

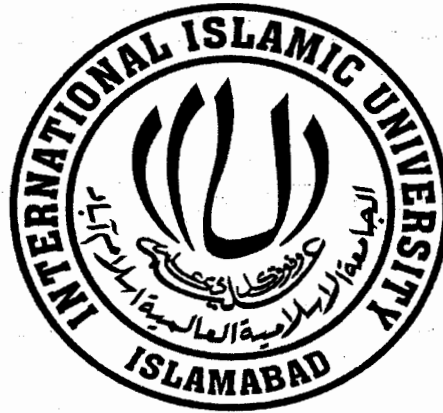
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DETENTIONS IN PAKISTAN DURING GLOBAL WAR ON TERROR

A thesis submitted in partial fulfillment
of the requirements of the degree of
MASTER OF LAWS IN INTERNATIONAL LAW
(Faculty of Shariah and Law)

International Islamic University Islamabad

1432/ 2011



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MS
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SHD

1. Detention of persons
2. Terrorism - prevention - Law and legislation

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Shumaila Mir

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**Dedicated to
My beloved Parents who are my ideal**

and

**To My worthy teacher Muhammad Mushtaq Ahmad who has
always been a source of inspiration for me**

APPROVAL SHEET

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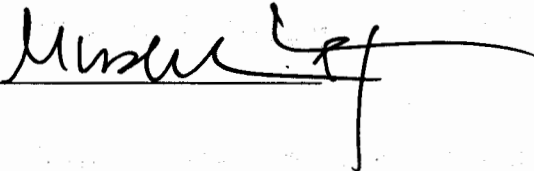
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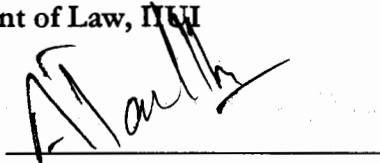
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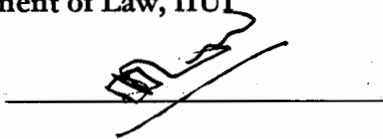
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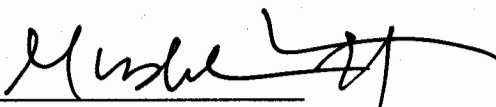
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ACRONYMS

1. AP Protocol Additional to the Geneva Conventions
2. ATA Anti-terrorism Act
3. CAT Convention against Torture and Other Forms of Inhuman and Degrading Treatment
4. CA3 Article 3 Common to all Geneva Conventions
5. CIHL Customary International Humanitarian Law
6. DHR Defense of Human Rights
7. GC Geneva Convention
8. GWOT Global War on Terror
9. HRCP Human Rights Commission of Pakistan
10. IAC International Armed Conflict
11. ICC International Criminal Court
12. ICCPR UN International Covenant on Civil and Political Rights
13. ICJ The International Court of Justice
14. ICRC The International Committee of the Red Cross
15. ICTR International Criminal Tribunal for Rwanda
16. IHL International Humanitarian Law
17. IHRL International Human Rights Law
18. MPO Maintenance of Public Order
19. NIAC Non-international Armed Conflict
20. POW Prisoner of War
21. PAA Pakistan Army Act
22. SCP Supreme Court of Pakistan
23. UDHR Universal Declaration of Human Rights

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ACKNOWLEDGMENTS

First and foremost, I would like to thank Allah the Almighty for giving me strength and patience to complete this thesis.

I wish to express my deep sense of gratitude to my supervisor Mohammad Mushtaq Ahmad, Assistant Professor in department of law, for his able guidance and useful suggestions, which helped me a lot in completing this thesis. Sir, your patience and kindness have been invaluable for me and one simply could not wish for a better supervisor than you.

I am particularly grateful to Professor Imran Ahsan khan Nyazee, who taught us the course of *Research Methodology* which was really a joyful experience and this course has helped me to prepare my thesis.

My parents have been a constant source of emotional, moral and of course financial support during my educational years, and this thesis would certainly not have existed without them. Very special thanks to my beloved siblings, Saima Mir and Wasif Mir, for their love and support.

Finally, I would like to express my heartfelt thanks to my dearest friends, Saadia Zahoor, Sadia Tabassum and Tahira Ifraq for their help, support and wishes for the successful completion of this thesis.

Allah bless you all!

