicial killings, is a rightful exercise of their right of self-defence under *Article 51 of the UN Charter*. It would entail discussion of the idea of pre-emptive self-defence; a customary right granted to states, along with the two elements of necessity and proportionality.

Furthermore, the idea of international humanitarian law will be discussed in the next section, which will include a debate of whether the war on terror can be termed as an armed conflict or not. Additionally, the four elements of humanity, precautionary measures, proportionality and military necessity that are required during an armed conflict, as mentioned in the *Geneva Conventions 1949, Convention relating to the Protection of Victims of International Armed Conflicts*[13] will be highlighted. An argument about there being no strong evidence of targets being involved in hostilities,

[10] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.
[11] American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (ACHR). art 4(1).
[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Entered into force 3 September 1953) ETS 5. Art 2(1).
[13] International Committee of the Red Cross (ICRC), '*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)'*, 8 June 1977, 1125 UNTS 3.

would be furthered, which would demand a discussion of whether the United States is actually targeting legitimate combatants or not.

Having considered the legality of the drone attacks through the paradigms of self-defence, *jus in bello*, and international human rights law, this article will analyse and criticize the arguments provided by US and Israel (in another subchapter). Focus would also be given to the rules that these states have made for themselves and how far have they actually relied upon these self-imposed rules. It would be pinpointed that only the argument of consent stands correct while all other justifications will be dismissed.

Chapter 1: Drones and Extra Judicial Killings:

This Chapter will focus on two issues: first, whether drones have been prohibited under international law in any document, and second whether extra judicial killings are endorsed or forbidden. The former would highlight the debate about whether drones can actually considered as weapons or not. The latter would entail discussion of the determination of the violation of the right to life under the main human rights' treaties. Due process will be discussed-it would be seen whether the terrorists are being heard in front of an impartial, independent tribunal or are allowed to vanish in the cloud of extra judicial killings.

Are drones analogous to the weapons prohibited under the Geneva Conventions?

Drones have been used not only in extra judicial killings, but also for lethal purposes generally. They seem to be qualitatively different from other weapons as they can carry out their lethal purposes simply without any risk to the perpetrator. The usage started with the attacks by the US Air Force in 1964, as a response to the deaths of a number of American pilots in Vietnam, and since then drone strikes have emerged as an important means of warfare. Whenever a new weapon surfaces, it generates a lot of discussion, some support it while others condemn it. Drones similarly have raised the question of whether they are implicitly prohibited by the Geneva Conventions0. The term 'implicitly' is used because there is no express mention of drones in the Conventions as such weaponry was not present when the Conventions were drafted.

Article 35 of 1977 Additional Protocol I to the Geneva Conventions 1949[14] expressly states that the right of the parties to the conflict to choose methods of warfare is 'not unlimited', while sub-section 2 of the same Article prohibits weapons, projectiles and material and methods of warfare of a nature which 'cause superfluous injury or unnecessary suffering'.[15] Interpreting these two provisions, two things become palpable: a party cannot choose methods of warfare at its discretion, and secondly, weapons and methods of warfare may be prohibited under Article 35(2) if they cause superfluous injury or unnecessary suffering.

The first issue is whether drones can actually be considered as weapons, as per the requirements of Article 35(2) of 'weapons' that cause unnecessary suffering. If yes, one needs to look at whether they are illegal weapons or not. It appears an analogy can be drawn between drones and helicopters or planes that fire missiles. Drones are simply another platform via which weapons such as missiles are fired or bombs are dropped. In this respect, they would not be seen as weapons inherently. But this does not prevent them from falling within the ambit of international law, because while the weapons that are fired from drones may not be illegal inherently, their use through the drones' platform might amount to unnecessary suffering.

The meaning of the term 'unnecessary suffering' can be derived from the *Preamble of the 1868 St Petersburg Declaration* which outlines two elements: first, the attacks that are carried out must be limited to weakening of the forces of the enemy; and second, that this objective will be exceeded if weapons are used to needlessly aggravate the suffering of disabled men.[16] According to the view of the International Committee of the Red Cross (ICRC), these apply to all parties to an armed conflict, whether international or non-international in character.[17]

Additionally, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case*, the International Court of Justice defined unnecessary suffering as 'a harm greater than that unavoidable to achieve legitimate military objectives'.[18] This means that the drones can only be unlawful if the weapon system attached to it contains

[14] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol 1) art 35(1).
[15] Ibid art 35(2).
[16] Declaration Renouncing the Use, In Time of War, Of Certain Explosive Projectiles, Saint Petersburg (29 November/11 December 1868).
[17] International Committee of the Red Cross, Beck Doswald and Jean Marie Henckaerts: '*Customary International Humanitarian Law Volume 1*'. See Rule 71.
[18] *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* [1996] ICJ Reports 1996. n 78.

components, which have the effect to cause such indiscriminate injuries.[19] The United Kingdom[20] and international organizations have affirmed that the use of drones must be in accordance with the general rules and principles of International Humanitarian law, which would be explained in a latter section.

Extra Judicial Killings: Endorsed or Prohibited?

A very essential concept that is linked with the usage of drones is the term 'targeted killings' that has several different names such as 'extra judicial killings' and 'precise killings'. Melzer defines targeted killing as the use of lethal force, by a subject of international law that is directed against an individually selected person, who is not in custody, and that is intentional, premeditated and deliberate.[21] The element of the target not being in custody gives rise to the seductive idea of drones being used for extra judicial killings. An extra judicial killing can simply be defined as the killing of a person by a government authority without any due process or procedure of law. The individuals that are targeted are not in custody and are killed because of their inclusion in the secret 'Kill List' developed by the Central Intelligence Agency and authorized by President Barrack Obama. This engenders two notions- first whether the right to life is being violated by the utilization of drones, and second whether the right of due process or a fair trial is threatened under international human rights law.

The right to life has been mentioned in *Article 2(1)* of the *European Convention on Human Rights (ECHR)*[22] as '*Everyone's right shall be protected by law*', while the *American Convention on Human Rights (ACHR)*[23]and the *International Covenant on Civil and Political Rights (ICCPR)*[24] prohibit arbitrary deprivations of life. Derogation can be made within the context of the ECHR under *Article 15(1)* but only within the realm of 'lawful acts of war'. No derogations can be made under the ACHR and the ICCPR and the whole idea pivots around what exactly is meant by 'arbitrary'

[19] *A fortiori, the drone would fall afoul of the law if the warhead were packed with a weapon or component that is itself prohibited, for example, chemical gas; this would be a violation of the Chemical Weapons Convention*, 32 ILM (1993) 804.
[20] UK Ministry of Defence, 'The UK Approach To Unmanned Aircraft Systems', Joint Doctrine Note 2/11, (30 March 2011). n 502.
[21] Nils Melzer, *Targeted Killing In International Law* (Oxford University Press 2008). 3-4.
[22] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Entered into force 3 September 1953) ETS 5. Art 2(1).
[23] American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (ACHR). art 4(1).
[24] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). art 6(1).

deprivation of life. The response has been provided by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case* where it expressly states that what amounts to arbitrary deprivation has to be deduced from international humanitarian law and not the terms of the Covenant itself.[25] Thus, under the paradigm of international human rights law, the usage of drones violating the right of life has to be determined by reference to international humanitarian law.

Another important right is that of due process, which has been established under the *Fifth and Fourteenth Amendments to the US Constitution*.[26] The *Basic Laws: Human Dignity and Liberty 1992* also highlights the importance of due process for criminal defendants.[27] The problem is that the escalation of drones has created a rift between securing national security and protection of the right of due process. This right encompasses three important conceptions: the presumption that a person is innocent until proven guilty; a person has to be arrested according to law; and a person should have a right to fair trial. It is devastating to see that drone attacks do not offer even one of these opportunities to the suspected terrorists and the policy of the US and Israel has been to directly target the suspected terrorists and kill them.

Even so overwhelming is the idea to kill American citizens outside American borders. The most prominent example of the extra judicial killing here is that of Anwar-al-Awlaki, an American citizen, killed in a drone strike in Yemen. The *Department of Justice White Paper on Lethal Operations Against Al-Qa'ida Leaders* laid down a framework developed by US top officials, justifying the killing of a US citizen outside the US territory when firstly, he poses an 'imminent threat' of violent attack, second, that the capture of the citizen is infeasible, and thirdly, that the operation can be conducted consistently with law of war principles.[28] This can be interpreted to see that the killing can be lawful only when violence is so imminent that arresting will give the other party the time to carry out the attack. Proceeding from this, the Inter American Commission presented a report coined as '*Human Rights Report on Terrorism and Human Rights*' where it clearly mentioned that lethal force can be used only against individuals that threaten the security of all; but it can constitute extra judicial killings if individuals who do not pose such a threat such as those who have been apprehended by

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[25] *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* [1996] ICJ Reports 1996. n 25.
[26] *'[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law…'*.
[27] The Israeli Constitution (1992) http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401838_text,Israel: Supreme Court Repeals Law Authorizing Ex-Parte Detention Hearings of Security Suspects.
[28] Department of Justice, "White Paper: Lawfulness Of A Lethal Operation Directed Against A US Citizen Who Is A Senior Operational Leader Of Al-Qa'Ida Or An Associated Force" (Leaked 2013).

authorities, or have surrendered, or who have been wounded, and abstain from hostile acts, are targeted.[29] The problem that breeds here is the lack of evidence present with the US and Israel to kill suspected terrorists who have not been apprehended for instance. One such mistake was demonstrated by the US killing a person with a similar name on the Obama administration's kill list on the third attempt. A reprieve team in Pakistan declared it to be a confirmed case of mistaken identity.[30] At present, such mistakes by such strong military powers clearly go against them- an extra judicial killing can never be justified when the alleged terrorists are not made to go through any transparent method! The justifications posed for such mistakes by both US and Israel would be analyzed later because at first one needs to have a glance over the law that is being breached which makes them justify their actions i.e. the law that allows the states the right to use force.

Chapter 2: Drone Strikes and the Law of Interstate Force:

This chapter sets out to examine the legality of the use of drones from the perspective of the states. One would focus upon whether the international restriction on the use of force covers drone attacks against non-state actors such as alleged suspects of terrorism, or not. Once it is answered in the affirmative, the exception of self-defence will be pinpointed by highlighting how the Security Council's enforcement mechanisms have failed to take actions against the victims of drone attacks, and how states rely on the right to justify extra judicial killings of the alleged terrorists. This will be followed by the idea of pre-emptive self-defence and finally an account will be provided as to how the US has failed to address the criteria of self-defence.

One of the primary aims of the *United Nations Charter* was to maintain international peace and security.[31] This objective's offshoot was seen in *Article 2(4) of the Charter* which augments that all states are prohibited from using force which threatens the territorial integrity or the political independence of another state, or is, in any other manner, inconsistent with the purposes of the United Nations.[32] The issue that arises

[29] Inter-American Commission on Human Rights, "Report On Terrorism And Human Rights" (22 October 2002). n 90-91.
[30] The Guardian, "41 Men Targeted But 1147 People Killed: US Drone Strikes-The Facts On The Ground" (2014).
[31] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 8 February 2016]. Chapter 1: Purposes and Principles Article 1(1).
[32] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 8 February 2016]. Article 2(4).

here is whether the extraterritorial use of drones will be lawful when it does not violate the territorial integrity of the state or threaten the political independence of the state. This is not the case because zooming on the wording '*in any other manner inconsistent with the purposes of the UN*' in the Article suggests that it is a residuary catch all provision, which places a blanket ban against all use of force.[33] This means that when a state employs drones as a means of warfare, they come under the umbrella of the prohibition on the use of interstate force. The question which arises here is whether this prohibition to use force against states can be justified or not, which brings us to the exceptions of the rule.