ABSTRACT

After September 11 attacks, America has declared global war in the name of combating terrorism. As a result of this war many persons have been detained due to their alleged links with Al-Qaida and Taliban. Pakistan became an ally in this war and started a military operation in tribal areas and swat.

In cooperating with US-led war on terror Pakistan has committed various human rights violations. Many persons have been tortured, arbitrarily arrested and detained by Pakistan. Thousands of the people have been disappeared and their whereabouts remained unknown. The right to habeas corpus has been denied. Many of the detainees have been handed over to America in violation of the principle of non-refoulement and Extradition Law. The intelligence agencies of Pakistan are making arrests without following a due process.

The thesis discusses the violation and application of International and Domestic laws to the persons detained in Pakistan during global war on terror (GWOT). In that context, it discusses the violations under IHL, IHRL and domestic law. It also examines the applicability of IHL, IHRL and Pakistan's domestic law to the detainees.

The thesis also examines the protection provided under customary international law. It also discusses the nature of the conflict in Pakistan and examines the status of detainees under IHL. The thesis also discusses person's right to life, liberty and protection against arbitrary arrest and detention provided by human rights treaties and the constitution of Pakistan.

Thus the thesis finds that the detained persons are not outside the protection of law and they are protected under IHL, IHRL and Pakistan's domestic law. Therefore, the treatment of detainees of war on terror in Pakistan is in gross violation of fundamental principles of law.

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INTRODUCTION

Global War on terror (GWOT) is one of the burning issues, which seeks the attention of whole world. On 11 September, 2001 terrorists hijacked four commercial passenger airplanes. Two of them crashed into the Twin Towers of the World Trade Centre of New York city and as a result both buildings collapsed within two hours destroying the adjacent buildings. The third plane crashed in Pentagon and the fourth one into a field near Pennsylvania.

After these attacks the American Government declared war against terrorism. The phrase "War on Terror" was first used by former president of America George W. Bush. Actually this war was waged against Al-Qaida¹ networks and Taliban² regime and the purpose of this war was to eliminate terrorism, which is a great threat to the integrity of all states.

In response to these attacks America has launched its operation in Afghanistan and Iraq in Oct 2001 and March 2003 respectively.

Pakistan became an ally of America in this war and started a military operation against its own people in tribal areas and swat. In cooperating with the US-led war on terror Pakistan has

¹ The true roots of Osama bin Laden's al Qaeda network stem from Afghanistan's conflict from 1979-1989. After Afghanistan was invaded by the Soviet Union, the Afghan Islamist extremists found a rallying call for their cause and young Muslims from around the world came to Afghanistan for jihad, against the invading Soviets. One of these young Muslims was a 23 year old from Saudi Arabia named "Usama" bin Ladin. He was a son of a wealthy construction magnate. Osama had taken to the religious sermons of Abdullah Azzam, a Palestinian and disciple of Sayyid Qutb. While he participated in few actual battles in Afghanistan, bin Laden became known for his generous funding of the jihad against the Soviets. When the Soviets pulled out of Afghanistan in early 1989, bin Laden and Azzam decided that their new organization should not dissolve. They established what they called a base (al Qaeda) as a potential general headquarters for future jihad. For more details see Bill Moyers Journal, Brief History of Al-Qaeda (July 27, 2007) www.pbs.org/moyers/journal/07272007/alqaeda.html (accessed April 4, 2011)

² The Taliban are fundamentalist Sunni Muslims, mostly from Afghanistan's pashtun tribes. The Taliban dominates large area of Afghanistan and tribal areas of Pakistan. The Taliban's most original aims were to enforce Sharia law and defend the integrity and Islamic character of Afghanistan. There was no such thing as a Taliban until Afghanistan's civil war (1979-1989) against Soviet Union.. In 1994, Bhutto's government appointed the Taliban as protector of Pakistani convoys through Afghanistan. The Clinton administration initially supported the Taliban's rise. The leader of Taliban is Mohammed Omar, who was a preacher and born in 1959 in Nodeh village near Kandahar, in southeastern Afghanistan. He had neither tribe nor religious pedigree. He had fought the Soviets and been wounded four times, including once in the eye. His reputation was that of a pious ascetic. The Taliban were overthrown in the 2001 American-backed invasion of Afghanistan. They reorganized themselves in the tribal areas of Pakistan. Mullah Omar is believed to be hiding in those tribal areas. For more details see Pierre Tristan, *History of Taliban: Who they are, What they want* (September 14, 2008) 1-7 www.middleeast.about.com/od/Afghanistan/ss/me080914a.htm

arbitrarily arrested and detained many of its nationals in violation of human rights. The detentions made in Pakistan during this war not only violate its domestic law but also violates many fundamental rules of International law.

Most of the people have been tortured and hundreds of people have been disappeared without following due process of law provided by domestic legislation. Hundreds of detainees have been unlawfully transferred to the other countries in violation of principle of non-refoulement³ and law of Extradition.

Complexity of issues

It is evident that Pakistan has violated its obligations under International Human Rights Law (IHRL), International Humanitarian Law (IHL) and its own Domestic Law while making detentions in context with its cooperation with the US-led war on terror. Many legal issues related to the detainees of this war require a detail discussion and examination.

Firstly, it is important to discuss that whether war on terror is an armed conflict⁴ or not? If it is an armed conflict then, it is necessary to determine its character that whether it is an International Armed Conflict (IAC) or Non-International Armed Conflict (NIAC). IHL recognizes two categories of conflict i.e. IAC and NIAC.⁵ It deals with the conduct of war and applies to the armed conflicts only⁶. The four Geneva Conventions of 1949 and its two Additional Protocols of 1977 are considered as one of the important treaties of IHL.

Secondly, the question arises that whether the military operation started in tribal areas of Pakistan as a result of war on terror is NIAC or not? If it is NIAC then Article 3, common to all

³ It is the principle of international law that prohibits the states from returning a person to a place where he or she might be tortured or ill treated. Pakistani authorities violated the principle of Refoulement by handing over its citizens and foreigner to American Authorities because it was clear to the authorities that these people will suffer humiliation and mal treatment in the hands of American authorities. For details see section 2.1.1.4 below.

⁴ Armed Conflict is not defined by The Hague and the Geneva Convention. The differences arises between the states that led to the intervention of armed forces is termed as armed conflict. For more details see section 1.1.1 below.

⁵ International armed conflict is defined as the conflict between two states and non international armed conflict arises within the state.

⁶ For details see chapter no 1 below.

four Geneva Conventions is applicable to the detainees of war on terror in Pakistan and Pakistan is also a party to these Geneva Conventions so this issue needs a detail examination.

Thirdly, as a result of this war, many persons detained due to their alleged links with Al-Qaeda and Taliban. According to USA, these persons are not considered as prisoners of war (POW)⁷ and hence they are not protected under the third Geneva Conventions (GCIII)⁸ because they failed to maintain the status of a combatant.⁹ Therefore, if a person violates the status of combatant then what should be his legal status?

Fourthly, if there is any doubt regarding the legal status of POW then the status should be determined by a competent tribunal.¹⁰ Whether the military tribunals formed by the Bush administration fulfill the requirement of a “competent tribunal”?

The application of IHRL to the detainees in Pakistan does not depend on proving its character because it is applicable in all situations i.e. peace and war. However, there are certain reservations regarding the applicability of IHRL which also requires a detail discussion.¹¹

IHRL provides various human rights treaties which prohibit arbitrary arrest and detention, enforced disappearances, torture and ill treatment and ensures free and fair trial of a detainee. Pakistan has not signed¹² most of the treaties but various provisions of these treaties are considered as a part of customary law that bounds every state to follow these provisions. It is questionable that whether the provisions of human rights treaties are followed while making detentions and whether the human rights of persons detained in Pakistan during war on terror are violated?

⁷ The persons, who have fallen into the power of enemy in course of an international armed conflict, are considered as POW.

⁸ The third Geneva Convention of 1949 deals with the treatment of prisoners of war.

⁹ The status of the combatant is defined under Article 4 of Third Geneva Convention (GC3). GC3 deals with the prisoners of war.

¹⁰ Article 5 of GC3

¹¹ For details see section 2.1.1 below

¹² Pakistan has signed ICCPR and UNCAT but not ratified these treaties. USA has signed and ratified these treaties. Therefore USA is under an obligation to follow the provisions of these treaties while making detention during war on terror.