There are three exceptions to the law on the use of force agreed upon by the international community: the enforcement mechanisms of the Security Council,[34] the concept of consent,[35] and for our main purposes, the notion of self-defence.[36] The Security Council, which has been charged with the maintenance of international order, is obliged under *Articles 39 and 40 of the United Nations Charter* to take measures in order to uplift their aim. Such measures under *Article 41* can include economic embargoes and severance of diplomatic relations, and even the use of military force under *Article 42*. An achievement here has been with the Council recognizing terrorism as one of the threats to international peace and security, on which the states employing drones for alleged terrorists rely upon. For instance in its *Resolution 1611 2005*, concerning the terrorist attacks in London in 2005, the Council clearly stated that it '*expresses its utmost determination to combat terrorism, in accordance with its responsibilities under the Charter of the United Nations*'.[37] However, the irony is that there is a difference between expressing a determination to combat terrorism, and in reality, combatting it. The problem with the Security Council has been its ineffectiveness to actually take actions against terrorists, which has acted as a catalyst for the member states to employ drones as a means of warfare for extra judicial killings, by relying upon the exception of self-defence.

Moreover, the idea of self-defence is articulated in *Article 51 of the UN Charter*, which provides for individual and collective self-defence if an armed attack occurs against the

[33] Tom Ruys, *"Armed Attack" And Article 51 Of The UN Charter* (Cambridge University Press 2010). 56-57.
[34] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 8 February 2016]. Articles 39-42.
[35] ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10.
[36] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 8 February 2016]. Article 51.
[37] UNSC Res 1611 (7 July 2005) UN Doc SC/8438.

member state. The concern which emerges here is whether such a right is available for actions against non-state actors or not.

There can be two approaches: first that a narrow interpretation of the Article suggests that the right of self-defence can only be used in restricted circumstances; or second that the UN Charter has adapted to the changing circumstances which can be reflected in the practice of the member states. The first approach has been used by the ICJ in *Nicaragua v. USA* where it stated that the right can only be exercised in response to an armed attack, the latter being satisfied when actions are taken by regular armed forces across the international border, and also when a state sends out armed bands on the territory of another state.[38] The judgment is thus giving the clear impression of the attacks by terrorist regimes which are supported or sponsored by states, constituting an armed attack, which prompt the right of self-defence. Here it can be pinpointed that there is no coherent evidence that the 9/11 attacks were actually controlled by the Taliban government in Afghanistan. Non-state actors' actions (such as terrorists) against whom drone attacks are carried out, on their own, would not qualify as an armed attack, and such a matter would be left at the mercy of criminal law.

The other approach however directs that since 1945, the international community has undergone various changes which have enabled the states to take actions by themselves rather than rely on the 'obsolete mechanisms' of the Security Council. For instance, when the 'Operation Enduring Freedom' was launched by the US against Al-Qaeda in Afghanistan, more than 10 states in November 2001 agreed to deploy their troops in Afghanistan, including UK, Italy and Canada.[39] Similarly, when the Bali Bombings took place which killed a huge number of Australian tourists in 2002, the Australian Prime Minister declared that they have the right to use force extraterritorially against those who threaten the state or its citizens.[40] One can argue that such state practice makes it difficult for the international arena to deny the state's right of self-defence in the context of extra judicial killings or targeted killings of the alleged terrorists.

If the second approach is considered to be correct on the basis that the law should be flexible and must adapt to the changing circumstances, the states' efforts to fit in the

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[38] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Reports 1984. n 195.

[39] CNN Library, "Operation Enduring Freedom Fast Facts - CNN.Com" (*CNN*, 2016). http://edition.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/ accessed 8 February 2016.

[40] Myint Zan, '*Comment: John Howard's Preemptive Strike Thesis*' [2003]: 1 JSPL. http://www.paclii.org/journals/fJSPL/vol07no1/3.shtml accessed 1 February 2003.

rubric of self-defence to justify targeted killings encompasses the right of anticipatory or pre-emptive self-defence. This is because the word 'inherent' in Article 2(4) clearly indicates a broader right's presence in customary international law.[41] The premise has been laid down in *The Caroline Case* where the US Secretary of State indicated that Britain had to show '*a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation, along with doing nothing unreasonable or excessive*'.[42] This statement lays down two branches to determine the right of pre-emptive self-defence: necessity which comprises of the elements of immediacy and leaving no choice of dispute resolution; and proportionality. This has been affirmed by the ICJ in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. USA) 2003, where the Court referred to the 'criteria of necessity and proportionality in the context of international law on self-defence*'.[43] So a state can use necessary and proportional force when threatened with an imminent attack, and are not obliged to wait for the attack to occur.[44]

Following this perspective, it needs to be first established whether an armed attack has been carried out on the US or not. The US is of the view that Al-Qaeda's attack on the World Trade Centre in September 2001 violated the territorial integrity and political independence of the state by damaging the Pentagon and breached the human right to life as a mass amount of civilians died. It has gone further than this in its *National Security Strategy 2002* where it upheld the idea of using force in self-defence even before obtaining evidence of an armed attack.[45]

Once it is believed that the US has responded to an armed attack as required by Article 51, the next pressing issue is to see whether it fulfils the requirements of the right to self-defence. The necessity principle requires the notion of 'immediacy' i.e. the right of selfdefence must be exercised within a reasonable time period when the armed attack occurs and must not unnecessarily be delayed. Here, the US can be rightly seen to justify their stance that their response to the 9/11 attacks was imminent primarily as the Operation Enduring Freedom was initiated after 25 days. The Operation has continued till the present date which may question its necessity.

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[41] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Reports 1984. n 176.
[42] Martin Dixon, *Textbook On International Law* (Oxford University Press 2007). 327.
[43] *Case Concerning Oil Platforms (Islamic Republic of Iran v. USA*) [2003] ICJ Report 2003.
[44] Garwood-Gowers, *Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?* (YBIL 2004). 51, 53.
[45] White House, 'National Security Strategy' (2002).

As far as the second aspect of necessity is concerned, the idea of first resorting to alternative dispute resolution rather than carrying out extra judicial killings of the non-state actors, is important. The victim state can always ask the other state to take action against the non-state entities on their soil rather than attack them in the first place. If such measures which do not involve force are not practicable, or are ineffective, the states can use force as a last resort. This all looks hunky-dory in theory, but sadly, it has not been followed by the US. For instance, the US did not even consider cooperation with the government while carrying out drone strikes to suppress the activities of the IS militants in Syria. This can be seen by the statement of State Department spokeswoman Jen Psaki that '*We are not looking for the approval of the Syrian regime*'.[46] Such a blatant refusal is a violation of the second aspect of the necessity principle.

Additionally, the criterion of proportionality is required for the implementation of the right of self-defence. This includes various aspects such as the force that is used in response must not exceed reasonable limits, both in terms of damage and casualties; it must be limited to the specific territory; and the action undertaken must be directed against the source of the armed attack. This is uncontested in both customary law[47] and under the Charter.[48] It can be argued that the US has carried out a series of attacks, which may lead us to doubt the proportionality of these counter measures. This requirement however will be dealt with in detail, in the next section pertaining to International Humanitarian law, as it is a huge debate that the response by the US is disproportionate.

Recapitulating the above, it can be said that while the right of self-defence is available to nation states as per Article 51 of the UN Charter, this right is to be used sparingly. States are mandated to refer the matter to the UN once the Security Council is in a position to take actions against the states which pose a threat to peace and international security. The Caroline principles which contain the prerequisites of self-defence must be complied with before states can rely on the framework provided in Article 51. United States has time and again deviated from the above principles of international law while launching drone strikes. This derogation has gone unregulated by the international community as the world super powers have perpetrated most serious collateral damage, causing massive civilian loss of life through drone strikes. This chapter has just dealt

[46] Justin Sink, "White House Won't Commit To Asking Congress For Syria Strike" *The Hill* (2014).
[47] Martin Dixon, *Textbook On International Law* (Oxford University Press 2007). 331.
[48] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ, REP 168.

with one aspect of what a state can do as part of their counter strategy. Another view is that the legal framework of the law of war applies if an armed conflict occurs, which brings us to the discussion of the rules of international humanitarian law.

Chapter 3: Drone Strikes and *Jus in bello*:

This section considers the legality of the drone attacks from the perspective of international humanitarian law, which applies whenever there is an armed conflict. The term 'armed conflict' will be looked at in detail, which would lead us to conclude that the 'war on terror' constitutes a non-international armed conflict. Led by such an idea, the chapter will highlight that the *jus in bello* does not prevent armed conflicts, but is present to regulate them whenever and wherever they occur. This would entail discussion of the four elements, along with arguments that the drone strikes do not meet the standard of international humanitarian law. Also, the law enforcement mechanisms for drone strikes which are not used in an armed conflict will be pinpointed.

The law of war is a set of rules which seeks to limit the effects of an armed conflict, for humanitarian reasons.[49] As can be seen from the definition, the idea of an armed conflict is a prerequisite for international humanitarian law, which demands some explanation. An armed conflict can be either international or non-international in character. The former focuses on a state using force without the other's consent, thus breaching its sovereignty. It can occur via drone attacks by one state in the territory of another as it does not require the soldiers actually stepping into the other state's territory.[50] The non-international armed conflict, on the other hand, either occurs between the governmental forces and organized armed groups, or between organized armed groups.[51] The idea which arises here is that the American response can be seen as a non-international armed conflict, as the response is not an interstate conflict.

This depends upon two factors, first, the hostilities must reach a minimum level of intensity and second, the armed groups must show a minimum of organization (*Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*).[52] The idea

[49] International Committee of the Red Cross, 'What is International Humanitarian Law?' (July 2004).
[50] International Committee of the Red Cross, 'How is the Term "Armed Conflict" defined in International Humanitarian Law?' (March 2008).
[51] See also: International Committee of the Red Cross, 'How is the Term "Armed Conflict" defined in International Humanitarian Law?' (March 2008).
[52] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1), June 8, 1977, 1125 U.N.T.S. 609.

of organization is pivotal to distinguish organized military hostilities from situations of internal disturbances such as riots and sporadic acts of violence,[53] as the ones taking part in the latter activities will be protected by the umbrella of the international human rights law.

The issue that emanates here is whether the suspected terrorists can be considered as an organized armed group who are using sustained violence, or not. As far as Al-Qaeda is concerned, in pursuit of which the War on Terror started, there is some controversy in defining it as an organized armed group because of its dispersion outside Afghanistan. In *Prosecutor v. Boskoski and Tarculovski*, where a non-state group was involved in the targeting of civilians, the International Criminal Tribunal for the Former Yugoslavia held that a group's raw ability to commit sustained terrorist attacks is evidence of 'high level of planning and a coordinated command structure'.[54] It can be argued that Al-Qaeda neatly fits this pattern. It has carried out terrorists acts continually in many parts of the world, which has resulted in a 43% increase in global terrorism.[55] Secondly, it has a particular vision-the spread of Islam-which drives it towards its goal i.e. attacking western interests. This commitment can be exhibited in the suicide attacks, for instance, that are carried out which convey an express message to the other party. Thirdly, Al-Qaeda's organization can be demonstrated by their relationships with other affiliated groups. For example, Al-Qaeda in the Arabian Peninsula, whose headquarters are located in Yemen, is an offshoot of direct orders from Osama bin Laden to Al-Qaeda members in Yemen.[56] So it does not necessarily matter that the armed conflict must take place between a state and an armed group within a particular territory.

On the above basis, US contends that the drone attacks aim legitimate targets i.e. organized armed groups. As the organization meets the criteria of an organized armed group, the war on terror can rightly be termed as a non-international armed conflict. This then triggers the discussion of the various elements that binds the US to their obligations under international humanitarian law-namely, distinction, precaution, proportionality and necessity.

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[53] International Committee of the Red Cross (ICRC), Article 1(2) '*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)'*, 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 27 February 2016].

[54] *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 July 2008. 204.

[55] Spencer Ackerman, 'Global Terrorism Rose 43% In 2013 Despite Al-Qaida Splintering, US Reports' *The Guardian* (2014).

[56] Leah Farrall, '*How Al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength'*, 90 Foreign Affairs 128, 132 (2011).

Article 48 of the Additional Protocol I to the Geneva Conventions And Relating to the Protection of Victims Of International Armed Conflicts states that the parties to the conflict must 'distinguish' between civilian population and combatants.[57] It is very difficult to determine a legitimate target practically as members of armed groups may directly participate in field operations while some may be responsible for investment or propaganda, whereas some may fuse within the general public as they do not wear a particular uniform and operate from civilian areas.