These treaties include Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), United Nation Declaration on the Protection of All Persons from Enforced Disappearance and International Convention for the Protection of All persons from Enforced Disappearances, Vienna Convention on Consular Relations, United Nation Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

As mentioned above that the detentions made by Pakistan during GWOT clearly violate the domestic law of Pakistan. Domestic law of Pakistan provides proper procedures regarding arrest and detention. Criminal Procedure Code of Pakistan has many provisions about how to make arrest and what to do after an arrest. It has full fledged process for pre-trial, trial and post trial issues. Are these provisions being violated in this GWOT? This issue also requires a detail discussion.

The detained persons in Pakistan during this war were denied of the rights guaranteed to them by the Constitution of Pakistan including their right to engage a lawyer of their own choice and to contact their families. Whether the forced disappearances in Pakistan during war on terror are a violation of Constitutional Law of Pakistan 1973?

Hundreds of detainees have been unlawfully transferred by Pakistani authorities¹³; whether these extraditions violate Pakistan's Extradition Act? Therefore, this is another important issue¹⁴ which requires a detail discussion in the light of the provided law. Issues regarding the applicability of domestic law of Pakistan to the detainees of war on terror are discussed in the final chapter of the dissertation.

¹³ The former President of Pakistan General Pervez Musharaf has himself mentioned in his book "In the line of fire" that, he has handed over hundreds of detainees to America in return of the million of dollars.

¹⁴ This issue is discussed in detail in the third chapter of dissertation.

Literature Review

The issue related to the violations and application of international and domestic laws to the persons detained in Pakistan during GWOT has been discussed by many scholars. Gabor Rana in his article *Interesting times for international humanitarian Law: Challenges from the "war on terror"*¹⁵ addresses the scope of application of humanitarian law, related international law and the domestic law.¹⁶ He discusses that IHL applies only to the armed conflicts.¹⁷ Domestic law and IHRL are also applied to armed conflicts but to the limited extent.¹⁸ He also discusses that war on terrorism is sometimes considered as an armed conflict and sometimes not.¹⁹ He analyzed that the treaties of IHL i.e. Geneva Conventions of 1949 and their additional protocols need to be modified in the context of war on terror.²⁰

Silvia Borelli in her article *casting light on the legal black hole: International law and detentions in "the war n terror"*²¹ discusses about the thousands of detainees detained abroad during GWOT in Iraq and Afghanistan. She argues that IHL and IHRL are applicable to these detainees wherever they are detained. She also concludes that IHRL is applicable to those persons, who are also protected under IHL.²² She also explains that the detainees held by USA outside its jurisdiction are fully protected under IHRL.²³

In the report *Defining the status and rights of "war on terror" detainees under domestic and international law*²⁴ by International Bar Association Human Rights Institute, the status of detainees detained at

¹⁵ Gabor Rana, *Interesting times for international humanitarian Law: Challenges from the "war on terror"*, the Fletcher forum of world affairs, vol. 27:2 (2003): 55-74.

¹⁶ Ibid., 56.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid., 57.

²¹ Silvia Borelli, *Casting light on the legal black hole: International law and detentions in "the war n terror"*, International Review of Red Cross, vol 87 no 857 (March 2005), 39-67.

²² Ibid., 53-55.

²³ Ibid., 55-61.

²⁴ HR: *Defining the status and rights of "war on terror" detainees under domestic and international law, an international bar association* (November 2008), 1-21.

Guantanamo Bay or detained anywhere else by USA after the attacks of September 11²⁵ are discussed.

This report has two aims i.e. to determine the status of detainees detained by USA during GWOT in the light of the Four Geneva Convention of 1949 and its two Additional Protocols of 1977²⁶, and to determine the fundamental rights of the detainees under Conventions and Protocols.²⁷

John P. Cerone in his article *Status of Detainees Non-International Armed Conflict, and their protection in the course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*²⁸ determines the status of detainees in NIAC in the light of Hamdan Case. According to article, the core law of NIAC is Common Article 3 (CA3) of Geneva Convention. The Supreme Court of USA held that Hamdan was protected under CA3 and the military commission established by the Bush administration violates the basic standards of this Article.

Amnesty International in its report *Pakistan: Transfers to US Custody without human Rights Guarantees*²⁹ points out that the IHRL obliges the states to protect the human rights violation by state and non-state actors.³⁰ This report also describes that Pakistan has violated a large range of human rights and IHL during war on terror; it has arbitrarily arrested and detained³¹ many people and transferred them to USA without reference to any legal requirement in circumvention of the Extradition Law of Pakistan.³² The report also mentions the recent cases of transference of detainees to USA and to other countries.³³

²⁵ Ibid., 3.

²⁶ Ibid., 4-13.

²⁷ Ibid., 14-21.

²⁸ John P. Cerone, *Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*, *The American Society Of international Law Insights*, vol 10, issue 17 (July 14, 2006)

²⁹ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 1-37.

³⁰ Ibid., 2.

³¹ Ibid., 8-13.

³² Ibid., 13-15.

³³ Ibid., 15-27.

Justice retired Rasheed A. Razvi in his article *Cases of Enforced Disappearances in Pakistan*³⁴ describes the cases of enforced disappearance in Pakistan after its involvement in the US-led war on terror. He has discussed that the issue of the missing persons become worst day by day.³⁵ He has made an attempt to deal with the subject of missing persons and its impact on the rule of law. He discussed that Pakistan is a member of UN Human Rights Council, which has passed the draft International Convention for the Protection of the Persons from Enforced Disappearances but still the convention has not been incorporated in to the domestic laws.

He points out that the government of Pakistan has handed over many detainees to USA in violation of Extradition Act, 1972. He discussed that under international law, torture is prohibited in all circumstances. Domestic law of Pakistan also prohibits torture. According to him the government should take some positive steps to counter all forms of terrorism.

Dr. Tariq Hassan in his article *Supreme Court of Pakistan: the Case of Missing Persons*³⁶ reviews the role of Supreme Court in dealing with the issue of missing persons.³⁷ The article discusses the domestic law of Pakistan and HRL. It draws the attention to the application of domestic law to kidnappings and abductions.³⁸

The article analyzed the person's right to life and liberty, protection against arbitrary arrest and detention, and safe guards against preventive detention.³⁹ It also point outs the international law on enforced disappearances⁴⁰ and discusses the remedies available by national courts.⁴¹ He is of the

³⁴ Rasheed A. Razvi, *Cases of enforced disappearance in Pakistan*, Pakistan Bar Council, 2007.

³⁵ Ibid.

³⁶ Dr. Tariq Hassan, *Supreme Court of Pakistan: The case of Missing Persons*, Criterion, vol 4, no.3 (February 15, 2011),

1-16.

³⁷ Ibid., 1.

³⁸ Ibid., 3-5.

³⁹ Ibid., 4-6.

⁴⁰ Ibid., 6-7.

⁴¹ Ibid., 8-10.

view that the major obstacle in the implementation of the Declaration on enforced disappearances is the amended Army Act of 1952, which allows the military courts to try the civilians.⁴²

Ahmed N. Warraich in his submission *ICJ-HRCP Anti Terror Hearings*⁴³ discusses the anti-terror laws and policies after the event of September 11. He also discusses the background and development of international law.⁴⁴ He then explains the tragedy of September 11, 2001 along with the role of Pakistan.⁴⁵ In the end he explains the violations made by Pakistan during GWOT with context to the detentions.⁴⁶

Outline of the Thesis

For analyzing the issues related to the *detentions in Pakistan during GWOT*, the thesis has been divided into three chapters.

Chapter One deals with the violation of IHL to the persons detained in Pakistan during GWOT. It, then, discusses the applicable IHL to these detainees and the related treaties of IHL i.e. Geneva Conventions of 1949 and its Additional Protocol of 1977 along with CIHL.

Chapter Two is about the violation and application of IHRL to the detainees of war on terror. It, then, discusses the gross human rights violations committed by Pakistan during this war while making detentions. It also explains the provisions of human rights treaties applicable to the detainees along with customary rules.

Chapter Three is about the application and violation of Domestic Laws of Pakistan. This chapter discusses the violations under Constitution of Pakistan 1973, the Code of Criminal Procedure 1898 and Extradition Act of Pakistan 1972 in the light of cases of enforced

⁴² Ibid., 15-16.

⁴³ Ahmed N. Warraich, *ICJ- HRCP Anti Terror Hearing* at http://ejp.icj.org/IMG/ICJ_HRCP_Ahmad_Warraich.pdf 1-12

⁴⁴ Ibid., 1-4.

⁴⁵ Ibid., 4-7.

⁴⁶ Ibid., 7-10.

disappearances and unlawful transfers. The chapter explains the relevant provisions of the Domestic Law, applicable to the persons detained in Pakistan on the name of GWOT.