But the problem is that the acts of the US in particular lead us to the image that they show no respect to this holy distinction. The US has adopted a policy of 'signature strikes' which has entitled President Barrack Obama to nominate individuals for targeted killings, based on their personal behavior, links with other non-state terrorist organizations and a range of other characteristics such as the threat that an individual poses.[58] Comments by the White House officials reflect that all military aged men (between 20 to 40 years) in a strike zone are presumed to be combatants, unless there is explicit evidence to rebut this presumption.[59] This means that drone attacks can be carried out in civilian areas just because men have gathered in a particular area and the drone strikes 'think' that they are terrorist suspects. Such a gross violation of law has been seen in Pakistan in March 2011 when a meeting of tribal elders in FATA (being held with the permission of the Pakistani government) was struck by a drone killing 42 people, just because the strikers presumed that the individuals gathered posed an imminent threat.[60] Thus, the policy of signature strikes together with the statistics indicate that the element of distinction in the law of war is not being adhered to.

Moving on, the next factor that the parties must take into account is that of taking reasonable precautions. This has been highlighted in *Articles 57(2)(a)(i)-(iii) and 57(2)(b) of the Additional Protocol I*[61] where it has been specifically mentioned that while applying the principle of distinction, the strikers must take all 'feasible'

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[57] International Committee of the Red Cross (ICRC), Article 48 '*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)'*, 8 June 1977, 1125 UNTS 3.
[58] Jo Becker and Scott Shane, 'Secret 'Kill List' Proves A Test Of Obama's Principles And Will' *The New York Times* (2012).
[59] Chris Woods, Analysis: Obama Embraced Redefinition of 'Civilian' in Drone Wars, Bureau of Investigative Journalism (29 May, 2012).
[60] Arianna Huffington, 'Signature Strikes And The President's Empty Rhetoric On Drones'.
[61] International Committee of the Red Cross (ICRC), Article 57(2)(a)(i-iii) '*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)'*, 8 June 1977, 1125 UNTS 3.

precautions in the choice of means of warfare to minimize incidental loss of life, injury and collateral damage. The criteria of a feasible precaution has been provided very broadly to include precautions which are practicable, or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.[62] This may include the choice of weapon that one uses i.e. a weapon that causes minimal harm; the availability of intelligence, and even a striker's control over the territory. Such factors lead us to the view that drone strikes have to be conducted on the basis of excellent intelligence so that the targets can be isolated accurately. One can rightly argue that the planning to conduct a drone strike is carried out for a long time which thus raises the bar of feasible precautions. One has a good long duration to consider all the precautions especially verifying the identity of the suspected party, surveying the area, giving warnings and investigating the amount of risk that can be caused to the nearby surroundings.

If this is so, USA's signature strikes do not satisfy the feasible precautions requirement. This is because despite lengthy investigations, the targets are the 'suspected terrorists' without any full verification of their identities. Even though a drone attack is carried out with preplanning, the end result is the killing of an individual on the basis of suspicion and his name on the 'Kill List'. The lengthy investigations that are carried out for targeting a suspected terrorist are therefore, in vain.

Another factor that regulates the *jus in bello* is that of proportionality, which has been highlighted in *Article 51(5)(b) of the Additional Protocol I.* Article 51(5)(b) stresses that an attack will be prohibited if the damage that it causes-loss of life or/and collateral damage-will be excessive in relation to the direct military advantage anticipated.[63] The point to consider here is that just because a drone strike kills illegitimate targets or damages property, this cannot be the sole factor to judge proportionality. It is a comparative concept rather than an absolute one which leads us to the conclusion that there is no set criteria or scale to judge proportionality, and the idea will vary from case to case.

The argument which ascends here is that drones are known for their precision and are one of the most reliable weapons of the US, yet targeting Al-Qaeda, inevitably lead to

[62] International Committee of the Red Cross (ICRC), Article 3(4) *'Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol I)',* 10 October 1980.
[63] International Committee of the Red Cross (ICRC), Article 51(5)(b) '*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)'*, 8 June 1977, 1125 UNTS 3.

a large scale collateral damage. The technical faults in a drone can be considered responsible as after all, drones are made by human beings and are prone to mistakes. The pentagon's former Chief Tester Philip Coyle drew an analogy between a drone's camera and a soda straw which distorts the field of view.[64] Such views lead us to the conclusion that a soldier on ground is far better than an unmanned aircraft, because the former can at least verify the target in the first place.

The statistics further strengthen the case of drone attacks being disproportionate in nature. In Yemen, between the years 2012 and 2015, while the CIA, on the other hand, is convinced that since May 2010, more than 600 militants have been killed in drone strikes without any incidental civilian harm whatsoever.[65] The latter reflects a faulty assessment criteria as the factual reality is entirely different.

Closely allied with proportionality is the element of military necessity which demonstrates that a state should only take certain actions if they are necessary to achieve a legitimate purpose, the purpose being to defeat the enemy.[66] This can only be possible if there is no alternative other than killing to achieve a direct military advantage. Such an element can justify drone strikes even if the civilians are killed or the factor of proportionality is infringed.

But the US did not resort to capturing the suspected terrorists-its ultimate aim was to kill, especially after President Obama had given executive orders of the shutting down of Guantanamo Bay.[67] Secondly, ultimate targets are usually low scale militants rather than high rated suspects. The US itself acknowledges that the CIA has killed around 12 times more low-level fighters than high level Al-Qaeda since 2008.[68] This raises questions as to why there is a military necessity to strike drones in order to kill the subordinates rather than the higher authorities. It can also be opined that a legitimate military objective is not being attained due to rising anti-American attitudes and recruitment in militant groups, which is promoting the opposition.

Thus, the US is indeed in breach of the rules regulating international humanitarian law. The distinguishing line between civilians and militants is being infringed and the above

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[64] E Umansky '*Dull drone: Why unmanned U.S. Aerial Vehicles are a hazard to Afghan civilians*' (2002). *available at* http://www.slate.com/id/2063105/ quoting a drone operator

[65] Scott Shane, 'C.I.A. Is Disputed On Civilian Toll In Drone Strikes' *The New York Times* (2011).

[66] Yoram Dinstein, *The Conduct Of Hostilities Under The Law Of International Armed Conflict* (Cambridge University Press 2004). 89.

[67] The White House, 'Closure Of Guantanamo Detention Facilities' (2009).

[68] A Entous, 'Special Report: How The White House Learned To Love The Drone' *Reuters* (2010).

statistics clearly indicate no respect for the principle of proportionality. It should be remembered that the ultimate aim is to achieve military objectives rather than killing the opposition. But it would be wrong to codify such an opinion unless the flip side i.e. the justifications by the US and Israel, is provided.

Chapter 4: Justifications by US and Israel: Are the violations even justifiable?

This chapter is divided into two components: the first deals with the main justifications provided by the US pertaining to the invocation of the right to self-defence, consent and international humanitarian law and the second focuses on the explanations of Israel. A side-by-side analysis will be provided to see whether such justifications actually stand a chance of being valid or not.

The Fundamental Justifications by the US:

International law is a body of law where all states are considered equal, who do not renounce their acceptance of international obligations. Likewise, the US and Israel do not deny that *jus ad bellum* and *jus in bello* are not laws, but instead believe that they are not responsible for the violations that have occurred.

As far as the US is concerned, three main justifications regarding the drone attacks are given. The first relates to the US exercising its right of self-defence in pursuance of an armed conflict. The notions of necessity and proportionality will not be highlighted here as they have already been dealt with in Chapter 2. The second entails the notion of consent while the third encompasses the idea that the US is in a state of armed conflict with the Al-Qaeda in Afghanistan which had a spill over effect in Pakistan and Yemen.

The main justification provided by the US is that of its exercise of the right of self-defence present in *Article 51 of the UN Charter*. As mentioned in Chapter 2, the US has tried to rely on a broad approach of pursuing self-defence on the basis of an armed attack from a non-state actor. The US is of the view that the 9/11 Attacks left a grave mark upon the law of self-defence and the Security Council, in two of its Resolutions embraced this right of self-defence, in such a way that the law on the topic has changed over the time. For instance, in *Resolution 1368*, the Security Council accepted that ‘horrifying acts of international terrorism’ are a threat to international peace and

security.[69] Furthermore, in *Resolution 1373*, it is implied that the Security Council accepted the right of self-defence and collective self-defence in response to terrorist actions.[70] One can rightly argue here that the expression 'horrifying acts' is equivalent to an armed conflict, and that the US was justified in launching the Operation Enduring Freedom. It is worth mentioning here that the US believes that they are facing a new kind of enemy, an enemy which has spread everywhere-so one needs all types of tools to fight the opposition.[71] The use of drones in pursuance of this right is then justified.

However, one can counter this by a simple interpretation of *Article 51*. The Article states that measures taken in pursuance of self-defence will be reported immediately to the Security Council, which will not affect the authority and responsibility of the Security Council in any way.[72] This reflects that once the measures are reported, it is the responsibility of the Council to maintain international peace and security, which comes into play, rather than the continuity of the exercise of the right of self-defence. The two Resolutions were a reply to the international acts of terrorism rather than a reinforcement of America's right of self-defence.

As far as the idea of pre-emptive self-defence is concerned, the National Security Strategy 2002 adopted under the Bush regime has already been catered to. However an important criticism can be made regarding this approach. The US is using the notion of pre-emptive self-defence as a weapon to extinguish the leadership of Al-Qaeda.[73] Most of the drone attacks have been carried out on militant leaders. Two policies are being used by the US to further this notion: signature strikes and personality strikes. The former as mentioned in Chapter 3, are carried out without confirming the identity of the target on the basis that their behaviour matches a militant activity, and has formed the basis of most of the strikes in Pakistan. This also links us to the constituent of necessity as such killings cannot be justified under this head.

Another argument proposed by the US is that of the consent of the Pakistani, Yemen and Syrian governments, to carry out drone attacks on their soil. If the consent of the other state is obtained, there is no question of breach of the latter's sovereignty. The US

[69] UNSC Res 1368 (20 December 2001) available at: http://www.refworld.org/docid/3c4e94557.html [accessed 21 March 2016].
[70] UNSC Res 1373 (28 September 2001) available at: http://www.refworld.org/docid/3c4e94552a.html [accessed 21 March 2016].
[71] O Connell, '*The Legal Case Against the Global War on Terror*', 36 Case W. Res. J. Int'l L. (2004), pp 350.
[72] Article 51 of the UN Charter.
[73] Shah, Sikander Ahmed, *War on Terrorism: Self Defense, Operation Enduring Freedom, And The Legality of US Drone Attacks In Pakistan* (Global Studies 2010). pp 115-116.

has had a complicated relationship with Pakistan in terms of drone strikes. Explicit approval of drone attacks was made by the military dictator, President Musharraf,[74] while the democratic government under Prime Minister Yusuf Raza Gillani gave its private approval.[75] However, the year 2013 saw a turn of events when the newly elected government under Prime Minister Nawaz Sharif in its early days, gave a public statement against the drone strikes, whereas the ruling government in the region of Federally Administered Tribal Areas (FATA) threatened to cut the access routes for NATO supply trucks.[76] The Peshawar High Court gave a further landmark judgment of *Khan v. Federation of Pakistan* in 2013 where it ruled that drone attacks constituted a violation of international law as well as a breach of the sovereignty of Pakistan.[77] However the argument that goes in favor of the US here is that Pakistan has never struck down any drones which indicates its tacit approval to the drone attacks.

Similarly, the Yemeni President Abed Rabbo has acknowledged the US drone strikes in his territory stating that he personally approves all the drone strikes and has expressed likeness over the accuracy of the remote controlled aircrafts.[78] Thus, in the opinion of the author the US stands justified on the basis of the argument of consent.

Focusing on the third defense, US claims that it is in a state of armed conflict with Al-Qaeda and its allies, pursuant to the threat of terrorism and thus can rightly conduct drone strikes in Afghanistan, Pakistan and Yemen. There are two problems with such a justification. Firstly, the US is not clear about its exact perspective of an armed conflict and second that Al-Qaeda is an organized armed group and thus a legitimate target (as established above in Chapter 3), the US has not been able to conform to the standards of international humanitarian law.