These chapters are followed by the Conclusion and Recommendations

CHAPTER 1

INTERNATIONAL HUMANITARIAN LAW AND THE DETAINEES OF WAR ON TERROR IN PAKISTAN

International Law relating to war has two branches i.e. *Jus ad bellum* and *Jus in bello*. Former branch of law deals with law of resort to war and later branch deals with law of conduct of war. IHL comes under *Jus in bello*, which deals with law of conduct of war.

IHL is also known as the Law of Armed Conflict. It is called humanitarian law because it tries to humanize the war fare. IHL has two branches i.e. the law of Geneva and the law of Hague.⁴⁷ Law of Geneva deals with those military personals who are no longer taking part in hostilities i.e. civilians.⁴⁸ The law of Hague deals with the rights and obligations of belligerents in the conduct of military operations.⁴⁹

The relevant treaties of IHL are the four Geneva Conventions of 1949⁵⁰ and its two Additional Protocols of 1977⁵¹; it is also governed by the rules of customary laws.⁵² The Geneva Conventions (GC) is considered as a primary instrument of IHL⁵³ that extend its application from IAC to NIAC.⁵⁴

⁴⁷ International Committee of Red Cross (ICRC), *what is international humanitarian law*, (Geneva, ICRC, October 31, 2002)

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ The Geneva Convention of 1949 provides basic protection for those who caught up during war. The First and Second Geneva Convention deals with the sick and wounded persons during an armed conflict on land and sea respectively. The Third Geneva Convention deals with the treatment of prisoners of war and the Fourth Geneva Convention deals with the protection of civilian in armed conflicts. Additional protocol 1 deals with the protection of persons detained during an international armed conflict and Additional Protocol II deals with the protection of persons during non-international armed conflict.

⁵¹ ICRC, *International humanitarian law and the challenges of the contemporary Armed Conflict*, International Review of the Red Cross, vol89 no867 (September 2007), 722. (hereinafter IHL and the challenges of the contemporary armed conflicts)

⁵² Human Rights First, *Ending Secret Detentions*, (June 6, 2004), 20.

⁵³ Ibid.

⁵⁴ Alain Aeschilimaan, *Protection of detainees: ICRC Actions behind bars*, International Review of Red Cross, vol.87 no. 857, (March 2005), 86.

The GC provides basic distinction between combatants and civilians.⁵⁵ Many violations of IHL are also considered as offences under the Rome Statute of the International Criminal Court (ICC).⁵⁶

IHL is the set of rules that helps to minimize the effects of war and prevent the people from sufferings. It has been influenced by the development of human rights treaties.⁵⁷ In recent times, certain situations of internal disturbances have complicated the application of Geneva Conventions but there are Articles and Protocols that applied to NIAC i.e. CA3 and Second Additional Protocol (APII).⁵⁸

In this chapter we will try to explain the law of armed conflict and its branches and we will focus on NIAC. I will also discuss the alleged violation of IHL by Pakistan during war on terror related to the persons detained in Pakistan during this war and I will explain those provisions of Geneva Conventions of 1949 and it's Additional Protocols of 1977, which are applicable to the detainees of war on terror in Pakistan.

1.1 War and Armed Conflict According to International Law

According to international law war and armed conflict have similar meanings both led to the intervention of armed forces. The detailed definition is given below:

1.1.1 General Definition of War and Armed Conflict

War in its most generally understood sense was a contest between two or more states primarily through their armed forces, the ultimate purpose of each contestant or contestant group being to

⁵⁵ Margarate D. Stock, *Detainees in the Hands of America: New Rules for the New Kind of War*, Terrorism and International Law: Challenges and responses (June 2002), 120.

⁵⁶ International commission of jurists, *Assessing damage Urging Action, Report of the Eminent jurists panel on terrorism, counter-terrorism and Human Rights* (Geneva: Switzerland), 53

⁵⁷ Alert Net, *Global efforts to humanize war*, www.trust.org/alertnet/crises-centre/.../international-humanitarian-law (accessed December 9, 2009)

⁵⁸ *ibid*

vanquish the other or others and impose its own conditions of peace.⁵⁹ According to Hall, an international law jurist:

When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of peace, the relation of war is setup, in which the combatants may use regulated violation against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.⁶⁰

According to the old definition of war, war is mainly a contest between the forces of two states. However, in the modern period it is often seen that war takes place not only between the armed forces of belligerent states, but also affects the citizens of the state concerned.⁶¹

1.1.2 Armed Conflict:

Armed Conflict is not defined by The Hague and the Geneva Convention. According to the jurisprudence of International Criminal Court armed conflict exist

Whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁶²

The differences arises between States that led to the intervention of armed forces is termed as armed conflict. According to the above definition, it seems that there is no difference between war and armed conflict both are same thing.