President George Bush highlighted two points in a memorandum in 2002: first, that the US and Al-Qaeda are not indulged in an international armed conflict, as Al-Qaeda is not a High Contracting Party as required under the Geneva Conventions; and second that the Common Article 3 of the Geneva Conventions (which is an Article common to all the four Geneva Conventions) applies only to non-international armed conflicts, and

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[74] Nic Robertson, Interview with President Pervez Musharraf, 'Ex-Pakistani President Musharraf Admits Secret Deal With US On Drone Strikes' (2013).
[75]The Guardian, 'US Embassy Cables: Pakistan Backs US Drone Attacks On Tribal Areas' (2010) http://www.theguardian.com/world/us-embassy-cables-documents/185598?guni=Article:in%20body%20link accessed 21 March 2016.
[76] Hakimullah Mehsud Drone Strike: *'Death of Peace Efforts'*, BBC News (2013). http://www.bbc.co.uk/news/world-asia-24787637
[77] *Khan v Federation of Pakistan* [2013] Peshawar High Court (Peshawar High Court). n 16.
[78] Greg Miller, 'Yemeni President Acknowledges Approving US Drone Strikes' *The Washington Post* (2012).

that this armed conflict is '*international in scope*'.[79] From the outset, it can be argued that the US's position is complicated-at one hand, it is arguing that the Al-Qaeda is not a state, but simultaneously, believes that despite this, the armed conflict is international. It seems as if the US itself is confused which can lead us to argue that this caused them to term their conflict against Al-Qaeda in Afghanistan as the 'Global War on Terror' rather than an 'armed conflict' in the first place. Such a confusing idea led to an important judgment in ***Hamdan v. Rumsfield***[80] by the US Supreme Court in 2006. In this case the conflict was termed as a non-international one. Since President Obama came into power, the notion of the Global War on Terror has transformed into that of an 'armed conflict between the US and Al-Qaeda'. This appears a better approach as the former hit and run strategy elevated the status of terrorists to 'enemy combatants', making the world look like a dangerous place to live in.

But the latter approach has also resulted in the expansion of the drone strikes outside Afghanistan in places like Pakistan and Yemen. One can rightly argue here that an armed conflict is present between US and Al-Qaeda in Afghanistan, but not in places like Pakistan and Yemen, or indeed any other place than Afghanistan. Drone attacks are being carried out in these areas on the basis that the whole world is a war zone and suspects can be killed irrespective of geographical constraints. Moreover, the American Convention on Human Rights, as pinpointed in Chapter 1 of this paper prohibits arbitrary deprivation of life as well as any derogation made from it. As highlighted before, the definition of such a concept is to be derived from international humanitarian law (*Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case*). On the basis of the above arguments as well as the various evidences of violations of international humanitarian law presented in the preceding chapter, it is settled that US is in no way in compliance with the *jus in bello* within Afghanistan, as well as outside Afghanistan. This suggests the US is definitely indulged in arbitrary deprivation of life. By not providing any chance of court representation to the suspects, nor arresting them according to law, it is thus in strict violations of international human rights law.

The Stance of Israel:

This subchapter is devoted to Israel's stance on the use of drones in relation to the law on self-defence and international humanitarian law. We will analyze to what extent

[79] The White House, 'Humane Treatment Of Taliban And Al Qaeda Detainees' (2002).
[80] *Hamdan v Rumsfield* [2006] US Supreme Court, 548 US 557.

Israel is justified in the policy of targeted killings via drones. It should be borne in mind that the US has always backed Israel in the conflict against Hamas in Palestine. For instance, the US has furthered support to Israel of its usage of drones to exercise its right of self-defence in the form of response to the Hamas's attacks in 2012. The United States House of Representatives adopted a resolution unanimously which expressed '*…. unwavering commitment to the security of the State of Israel… and recognizes and strongly supports its "inherent right to act in self defence" to protect its citizens against acts of terrorism*'.[81]

The evidence of the usage of drones by Israel is immense. For instance, Israel carried out a large-scale assault on Gaza 'Operation Pillar of Defense', which started with the killing of Ahmed Jabari, chief of Hamas's military wing, and which took place over eight days in November 2012. The United Nations' reports suggest that around 165 Palestinians were killed although there were no Israeli 'boots on the ground' inside Gaza.[82]

Israel has relied on the notion of self-defence to carry out targeted killings via drone attacks by arguing that terrorist activities constitute an armed conflict rather than a matter which can be left at the mercy of the criminal law. This can be especially true when there are a continuing series of attacks rather than a secluded one.[83] This argument is seen as the main argument that Israel invokes in order to justify the immediacy head in the idea of self-defence-it was indicated in the form of Israel launching the Operation Pillar Defense '*in response to incessant rocket attacks'* from the Gaza Strip led by Hamas military wing.[84]

Focusing on the second aspect of necessity, Israel Defense Forces' lawyers have come up with a three part test to legitimize targeted killings: Israel will demand the Palestinian authorities arrest the target; if the Palestinian authorities ignore such appeals, Israel will attempt to arrest the target; if it fails, and it is realized that a terrorist attack can occur if the target is not eliminated, Israel can lawfully target.[85] This also

[81] U.S. Government Printing Office, 'House Resolution Supporting Israel's Right to Self Defence' (16 November 2012).
[82] United Nations Office for the Coordination of Humanitarian Affairs (2012).
[83] Judith Gail Gardam, *Necessity, Proportionality, And The Use Of Force By States* (Cambridge University Press 2004). 86.
[84] IDF Blog | The Official Blog of the Israel Defense Forces, "2012 Operation Pillar Of Defense - IDF Blog | The Official Blog Of The Israel Defense Forces" (2013) https://www.idfblog.com/about-the-idf/history-of-the-idf/2012-operation-pillar-of-defense/ accessed 8 February 2016.
[85] Amos Harel and Gideon Alon, 'IDF Lawyers Set Conditions For Assassination Policy' *Haaretz* (2002).

highlights the policy of pre-emptive self-defence as the attacks to be carried out are not conducted in retribution, but with the aim to deter future attacks.

Regarding proportionality, the Israeli government is of the view that it fulfils this requirement. Targeted killings are only performed as a last resort whose goal is to save lives: '*At times, targeted killing missions have been cancelled, when it has turned out that there is no possibility of performing them without disproportionately endangering innocent* persons'.[86] The greatest criticism however that can be posed at Israel is the colossal loss of the lives of civilians and collateral damage that occurs when drones strike. For instance, 37% or 840 people, were killed in drone attacks alone during the summer 2014 attacks.[87]

As far as international humanitarian law is concerned, Israel believes that such laws allow striking at persons who are a party to an armed conflict regardless of whether it is international or non-international in character. These parties are termed as unlawful combatants. Even if this category is not accepted, Israel is of the view that it has the right to target civilians who take part in direct hostilities. As Israel is not a part of *Article 51(3) of the First Protocol*,[88] which allows the targeting of civilians only till they take part in direct hostilities, Israel opines that it can target civilians even when they do not take part in such hostilities.

As far as the principle of precaution is concerned, the Israeli High Court of Justice has come up with a definition of a precaution in terms of a need of 'a careful verification' before an attack is made.[89] It can be debated that Israel had occupied Gaza in the past and so is deeply aware of the area. Conducting drone strikes in such a densely populated region questions the State's precautionary measures-knowing the civilian localities and still targeting them is a violation of the law of war principles. The idea of a careful verification can also incorporate the constituent of warnings, as it allows the civilians to scatter away from the targeted area. But to give a telephone call or conduct a relatively weaker drone strike-termed as 'roof knocking'- five minutes prior to the execution of a proper one, is inferred to be unreasonable. The view that warnings are

[86] *The Public Committee Against Torture in Israel v The Government of Israel* [2005] HCJ 769/02 (The Supreme Court Sitting as the High Court of Justice). n 13.
[87] Rania Khalek, 'Israel "Directly Targeted" Children In Drone Strikes On Gaza, Says Rights Group' https://electronicintifada.net/blogs/rania-khalek/israel-directly-targeted-children-drone-strikes-gaza-says-rights-group accessed 22 March 2016.
[88] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.
[89] *The Public Committee Against Torture et al v The Government of Israel*, Israeli High Court of Justice, HCJ 769/02 (2006). 40.

so effective can be negated by the statistics which reflect such high death tolls. 869 Palestinian homes had been destroyed merely in a week in July 2014 accompanied by the deaths of 173 people, the majority of which were civilians,[90] while Israel has killed 143 out of 171 Palestinians in the 2012 Operation Pillar of Defense.[91]

Israel has also advanced the justification of disproportionate attacks by pinpointing that Hamas used human shields which leaves no choice but to target civilians. But if this is so, then Israel's boastful attitude of its weapons becomes of no use. Israel has always believed that its weapons are superior as they are precise and deliver proper images of the target-to-be. Such an idea leads us to augment that Israel is then deliberately targeting the civilians.

Therefore, Israel's stance is unjustified. The fact that they are not bound by Article 51(3) does not exclude them of customary law obligations. Moreover, their strong military power can in no way explain their negligence in killing citizens instead of legitimate targets. The notion of self-defence also fails on the basis of the proportionality requirement. On the other hand, the only proper justification provided by the US is that of acquiring of consent from the states on whose territories the drone attacks are conducted. Pre-emptive self-defence is a weak stance as the policy of signature strikes indicates the US moving away from its real mission to targeting the militant leaders altogether. As far as international humanitarian law is concerned, the US does not fulfil the four requirements and its approach of an armed conflict's character itself is clouded. The Chapter thus has aimed to analyze the defense of both US and Israel, and concludes on the note that apart from the argument of consent, no other argument is strong enough to justify the violations of international law.

Conclusion:

In conclusion, it can be stated that the US and Israel's drone strikes do not comply with international law standards. *Article 2(4)* is the chief principle which is superior to the idea of state practice. Law is above all and has to be followed, especially when it has been formed consensually by the international actors. The US drone strikes even today, without reporting their measures to the Security Council are illegal. Israel, if not bound by Treaty law, definitely has to respect customary law and its justification of self-

[90] Peter Beaumont, 'A Knock On The Roof, Then Another Gaza Home Destroyed By Israeli Missile' *The Guardian* (2014).
[91] Hazem Balousha, 'Israeli Drones Haunt Gaza' *Palestine Pulse* (2013).

defence falls short of the proportionality requirement. Moreover, an armed conflict is evident between US and Afghanistan, but its spill over effect in Pakistan and Yemen is blurred. If Israel has always boasted its superiority of the weapons, then it should be held accountable for the massive damage in terms of both lives and property that has occurred via drone strikes.

Over and above all, the fact that drone strikes are giving birth to extra judicial killings is concerning. The statistics shown above are deeply disturbing and the statements given by the top officials are even more devastating. For instance, '*I would suggest that you should have a far more responsible father if they are truly concerned about the well-being of their children*'[92] was the response of President Obama's Top Adviser Robert Gibbs, when asked to justify the drone attack that killed a 16 year old American in the Pakistani territory. Such statements clearly purport that President Obama's administration made the policy of drone strikes ardently its own. The problem with such a policy has been its unleashing power that has given the American President to kill those on the Kill List, without any accountability. It is correct to say that the government should not disclose information in the general national interest, but this does not mean that the law behind the drone program be kept latent. It looks as if President Obama's action are manifesting a particular section of the *White House Draft Joint Resolution of 2001* which expressly was omitted in the passage of the '*Authorization to Use Military Force*'.[93] The section purported that the US President be given statutory authority to deter and pre-empt any future acts of terrorism or aggression against the US. It was opposed by the key legislators as it gave an open ended authority to the President to deal with terrorists anywhere in the world. This is exactly what is happening,the US can conduct drone strikes anywhere in the world in breach of international human rights principles-'dealing' with terrorists is considered equivalent to killing them rather than declaring them guilty through the proper mechanisms of the respected courts.