⁵⁹ J.G.Starke, *Introduction to International Law*, (London: Butterworths, 1994), 527.

⁶⁰ Ibid., 527.

⁶¹ S.K Kapoor and L.N Tandon, *International law*, (Lahore: Mansoor Book House), 599

⁶² John p Cerone, *Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*, The American Society Of international Law Insights, vol.10, issue.17(July 14,2006)

1.1.3 Status of war on terror

It is debatable that whether war on terror comes in the ambit of war or not. War according to International law has very restricted meaning. American attacks on Iraq and Afghanistan comes within the ambit of War on terror. The American attack on Afghanistan against Taliban Regime was considered as war, which has resulted from September 11 attacks.

It is agreed that attack of America on Afghanistan and Iraq comes within war. However the ongoing attacks in different parts of the world in the name of War on terror do not comes in the ambit of war. But here the question arises that all ongoing attacks in different parts of the world in the name of GWOT are considered as armed conflict or not and if they are Armed conflict then we have to look that whether it is IAC or NIAC.

1.2 War on Terror: An International Armed Conflict or not

As IHL applies to armed conflict only so, it is debatable that whether GWOT is an armed conflict or not? To reach the answer first we should look at the definition. IHL nowhere defines Armed Conflict and none of the Geneva Conventions and Additional Protocols defines it. However the International Committee of Red Cross (ICRC) provides a commentary to Common Article 2, which further clarifies the definition.

Any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.⁶³

The basic elements of armed conflict are that the difference must arise between two states, which lead to the intervention of armed forces and the existence of High Contracting Parties. So according

⁶³Gabor Rana, *Interesting times for international humanitarian Law: Challenges from the "war on terror"*, the Fletcher forum of world affairs, vol. 27:2 (2003), 58.(hereinafter the article by Gabor Rana in the Fletcher forum of world affairs)

to above definition, the American attacks on Afghanistan and Iraq after September 11 were considered as Armed Conflicts. International humanitarian law dealt with two categories of armed conflicts: IAC or NIAC.⁶⁴

1.2.1 Arguments of those who said that WOT is an IAC

IAC involves the use of armed forces by one State against another. Geneva Conventions of 1949 and First Additional Protocol (AP1) deals with IAC. GWOT has many characteristics of a typical armed conflict.⁶⁵As the NYT reports:

Since 2004, the USA has carried out many undisclosed attacks against Al-Qaeda and Taliban. These attacks are carried out by Special Forces. These attacks are authorized by an order which is approved by President of United States. The secret order gave the military new authority to attack the Qaeda terrorist network anywhere in the world, and a more sweeping mandate to conduct operations in countries not at war with the United States.⁶⁶

War waged in Afghanistan and Iraq is considered an IAC because it involves the two states and US Military Authorities are killing and detaining innocent people on the basis of their alleged links to Al-Qaeda and Taliban.

1.2.2 Arguments of those who reject that WOT is an IAC

The arguments of those who reject that war on terror is an IAC are discussed below:

1. War on terror is not an IAC because it is not a conflict between states. It has neither defined boundaries nor any beginnings and endings.⁶⁷ Under humanitarian law IAC is between

⁶⁴ICRC, The relevance of IHL in the context of terrorism (July 21, 2005) <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> (accessed November 16, 2009) (hereinafter the relevance of IHL in the context of terrorism)

⁶⁵ Julian Ku, Is there really a war on terrorism outside of Afghanistan? You Betcha, November 10, 2008.

⁶⁶ Ibid.