Some recommendations to keep a check at least on this overreaching of power can be made. Firstly, the public have a right to know on what grounds are people targeted exactly. Merely giving a guideline that men aged between 20 and 40 years in a strike zone are presumed to be combatants is not sufficient and more grave is the idea that they are not even considered innocent until proven guilty! The US government should issue a proper legal memorandum describing such requirements along with providing

[92] Conor Friedersdorf, "How Team Obama Justifies The Killing Of A 16 Year Old American" *The Atlantic* (2012).
[93] Text of Original Draft of Proposed White House Joint Resolution (12 September 2001).

detailed reports of how many innocent civilians have been victimized. Secondly, judicial review should be introduced which will allow the judiciary to make the government answerable for its actions. The judgments made in such cases will be valuable as they would provide guidelines pertaining to extra judicial killings. Thirdly, investigatory bodies can be set up which can investigate the collateral damage that occurs when drones hit, and the responsible governments can be made to compensate the families. Fourth, the CIA should not be authorized to carry out the drone strikes on behalf of the President. The primary responsibility should lie with the Department of Defense. The third and fourth recommendations are influenced by the law on state responsibility which requires the states to investigate the use of lethal force by their agents, in this case the CIA. The states have a customary duty to provide reparation to the victims and their families in the form of rehabilitation, satisfaction and financial compensation.[94] There is evidence of such compensation in Afghanistan, but the policy should be extended to Pakistan, Yemen and Palestine.

Thus to conclude, the human progress that has provided the states the technology to strike more than half of the world, also demands the discipline to constrain it. This discipline can only arise if law is respected in the first place, which at present, is being breached by the US and Israel.

[94] *Case Concerning the Factory at Chorzow (Claim for Indemnity)* [1927] Series A No 9 (Permanent Court of International Justice). 29.

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STUDENTS

A MYTH TO REALITY: WOMEN EMPOWERMENT IN PAKISTAN

By Uzma Nazir[1]

"I raise up my voice — not so I can shout, but so that those without a voice can be heard…we cannot succeed when half of us are held back." [2]— Malala Yousafzai

Introduction

Gender inequality; a problem as old as time itself; one that can be traced all the way back to the Garden of Eden, where Eve became responsible for mans' expulsion from Paradise for being the first to eat the fruit of the forbidden tree. Eve's perceived responsibility for the fall of man has subjugated women for generations. The folklore gains further support from philosophers too, such as Plato, who believe "the relation of male to female is by nature a relation of superior to inferior and ruler to ruled."[3]

Fortunately, the world has come a really long way since and we now live in an age where societies accept not one but multiple genders; a world where all genders are treated equal. Are Pakistanis living in that world? Certainly not; but are we getting there? Slowly and gradually, yes. The most common assumption about Pakistani women is that they are oppressed; not as much of an 'assumption' because it is the bitter truth. However, another assumption about Pakistani women, developed over the last few years, is that they have a stronger voice now. Again, this is more than just a mere assumption. It is nothing short of the truth.

> "No nation can rise to the height of glory unless your women are side by side with you" — Muhammad Ali Jinnah.

Perhaps, the reason why we see Pakistan progressing a little faster now than before is attributable to the fact that the women are given a greater role in the society. Women have always been strong; all that is required is a change in how this strength is perceived.

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[2] *Malala's Speech.* UN. http://www.un.org/News/dh/infocus/malala_speach.pdf

[3] e Women. *Internet Encyclopaedia of Philosophy*. http://www.iep.utm.edu/aris-pol/

The Perfect Housewife

Pakistani women - the perfect housewife, one who looks after her husband's needs and if she fails to do so, a couple of blows should set her right. Even if she is performing her wifely duties as per the standards of her husband, and more importantly her society, her husband still reserves the right to physically abuse her when he so wishes. The job-description, as drafted by the society, also provides that women are not to raise their voices against domestic abuse because it is a private matter, something that needs to remain within the boundaries of the relationship because it may destroy the 'traditional family unit'[4]. That was yesterday, today, Pakistan acknowledges domestic violence as a big issue and last year, the country took a major step forward by making this supposedly 'private matter' a public one by passing The Punjab Protection of Women against Violence Act 2016; a direly needed legislation for Punjab where 7,548 cases of violence against women were reported out of a total of 10,070 cases in 2014. [5]

In March 2013, a recommendation was made by the Committee on the Elimination of Discrimination against Women[6] to the Government of Pakistan to take positive measures for creating gender equality in Pakistan and fulfil its international obligation under the Convention on the Elimination of All Forms of Discrimination Against Women. The State party was called upon to adopt pending bills, such as the Domestic Violence Bill, and design strategies to overcome obstacles to their adoption through any reasonable means including through the sensitization of parliamentarians and members of the Council of Islamic Ideology on women's rights.

The Punjab Protection of Women against Violence Act 2016 is lauded by activists for its comprehensive attempt to prevent violence and also to provide proper steps for implementation. The Act is, firstly, appreciated for its definitions provided in section 2.[7] The Act does not define 'defendant' to be a man, husband, or son. Rather, defendant can mean both men and women, against whom relief is sought by the victim of violence. This way, the law has given recognition to the fact that women can be victims of violence even at the hands of female perpetrators, thus minimizing the misuse of the

[4] (2016, February 29). Women protection bill will cause divisions within families and increase divorce rate: JUI-F chief. *The Express Tribune*.
[5] Aurat Foundation (Annual Report, 2014). https://www.af.org.pk/Annual%20Reports/Report_2014/AR%202014.pdf
[6] *Concluding Observations on the Fourth Periodic Report of Pakistan Adopted by the Committee at its Fifty-fourth Session.* (CEDAW/C/PAK/CO/4, 2013)
[7] s.2(n) "defendant" means a person against whom relief has been sought by the aggrieved person;

law. Furthermore, 'violence'[8] covers a wide range of activities including sexual, psychological, economic, stalking and cybercrime.

However, the interesting part of the Act is its measures for implementation. Under section 3 of the Act, the government has created procedural reforms by instituting a toll free helpline for the aggrieved women and established the first Violence Against Women Centre (VAWC) in Multan which is run by an all-women staff and has everything, ranging from the FIRs to medical examination, under one-roof. This effectively removes the problems of going to the police station and convincing male police officers to lodge an FIR for what they would always consider a 'private matter', and even if an FIR would be lodged, the case would not be taken any further, and quite conveniently be swept under the carpet. But under the Act at hand, the Protection Officers are to submit complaints to the Family Court, which must fix hearings within seven days and the complaint is to be decided within ninety days.[9]

Additionally, a protective aspect of the Act, which is fascinating to some and criticized by many, is the cuffing of a defendant with a GPS tracker in cases of grave violence.[10] This is interesting because such protection in a country like Pakistan, could previously exist in dreams alone. The fact that this Act actually envisages such a protection in our patriarchal society, where some men have claimed that wearing of the tracker is humiliating for them because they are not animals, is quite commendable. Another praiseworthy part of the Act is the acknowledgement of societal pressures and potential harassment faced by many victims. The Act goes one step further in realization of the above and allows orders to be made to restrict the defendant from interacting with the victim at the residence and workplace.

The government has taken a great step forward by putting massive efforts into actually providing protection to women against domestic violence and there is a clear political will to empower women, but how will the government influence the socio-cultural roots

[8] s.2(r) "violence" means any offence committed against the human body of the aggrieved person including abetment of an offence, domestic violence, sexual violence, psychological abuse, economic abuse, stalking or a cybercrime;

[9] s.4 (3) On receipt of the complaint, the Court shall issue a notice to the defendant calling upon him to show cause within seven days of the receipt of notice as to why any order under the Act may not be made and if the defendant fails to file a reply within the specified time, the Court, subject to service of the notice on the defendant, shall assume that the defendant has no plausible defense and proceed to pass any order under this Act.

s.4 (4) The Court shall finally decide the complaint within ninety days from the date of the receipt of the complaint, as nearly as possible, under Chapter *XXII* of the Code relating to the summary trials.

[10] s.7 (d) wear ankle or wrist bracelet GPS tracker for any act of grave violence or likely grave violence which may endanger the life, dignity or reputation of the aggrieved person;

of domestic violence? How can we expect a real change when women are still scared to report domestic violence without the fear of the society, police and her own family labelling her as the faulty one in the marriage and the one to bring shame to the family name?

It appears as if the government has done its part and it is now for the people to understand the intensity of this social-evil and speak up more about it, especially since domestic violence now has a statutory footing. It is not that people have not spoken about it in the past, they have and it was due to those raised voices that we now have a law protecting women against domestic violence, however, majority of the cases go unreported, and just like many other evil cultural practices, such as *widow inheritance* or *sati*, people think there is nothing wrong with domestic violence.

Under the Act, the government is required to widely publicize this law[11], however, according to activists, there is still not enough awareness of this legislation among common women[12]. Furthermore, another reservation one may have with this law is the fact that only civil remedies are provided and domestic violence has not been criminalized. The issue of domestic violence may not have an effective deterrence unless it places strict penalties in the form of heavy fines or imprisonment.

Moreover, it is remarkable that 'stalking' and 'cybercrime' are recognized as violence, but s.2(2)[13] of the Act provides that words left undefined are to be assigned the same meaning as in the Code of Criminal Procedure 1898 or the Pakistan Penal Code 1860. Unfortunately, both the Act and the Pakistan Penal Code are silent on the meanings of stalking and cybercrime. This creates room for potential abuse. Additionally, the Act extends only to Punjab, while domestic violence is faced by women all over Pakistan and it is of absolute importance that women in every province are provided statutory protection against it.

This piece of legislation is undoubtedly a huge step that meddles greatly with the evil societal norms, but one cannot ignore the patriarchal mindset that is deeply embedded amongst the people. A change in that mindset is vital for the success of this Act. A

[11] s.3 (d) arrange for wide publicity of this Act and the protection system in Urdu and, if necessary, in local languages

[12] (2017, February 2017). Inhuman treatment: South Punjab tops the list in domestic violence cases. *The Express Tribune.*

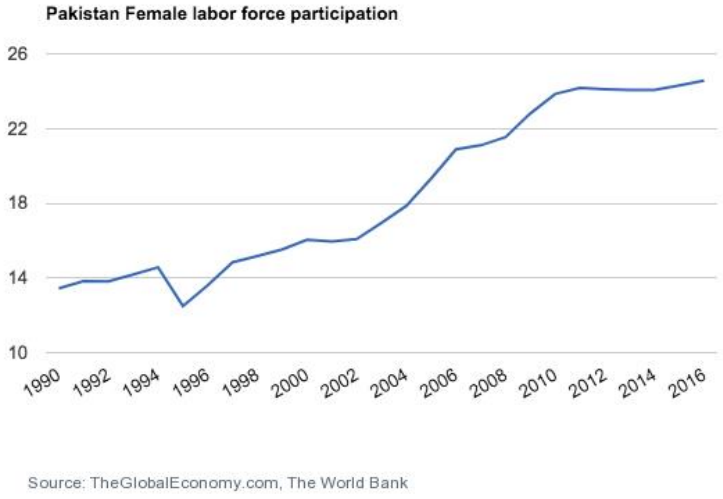
[13] s.2(2) A word or expression not defined in the Act shall have the same meaning as assigned to it in the Code or the Pakistan Penal Code, 1860 (XLV of 1860).

gradual change in the mindset is evident from the very willingness to enact a law against domestic violence, and the increase in reported cases in 2014 is also a clear indication that people are more willing to report it. However, the law still needs to be widely publicized, and people need to engage in dialogues to condemn all types of violence regardless of the gender that is victim to it in order for us to achieve gender equality.

Improved Status of Women

Pakistan has made progress in the recent years, and this paper now turns to examine some of the areas where progress is evident. In March 2014, The Punjab Commission on the Status of Women (PCSW) started functioning under the Punjab Commission on the Status of Women Act, 2014. The objectives of the commission are to empower women, provide opportunities for socio-economic development of women, and to eliminate all forms of discrimination against women.[14] The commission manages a toll-free helpline where all-women call agents address inquiries relating from harassment to skills development.[15] The PCSW has linked government job portals with its toll free helpline in order to provide information regarding job vacancies to women callers.[16] The Punjab Fair Representation of Women Act 2014 ensures 33% representation of women on at least 15% Boards of Statutory Organizations, Public Sector Companies, Special Purpose Taskforces and Committees.[17] Additionally, the World Bank Data suggests that the percentage of female labour force in Pakistan has increased from 13.44% in 1990 to 24.57% in 2016.[18]

[14] *Women in Leadership*. Women in Leadership | PCSW. http://www.pcsw.punjab.gov.pk/wilinfo
[15] Inquiries and Complaints | PCSW. http://www.pcsw.punjab.gov.pk/inquiries_complaints
[16] (2015, October 20). *Gainful opportunities: Commission for Status of Women to inform callers about govt jobs.* The Express Tribune.
[17] Ibid.
[18] Labor force, female (% of total labor force). World Bank Data. https://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS



This is not to say that these figures are substantial or highly competitive in comparison to other developing nations, but the trend for female labour participation has been a continuous positive since 2002, which indicates that Pakistan has made a progress and is still progressing. This progress was evident in last year's GDP of US $283.7 billion[19]; an all-time high for Pakistan since 1990.As the female work force has now expanded to different sectors and more women are now entering professions that were previously considered suitable for men only, The Protection against Harassment of Women at the Workplace Act 2010[20] is in place which aims to create a safe working environment where women are able to contribute towards the economy of the country without any fear of harassment, abuse or discrimination.

Moreover, the female political participation has improved due to reserved seats in the Parliament. This position held by females is also used to empower women. The Representation of the People (Amendment) Act 2017 bill[21] provides in its Statements and Objectives that it seeks to make available gender disaggregated data as a method of documentation as well as a tool to identify and resolve issues faced by women who vote. It also sets a minimum female voter turnout of 10% failing which the Commissioner will deem void the results of the election and call a re-election within 30 days. On the contrary, however, gender wage gaps continue to persist and the male to

[19] Gross Domestic Product, Pakistan. World Bank. https://data.worldbank.org/indicator/NY.GDP.MKTP.CD
[20] https://www.qau.edu.pk/pdfs/ha.pdf
[21] Senate of Pakistan. http://www.senate.gov.pk/uploads/documents/1484215009_148.pdf

female employment ratios are far from close.[22] Also, the gender representation is still considered to be quite inadequate, and Pakistan has yet to cover a long distance in awarding equal rights to its citizens and narrow the gender gap.

A Renaissance

At this point, it is pertinent to consider the Age of Enlightenment. The era of the industrial revolution. Although the Enlightenment played its role in breaking the shackles of patriarchy in the West, oppression against women continued to exist until the two World Wars and prior to that women were still considered second-class citizens and their places were thought to be in the kitchen. It was after World War I that women were given the right to vote and the female workforce increased continuously in Europe after World War II.[23] With the economies in ruins, nations realized that they cannot grow without the efforts of all of its citizens. Subsequently, women for decades fought for equal pay and spoke against oppressive practices like the marriage bar and domestic violence etc. due to which women in the west are no longer known as 'second-class' citizens. The journey from the Enlightenment to the modern 21st century has indeed been a long one. This is a journey that the developing nations have now embarked upon, and the reason to highlight the progress in Pakistan is to serve as a ray of hope for success. The common perception of the Western women of the 1900's is more or less the same perception that people now have of Pakistani women, and it it is undeniable that Pakistani women have a stronger voice against oppression, just as the western women of the 1900's who broke the shackles of patriarchy by raising their voice. Pakistan, along with other developing nations, is going through what the West has already been through pre and post-World War II. However, at the same time, the rural areas of Pakistan are on the same page with the underdeveloped countries, where extreme evils like sexual cleansing and female genital mutilation are common, just as the extreme evils of honour killings, and acid-attacks are common in Pakistan.

Pakistan has taken rather small steps in empowering women, but they are nevertheless steps that have taken it forward instead of taking it backwards. Perhaps, a few fundamental women rights that Pakistan can benefit from are the right to education, which is a constitutional right but a privilege in reality, freedom of choice without being

[22] (2016, May 26). Gender wage gap. *DAWN NEWS*. https://www.dawn.com/news/1260629
[23] Striking Women. Post World War II: 1946-1970 | Striking Women. Post World War II: 1946-1970 | Striking Women

punished for it, and the right to equal opportunities. Reforms will never be successful until the population, especially men, will be more literate, as they consider themselves to be the superior gender. It is very important for the Educational institutes in Pakistan to introduce curriculum that molds students into understanding the need for equal opportunity and treatment of genders. However, such fundaments still require legal protection and affirmative action on part of the government. Furthermore, with increasing participation of women in the work force, laws on maternity leave for both parents must be enacted, and laws against the marriage bar must be enacted. Additionally, professions such as engineering, architecture, criminal prosecution etc. have little to no female participation. Professionals must encourage women to enter such professions by holding seminars at educational institutes to end discrimination.

Conclusion

Honour Killings, Acid Attacks, Domestic Violence, and countless other cultural practices are incontrovertible realities in Pakistan, but the little progress that the country has recently made is equally incontrovertible. It is due to the stronger voice of the people that we have moved slightly forward, and it is crucial that we continue to condemn evil practices because speaking and fighting for a cause is accompanied with an underlying faith in change. It can only be hoped that we continue to make progress, and take greater steps to achieve gender quality so that one day the labels on Pakistani women, such as ‘second-class citizens’, ‘oppressed’, ‘marginalised’, and ‘conservative’ can evaporate into mere myths.

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MENTAL ILLNESS IN THE PAKISTANI LEGAL SYSTEM

Hira Zulfiqar[1]

Introduction

Pakistan is the sixth most populous country in the world but has one of the most severe crisis when it comes to mental health issues and legislation regarding it. Mental health issues have expanded into various categories across the world. For the purpose of the present article we will move forward with the understanding that mental health issues can be understood in terms of two categories: (i) mental illness and (ii) insanity. The importance of the distinction is that under Pakistani law defendants can only raise the defense of insanity which does not include all aspects of mental illness i.e. only some mental illnesses meet the threshold of the defense of insanity. This article will explore the definitions and parameters of the two categories mentioned above as they become significantly important to ensure the protection of the rights of the defendant.

Defining mental illness and insanity

The Mental Health Ordinance, 2001, defines mental illness by further dividing it into three sections:

1. **Mental impairment:** this constitutes a state of mind that has arrested/retarded or incomplete development which does not amount to severe mental impairment, but includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned
2. **Severe personality disorder**: this means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) that results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned
3. **Severe mental impairment :** means a state of arrested/retarded or incomplete development of mind which includes severe impairment of intelligence and

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social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned[2]

There are generally two types of mental disorders:

Psychotic disorders: these disorders are severe mental disorders that cause abnormal thinking and perceptions, psychoses makes patients lose touch with reality. Two of the most common symptoms are delusions and hallucinations.

Neurotic disorders: are the class of functional disorders that involve distress where the behavior of the patients is not outside socially acceptable norms.

Insanity

According to Black's Law Dictionary,[3] insanity means:

"Any mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility"

The English law through the McNaughton case[4] lays down two requirements under which a person can be considered insane:

1. Disease of mind; and
2. Caused by a defect of reason at the time of the commission of the offence.

Pakistani law defines insanity in section 84 of the Pakistan Penal Code, 1860, ("PPC"). The section reads:

"Nothing is an offence which is done by a person who at the time of doing by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he doing what is either wrong or contrary to law"

In addition to section 84 of PPC, a complete chapter, Chapter 34 has been devoted in the Criminal Procedure Code, 1898, (CrPC) to the topic of insanity.

History and Developments

Before the Mental Health Ordinance, 2001, mental illness was dealt with under the Lunacy Act of 1912[5] - which had been formulated when the British ruled the sub-

[2]Section 2(1) (m) Mental Health Ordinance 2001, Government of Pakistan
[3] https://thelawdictionary.org/
[4]8 ER 718, Volume 8
[5]Government of Pakistan. Lunacy Act 1912.

continent. However there were some very noticeable defects in the law, the major one being the use of outdated terms and concepts such as "lunatic", "criminal lunatic" and "asylum".[6] The Ordinance exchanged these terms for more medically accepted and relevant terms and concepts such as "mentally disordered person" and "health facility".

The 2001 Ordinance introduced several definitions, the most important perhaps is the detailed definition of informed consent in the context of treatment. The Ordinance provides that for consent to be deemed valid and informed, the patients have to be informed about the risks of the treatments, the likelihood of its success, any alternative treatments available and the estimated costs of treatment.[7] This is important because the Lunacy Act 1912 did not provide for the concept of informed consent.

Informed consent gives the patients an option to take the treatment or not it has varies legal and ethical benefits, the most important one is that the patient knows the risks and dangers of the treatment and has a say in how they want to be treated and they can also chose not to be treated at all.

Moreover, the Lunacy Act was more focused on punishment rather than rehabilitation, while the 2001 Ordinance has taken significant steps to make a shift from punishment to rehabilitation. For example in the lunacy act of 1912 according to its section 13-16 alleged lunatics could be detained for up to 10 days and in some cases with the permission of the magistrate maximum 30 days before the mental status of the accused could be determined. However, after the enactment of the 2001 Ordinance, under sec 19(2) the detainee cannot be held for more than 72 hours during which an evaluation must be made by a psychiatrist or psychiatrist's nominated medical officer and subsequent to that relevant treatment and care must be provided to the detainee.

According to the 18th amendment in the Constitution of Pakistan, 1973, provinces were given the authority to legislate on matters related to health which previously fell in the federal domain. As a consequence the Mental Health Authority was dissolved and mental health became a subject for the provinces to legislate on through their respective assemblies.[8]

The Province of Sindh is the only province that has made significant progress in this regard. Section 54 (2) of the Sindh Mental Health Act, 2013,[9] specifies that mentally

[6] Lunacy act 1913 section 3
[7] Government of Pakistan. Mental Health Ordinance 2001 article 2 (i)
[8] http://pubmedcentralcanada.ca/pmcc/articles/PMC5618880/pdf/BJPI-13-67.pdf
[9] Mental Health ordinance 2013

distorted prisoner, being detained in jail, has to be visited by the Inspector General of Prisons to ascertain his or her state of mind, and if they are not of sound mind then steps should be taken to transfer the person from a criminal justice system to a mental health system.

Section 53(3) mandates an assessment by the Board or two of its members in cases where a person is detained for 'offences affecting the public health, safety, convenience, decency or morals', to ascertain a person's state of mind..

This legislative framework, however, does not provide safeguards to all defendants who are mentally ill, as those held in custody under blasphemy laws do not have any such rights in law. Concerns have been voiced by human rights organizations that a significant proportion of individuals who have a mental illness are being prosecuted under the blasphemy laws for this reason. [10].

The Punjab government enacted the Punjab Mental Health Act in 2014, without significant consultation with mental health professionals or advocacy groups. The Act is a rehashing of the Ordinance, merely substituting the words 'Federal Government' with 'Government'. The situation in the provinces of Baluchistan and Khyber Pakhtunkhwa remains legally ambiguous. Since the Mental Health Ordinance Pakistan 2001 has lapsed, there has been no new act from the provincial parliament to remedy gap created.

Problems with the Existing law

In Pakistani law, although insanity can be raised as defense to many crimes (the onus of proving which lies on the defendant himself), it does not necessarily cover all mental health issues. In the case of Imdad Ali[11], a man with schizophrenia was awarded a death sentence because the court found that schizophrenia was not a permanent mental disorder as it can be improved by treatment. The American Psychological Association has defined schizophrenia[12] as "a serious mental illness characterized by incoherent or illogical thoughts, bizarre behavior and speech, and delusions or hallucinations, such as hearing voices."[13] Schizophrenia is a psychotic disorder which makes it hard for people to judge reality, it has no cure and more than one third of the patients who have it never

[10]Husain, M. (2014) Blasphemy laws and mental illness in Pakistan. Psychiatric Bulletin, 38, 40–44.
[11]legalcrystal.com/451974
[12] http://www.apa.org/topics/schiz/
[13] http://www.apa.org/topics/schiz/index.aspx

recover[14], and the road to recovery is not a short and easy one it disrupts a person's life to every extent imaginable therefore even if it is not a permanent disorder it can be treated as one. The limited nature of the defense of insanity is apparent from the Imdad Ali case as not every mental illness can qualify under the existing provisions of law.

There has been backlash on this decision on many different platforms from the Ministry of Human Rights Pakistan to the UN. The concern being that the death sentence of a person suffering from a mental illness would be contrary to international law and basic rules of human dignity. This however is just a segment of the problem with existing laws. Leaving the death penalty aside, the greater issue is the taboo or inability of society to accept and thus the failure of local laws to include a wider understanding of mental illnesses.

Another prominent problem lies between the issue of mental illness and blasphemy laws of Pakistan. Under the Pakistan Penal Code section 29, 295A, 295B and 295C deal with blasphemy and often lead to severe problems for persons suffering from mental illnesses. This is because individuals suffering from psychotic and/or neurotic disorders are at a risk of prosecution under these laws without any special protection. Since psychotic disorders such as schizophrenia can have other symptoms including grandiose and the individual having a false self-belief that he or following acceptable social behavior and others suffering from neurotic disorders such as Obsessive Compulsive Disorder (OCD) can sometimes be compelled to perform blasphemous rituals. There is no special protection under the law for such persons and they are likely to be prosecuted without a defense. This can lead to unfair prosecution if not conviction under the blasphemy laws of Pakistan.

Some cases have dealt with the overlap between the laws of blasphemy and mental illness. In 2012 a "mentally unstable" man was arrested in Bahawalpur district of Punjab. He was had burned pages of the Holy Quran and was arrested under the blasphemy laws. A mob of 2000 people extracted him from the police station and burned him at the site where he had burned the pages. It is also been reported that he was laughing and chanting when he was in the custody of the police and when he was extracted he had no idea that the people intended to kill him.

By the example of this case it can be seen that another problem that the Pakistani law faces is that not only are the mentally ill convicted but there are no laws that protect

[14] https://www.sharecare.com/health/schizophrenia/chances-permanent-disability-with-schizophrenia

them, with the defense of insanity at least the accused can score a mitigated sentence, mentally ill patients do not get any defense and unfortunately insanity does not cover all the mental illnesses.

In the case of Shahbaz Masih v State, heard in Lahore High court, the defendant was charged under the section 295-B of the Pakistan Penal Code, for throwing the pages the pages of the Holy Quran on graves, he was however able to raise the defense insanity and was acquitted.

The laws of blasphemy have in some cases also been used to frame innocent people with mental disabilities like in this case of a 14 year old with Down syndrome was accused of burning the pages of the Holy Quran she was arrested but was released on bail it was later found that it had been planted by a religious leader though she was given state protection, it is not always the case that the accused especially with a mental disability would be saved and this case serves a good example of the relationship her vulnerability as an individual with Down syndrome and her victimization under the blasphemy law.[15]

Moving forward

Despite all of this though, the Sindh Mental Health Act, 2013, enacted by the Province of Sindh, has made some progress in this area. This is because the blasphemy laws of Pakistan are coded under Chapter XV of the Pakistan Penal Code 1860, and Section 53(3) of the Sindh Mental Health Ordinance 2013 refers to Chapter XIV of the Pakistan Penal Code instead, which refers to essentially non-religious moral and public nuisance offences. Therefore, albeit modest in its apparent scope, it could still be construed as the first ever introduction of any form of legal protections for mentally ill defendants being prosecuted under blasphemy law. It can only be hoped that this progress continues.[16]

Another issue, though not directly related to the law but still equally relevant is the shortage of psychiatrists in the country: there are 342 registered psychiatrists in Pakistan which if compared to the ratio of the people in the country leaves one psychiatrist for about half a million people. [17]

[15] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4067851/#R6
[16] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4067851/#R6
[17]Naqvi HA (2005) Mental health care and mental health legislation in Pakistan: No mercy for losers. PLoS Med 2(11): e397.

It also does not help that the topic of mental health is the one that has severe stigma around it and people would rather seek traditional or religious remedies rather than the medical ones. And no significant progress has been made to combat this issue.

Conclusion

The conclusion that can be drawn from this that though there have been some developments in the law over the years, the progression is too slow for the gap that needs to be bridged. Mental illness needs to be incorporated in the law and prompt steps need to me taken to fight the taboo surrounding it as a society. Furthermore, the provincial parliaments need to legislate on this matter and resolve the ambiguity in the law so no more injustice can be done to the people who truly deserve help.

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[1]8 ER 718, Volume 8 – **please insert the full name (this is the citation provided for it on its website)**

ARE WAR CRIMINALS 'EVER' HELD ACCOUNTABLE?

By Sana e Muhammad[1]

"You don't tell about a war,

You tell about a child's bloodstained shoe in the middle of a road"

Introduction to IHL

International Humanitarian Law (IHL) is, in simple words, the law governing wars. What protocols are to be followed in land[2], air[3]and sea[4] war, which situations do not justify waging a war[5] etc. It is a body of law that developed through accepted practice by states and was eventually codified into various treaties, conventions and declarations.

Moreover, certain acts amount to 'State Liability' (such as use of forbidden weapons) and certain other acts (such as gross violations of IHL including biological experimentation on prisoners of war) amount to 'Individual Criminal Liability' (although that individual can be a head of state, aware and consenting of such acts). Proceedings for 'Individual Criminal Liability' can be brought in 'International Criminal Court (ICC)'.

This article concerns 'Individual Criminal Liability'. Regardless of the availability of such sophisticated system of law, wars follow. Not only that, people responsible for gross atrocities in them are not held accountable. WHY?

To answer this question, I will be testing two hypothesis that could possibly be the reasons for this lack of accountability, via two case studies, namely The Yugoslav War and Iraq War.

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[1] The author is a second year student of the LLB (Honours), University of London International Programmes.
[2] Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907
[3]Hague Rules of Air Warfare drafted by a Commission of Jurists at The Hague, December 1922-February 1923
[4] San Remo Manual on International Law Applicable to Armed Conflict at Sea, San Remo, 12 June 1994
[5] Proportionality in Attack, Rule 14 of International Customary Law

Reasons for lack of IHL's implementation

Some reasons, recognized by International Committee of Red Cross (ICRC)[6], for this lack of enforceability are:

(1) Ignorance of the relevant law. As ICRC notes:

"Ignorance of the law is the major obstacle to respecting it"

(2) Lack of means. Many people, who are victims of war, would lack the means to afford legal representation.

(3) Lack of political will of the States to do so:

"The enforcement of ICC (or ICJ) verdicts depends essentially either on the State in question[7] (which might view the verdict as political[8] or be unwilling to prosecute its nationals[9] or pay penalties[10]) or, in case of default, on the UN Security Council's (UNSC) Resolution, which may either be vetoed by the permanent members of UNSC (namely USA, UK, France, Russia and China)[11] or may never come to exist due to diplomatic unwillingness[12], making the verdicts essentially nothing more than a piece of paper. Hence, IHL is not always enforced."

(4) Lack of any concrete centralized system of enforceability[13], which means that:

"In default of any centralized system, of perhaps a police regime and prison facilities specific to the ICC, there is room for the interplay of politics and

[6] Refer to pg. 87 and 96 of 'International Humanitarian Law, Answers to your Questions'
[7] For example, the Common Art. 1 of Geneva Conventions.
[8] See the case of Darfur (the President of Sudan, alleged for Crimes against Humanity and War Crimes) and the lack of cooperation by the Sudanese government
[9] See the case of Al-Rabbat, although it is not an ICJ or ICC verdict, it essentially demonstrates the unwillingness of States to prosecute their nationals for war crimes
[10] See the case of Nicaragua vs. USA
[11] Ibid
[12] Ibid
[13] See these problems in light of case law in the Aljazeera article (25 Mar 2013)

diplomacy at international level. Had there been any such system, the problem of enforceability would greatly be reduced"

This list by ICRC is very technical and while it would be an excellent addition to literature of the theory of international law, perhaps even for reform proposals, it does little or nothing to present a more reality-based account of lack of accountability, namely how politics and other abstract factors come into play. These reasons are essentially the ones that need to be tackled in ensuring a more accountable international legal system, and not establishment of mere idealistic institutions (like awareness programs by ICRC). The first step is always to access the root causes, only then can idealism be imposed.

To figure out these root causes, I will be testing two hypothesis (from the top of my head as to what could possibly be lying between accountability and unaccountability):

(1) Is the reason for lack of accountability the absence of **'Willingness in Victim State and its allies'** to take proceedings to court (at the onset it seems that the reason 'war criminals' are not held accountable in some cases is because the victims are not willing to take them to court);

(2) Is the reason for lack of accountability the presence of '**Imbalance of Political and Economic Power'** between Oppressor (State and its allies) and victim (State and its allies)

For this, I will be making a contrasting analysis of two case studies; The Yugoslav War (where there was accountability) and The Iraq War (where there was no 'real' accountability).

Case Study: The Yugoslavia War

The Yugoslavia wars, fought during 1991-2001, were a series of civil wars, which resulted in its disintegration, between different (ethnic) constituent-republics in Yugoslavia for protection of their rights and the cause of self-determination. While, the situation was bad as it was, it worsen further when one of the constituent-republics, namely Serbia under President Milosevic, allied with the Yugoslavian Army, with the

intention of creating a 'Greater Serbia'[14] from parts of provinces of Croatia and Bosnia. Overall, it caused the death of 140,000 people[15] and 2 million people refugees[16].

It may be noted for the purpose of our case study that there was no significant 'Imbalance of Economic and Political Power' between rest of Yugoslavia and Serbia. Also, this is not the only imbalance that matters. Serbia might, itself, not be a very rich country, but was it supported by any international power? The answer to this is no. As, the international powers had no interest, what so ever, in The Republic of Yugoslavia, they did not support Serbia's aggravation[17] of it and take their own share out of the 'spoils of war' (namely the regional instability).

Therefore, in response to President Milosevic's war crimes in Yugoslavia, the UNO posed sanctions and an oil-embargo on it[18], followed by NATO's military operation in Yugoslavia[19]. This was made possible by Europe's support for Yugoslavia's ethnic minorities' right against being persecuted (namely the post-WWII 'Respect for Human life' Europe[20]). Later on, various peace agreements[21] were signed between different groups (including Serbia) involved in the Yugoslavian war and they were given independence and recognition as sovereign states[22]. That being done, Milosevic and other people involved in the gross atrocities were held accountable[23] via the establishment of an ad hoc International Criminal Court for Former Yugoslavia (ICTY) under the Rome Statue. A tribunal of this kind occurred after almost 50 years of the Nuremberg and Tokyo tribunals, which tried the Axis forces[24] for their atrocities during WWII.

For the purposes of testing my hypothesis, it suffices that Yugoslavia and its allies had the willingness to take a legal action against Milosevic for his war crimes. But does any State lacks this willingness?

[14]Bassiouni, M. Cherif (1994)
[15]Report by International Center for Transitional Justice (2009)
[16]Report by UNHCR (2004)
[17] Compare Syrian war, the support of Russia and the establishment of ISIS
[18] Article in Los Angeles Times (May 31, 1992)
[19] Codified as 'Operation Allied Force'
[20] See generally the analogy drawn between war accountability in Europe and war accountability somewhere else in Hannum and Shleton's book
[21] See Dayton Accords (21 November 1995) and the Washington Agreement (18 March 1994)
[22] Ibid
[23] The case of Milosevic
[24] Mainly Nazi Germans and Imperial Japanese

Case Study: The Iraq War

The Iraq war, stretched throughout 2003-2011, was a military invasion of Iraq chiefly by the USA and UK, justified on claims of presence of Weapons of Mass Destruction (WMDs)[25], connections of Iraq with international terrorism organizations like Al-Qaeda[26], the consequent threat to USA[27], and Humanitarian grounds of strengthening democracy in Iraq[2829].Overall, the lives lost were approximately 1.2 million[30]. It must be noted that Iraq has still not recovered from the war nor is stable till date[31].

It may be noted that the UN, and hence the international community, never approved the Iraq war[32]. While, Iraq too, itself, violently opposed such an intervention. And as the war was not a success, Bush and Blair too suffered severe disapproval internationally[33] and nationally[34].

Shortly after the invasion, President Saddam Hussein and his allies were convicted[35] by the Iraqi Special tribunal of crime against humanity[36], much to the criticism over such a tribunal's jurisdiction[37] and authenticity[38], and executed.

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[25]Wayback Machine (28 January 2004)

[26] "Osama Bin Laden and Saddam Hussein had an operational relationship…that involved training in explosives and weapons of mass destruction, logistical support for terrorist attacks, al Qaeda training camps and safe haven in Iraq, and Iraqi financial support for al Qaeda", The Weekly Standard. 24 November 2003

[27]White House (Press release). "Iraq could decide on any given day to provide a biological or chemical weapon to a terrorist group or individual terrorists. Alliance with terrorists could allow the Iraqi regime to attack America without leaving any fingerprints."

[28] Wayback Machine (26 February 2003)

[29] "The Iraq war and the effort to justify it even in part in humanitarian terms risk giving humanitarian intervention a bad name", Human Rights Watch (2004)

[30] Wayback Machine (1 February 2008)

[31] The Independent (16 December 2016)

[32]"I have indicated it was not in conformity with the UN Charter. From our point of view, from the charter point of view, it was illegal", says Annan UN Secretary-General

[33]BBC (20 March 2003)

[34] In Britain: The opposition to Blair's party, the Tories, made it their election-mandate to investigate Blair for Iraq war and subsequently, won that year. Also, motions were passed in the British parliament to take such course of action. Also, the British soldiers involved in Iraq war sued Tony Blair "to ensure that never again will our politicians act with such impunity in taking our country into an unjust war with such tragic consequences (Matthew Jury, the lawyer)"
In USA: "With more than 3,200 U.S. troops dead Public support for the war has fallen to its lowest levels. Last month, AP-Ipsos polling found (that) six in 10 (opposed the war)" CBS News. Due to these factors, while Bush become unpopular, Obama won the next presidential election by a landslide, with the Democrats vouching for change in war policies. See generally 'How the Iraq War Launched the Modern Era of Political BS'

[35] See generally https://en.wikipedia.org/wiki/Trial_of_Saddam_Hussein

[36] Involvement in Dujail massacre, which cause death of 148 Shiites, in retaliation for an assassination attempt against him

[37] "Iraqis responsible for past crimes should be prosecuted before an international tribunal, not the U.S.-sponsored, Iraqi-led judicial process outlined at the Pentagon today', Human Rights Watch said

[38] Amnesty International stating the trial as 'unfair'. Malaysian PM Mahathir labelling it as a 'kangaroo court' (that is an unofficial court held by a group of people to try someone without good evidence), in Aljazeera (28 November 2011)

The question follows in any conscientious mind that while Saddam did commit some atrocities and was eventually held accountable (if he even should be, given that accountability and democracy is a matter of State sovereignty[3940]), why were the USA and UK heads of state (namely Bush and Blair) not held liable for the atrocities committed in Iraq due to their miscalculation? Given that there are now national[41] and international[42] reports supporting the claims that Iraq war was unnecessary[43] (namely that it was ill-planned[44] with no definitive objectives in mind), as not only were there no WMDs found and no connections to Al-Qaeda established[45], the intelligence generating the action of war was also heavily flawed[46]. Furthermore, this miscalculation (in legal terms grossly disproportional), whether due to negligence or some ulterior motive[47], cost the lives of 1.2 million people. Then, when there are evidences, why is there no accountability?

For the purposes of testing the first hypothesis, I will be examining whether Iraq and its allies were even willing to administer accountability or not? That is, was there a legal action initiated?

The reasons for not initiating a legal action against USA in ICJ are pretty clear after the case of Nicaragua vs. USA, where the ICJ ruled in favor of Nicaragua and awarded reparations to it but the USA blocked enforcement of the judgment via the UN Security Council, exercising its veto as a permanent member.

[39] The principle of Universal Jurisdiction aside, see general criticism in 'Five million displaced Iraqis disagree that Iraq is better off now than before the invasion' at https://www.theguardian.com/commentisfree/2013/feb/26/iraq-war-was-justified#comment-21573893 and The Guardian's articles: "Iraq inquiry: dictators are best toppled by citizens within their country (17 July 2016)" and "Chilcot: Tony Blair was not 'straight with the nation' over Iraq war (6 July 2017)". Also, for claims that the Iraqi Special Tribunal, which tried Saddam, was not independent, see 41.

[41] The Chilcot report
[42] See 37
[43] That is in legal language according to Rule 14 of International Customary Law (i.e. 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited') Iraq war was grossly disproportionate as no claims, which were prime justification of war, of WMDs or connections with terrorist organizations were established, and the intelligence relied on was also inadequate to generate such a massive military action.
[44]Also, see NBC News (6 September 2015)
[45] See The Guardian (7 October 2004) and CNN (13 March 2008)
[46] The Chilcot Report
[47] See 51 below

As for the ICC, the USA withdraw its ratification of the Rome Statue[48] making ICC not applicable to them. However, as per the principle of Universal Jurisdiction, if a USA national commits war crimes on the territory of a State Party to the Rome Statue, that individual can be tried by ICC[49]. The only problem would be that the State on whose territory the war crime took place is not a Party to the Rome Statue[50]. However, even if Iraq was a party, and initiated a claim in ICC and won, the judgment would still, most probably, not be enforced as per UNSC's political nature[51]. Nevertheless, there is an ICC case concerning the mistreatment of Iraqi detainees by British soldiers going on currently[52].

One of the Iraqi generals also initiated a claim in the national courts of UK, namely the case of Tony Blair vs. Abdulwaheed al-Rabbat[53]. In this, the council for claimant (Mansfield) argued that the international crime of a war of aggression had effectively been assimilated into English law at the time of the Nuremberg trials of Nazi war crimes, where the then UK attorney general Sir Hartley Shawcross QC stated it. But the judges still held that there was no crime of aggression in English law under which the former prime minister could be charged, and hence, not giving any satisfactory answer for blocking the case.

In such circumstances, with the UN not establishing an International tribunal[54] for Iraq (like they did for Yugoslavia) despite repeated requests, the allies of Iraq resorted to a citizen's tribunal (with no jurisdiction of enforceability), walking on the footsteps of 'Russell tribunal' for War Crimes in Vietnam war. This was called the 'World Tribunal on Iraq'[55]. It consisted of various tribunals around the world, followed by a final verdict in Istanbul drawing on them. It operated from 2003-2005. This has been described as 'Moral Globalization'.

Another effort of this kind was the 'Kuala Lumpur War Crimes Tribunal (KLWCT)'. It drew on a variety of precedents, namely the principle of Universal Jurisdiction, the

[48] After the UNSC exempted it from having blanket immunity for the third time under ICC. https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-in-the-security-council-6-4.html
[49] See blog by Michael P. Scharf
[50] Visit pgaction's website for their efforts to convince Iraq to ratify the Rome Statue. http://www.pgaction.org/campaigns/icc/me-med/iraq.html
[51] 'United Nations Tribunals Unfairly Criticized' at https://quod.lib.umich.edu/j/jii/4750978.0006.204/--united-nations-tribunals-unfairly-criticized?rgn=main;view=fulltext
[52] See https://www.icc-cpi.int/iraq
[53] See
[54] 'The World Speaks on Iraq (14 July 2005)' at wagingpeace.org
[55]For details over its formulation, see Chapter 13 of 'The Costs of War: International Law, the UN, and World Order After Iraq' by Richard A. Falk

Nuremberg judgment, demand of a UN Resolution etc., so that this would 'endow its findings and recommendations with a legal weight expected to extend beyond a moral condemnation of the defendants[56]'. The Malaysian PM Mahathir said[57] of it that "We cannot arrest them (Bush and Blair), we cannot detain them, and we cannot hang them the way they hanged Saddam Hussein", however, "The one punishment that most leaders are afraid of is to go down in history with a certain label attached to them ... In history books they should be written down as war criminals and this is the kind of punishment we can make to them". This demonstrates the frustration surrounding the lack of accountability of the powerful.

The above events justifiably satisfy the hypothesis that Iraq and its allies were, in fact, willing to take USA to court. This is because, as is obvious from the case studies, where there will be injustice, there will evidently be an innate sense to demand justice.

Hence, **evidence suggests that the first hypothesis plays no part in determining whether there will be accountability or not**, and is null and void.

Then, why was there still no accountability?

Moving on to the second hypothesis, there evidently exists a huge Economic Imbalance between Iraq and USA. With Economic power comes Political power, these are essentially reciprocal. Therefore, the interests of US, that was an unstable Iraq[58], could be more politically protected than the interest of Iraq. This is preposition is also valid technically, with the USA being a permanent member of the UNSC, and having the right to veto, it can halt the proceedings of ICJ or ICC[59] or stop the enforcement of its judgment.[60]

Conclusion and Suggestions for remedies

The conclusion therefore follows, that much like a domestic court structure, the powerful and the influential cannot be held accountable of war crimes committed by them.[61] This runs contrary to many principles of International law like 'Equal

[56]'Kuala Lumpur tribunal: Bush and Blair guilty', 28 November 2011 at aljazeera.com
[57] Ibid
[58]See 'Sure enough, five years later, when the neo-conservatives got their invasion and Iraq was descending into chaos and looting, U.S. troops made a beeline to secure its oil facilities' in Huffpost blog. Also, see blog in The Conversation (8 July 2016) and the articles in The Guardian (16 September 2007) and CNN (15 April 2013)
[59] See Art. 16 (Deferral of investigation or prosecution)of Rome Statue
[60] See Nicaragua vs. USA
[61] See 'Why No Economic Sanctions against the US? (July 07, 2012)' at globalresearch.ca

treatment', 'Non-discrimination', 'Right to life' etc. And is in the simplest of language 'Grave Injustice'. So, how can it be resolved? In the past, absent any ICC, the act of holding war accountability was even more difficult[62] because to do so, the UNSC itself must authorize the establishment of such an ad hoc tribunal. Absent the political willingness, the criminals would roam free. This was tackled, after much efforts, when the ICC came into being. However, while the ICC does allot guilt, there is still no concrete method of accountability as there is virtually no enforceability (of the verdicts), although the prosecutors and judges are independent. That is to say that after its trials, ICC relies on States to arrest and detain, in their prisons, those responsible or 'Individual Criminal Responsibility', **absent the State's political will (i.e. reluctance to arrest nationals of economically and politically powerful states for obvious reasons),** while the guilt is allotted to the criminal, **deterrence of accountability (detention) never comes into play**.

To resolve this, I propose the establishment of an **Independent 'Police Regime Specific to ICC'[63], so that ICC no longer has to look towards State's to execute its judgments.** It must have the jurisdiction to conduct arrests, authorized by ICC, in Sovereign States, as well as the strengthening of Intelligence cooperation between States. In this way, a potential war criminal would not only be awarded fair trial, if found guilty, it would also in fact be held accountable (so that the victim is finally given justice) and not given immunity via association with a powerful State.

Of course, this is an ideal and our international community is in the early stages of political maturity. There would be a long way before we, as an international community, would affirm by words and by conduct, the right of individuals against persecution indiscriminate of their nationality, and be willing to prosecute our own nationals, if it be so, to uphold high standard of justice and accountability. This being said, the law has the built-in capacity to evolve, and like it did within First World Sovereign States, so that the influential and powerful is also held liable now, it can do so that in International sphere as well. Hope remains.

To sum it all up, 'War criminals' are held accountable, if they do not belong to international power or allies of an international power. In case, they do, there are numerous political and legally technical barriers to their accountability. However, an Independent Police regime and better Intelligence cooperation between States and ICC

[62] See 61
[63] Also, supported in the Aljazeera article mentioned at 20

can solve this problem. This requires a inherent ‘Respect for Life’ among all the international community, which is a slow process of evolution and can only be hoped for.

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