⁶⁷ The Article by Gabor Rana in the Fletcher Forum of World Affairs, vol.27:2 (2003): 64.

two or more states but the war on terror has no defined boundaries and it is not between the two states.⁶⁸

2. Ongoing violence taking place in other parts of the world in the name of war on terror are usually described as terrorist activities perpetrated by organized groups.⁶⁹ These organized groups are doubted to be considered as a “party” to the conflict within the meaning of IHL.⁷⁰ Most of the measures taken by states to prevent or suppress terrorist acts do not amount to armed conflict. Measures such as intelligence gathering, police and judicial cooperation, extradition, criminal sanctions, financial investigations, the freezing of assets or diplomatic and economic pressure on states accused of aiding suspected terrorists are not commonly considered acts of war. Terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement.⁷¹
3. Afghanistan war was clearly an IAC. Third Geneva Convention (GCIII) related to the Treatment of Prisoners of War (POW) applies on it. According to the USA, Taliban are not entitled to the status of POW because they have no uniform and they did not conduct their operations according to the laws of war. These factors are the part of GCIII, Article 4(2) which states that:

Members of other militias and members of the other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- a. that of being commanded by a person responsible for his subordinates;

⁶⁸ Ibid.

⁶⁹ ICRC, *International Humanitarian Law questions and answers* (Geneva, ICRC)

⁷⁰ Ibid.

⁷¹ Ibid.

- b. that of having a fixed distinctive sign recognizable at distance;
- c. that of carrying of arms openly;
- d. that of conducting their operations in accordance with the customs and laws of war.

NIAC involves hostilities between government armed forces and organized armed groups or between such groups within a state.⁷² NIAC is not only between a state and non-state actors but it also includes those conflicts which are internal in their nature and occurs in a single state⁷³

CA3 and APII deals with NIAC. Majority of the ongoing conflicts are non-international armed conflicts but in many situations states have refused to accept that their internal disturbance has reached to the level of NIAC and, therefore refuse to give the protection under CA3.⁷⁴

As a result of these conflicts many civilians are suffering from fear. Torture, enforced disappearances, illegal transfers, arbitrary arrest, and detention during non-international armed conflicts are common throughout the world.⁷⁵

1.3 Alleged violations of IHL in Pakistan

Pakistan has violated large range of Humanitarian Law during this War. In the war on terror it has arrested many Pakistani and non- Pakistani nationals on the basis of their alleged links to Al- Qaeda and Taliban⁷⁶.

⁷² The relevance of IHL in the context of terrorism (July 21, 2005) <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> (accessed November 16, 2009)

⁷³ Marko Milanovic: *Lesson for human rights and humanitarian law in the war on terror: Comparing Hamdan and Israeli targeted killings case*, vol. 89 no. 866 (June 2007), 379.

⁷⁴ For example in France, United Kingdom and Russia, states have refused to accept the applicability of CA3 and hence refused to give these conflicts a status of NIAC.

⁷⁵ *IHL and challenges of contemporary Armed Conflicts*, 741.

⁷⁶ Ahmed Warraich, *ICJ-HRCP Anti Terror Hearings* at http://ejp.icj.org/IMG/ICJ_HRCP_Ahmad_Warraich.pdf 6-7.

A large number of people have been denied of their right to life and liberty, hundreds of the people become the victims of enforced disappearance⁷⁷, unknown numbers of detainees⁷⁸ are handed over to America in violation of principle of Non- Refoulment⁷⁹. Disappearances, torture and detentions in Pakistan are also “made in USA”⁸⁰ because American forces are operating in the territory of Pakistan and instructing Pakistani forces.

As a key ally of America in the war on terror, the Army of Pakistan started a military operation in its tribal areas against Al-Qaeda networks and Taliban. War waged in the name of War on Terror in Afghanistan and Iraq was considered as IAC but military operation started in Pakistan is NIAC according to the definition mentioned below and it is regulated by Article 3, common to all Geneva Conventions.

One of the current conflicts is in the region bordering Afghanistan i.e. North and South Waziristan. ⁸¹ In the beginning of April, 2009, the Pakistani army conducted operation against Taliban militants in the Swat valley and the government declared the operation successful in July 2009⁸², but still the situation is not under control. The information about the illegal transference of detainees and secret detentions are still not known, hundred of detainees are still missing.

The Government of Pakistan is not only violating its domestic law but also violating International law. The persons who are displaced with regard to war on terror are mostly from Pakistan. These persons are captured mostly by Security Agencies of Pakistan, which are allegedly

⁷⁷ For details see HRW, Off the Record U.S. Responsibility for Enforced Disappearances in the “War on Terror”, 7-18

⁷⁸ Dr. Aafia is not the only Pakistani who disappeared and transferred to American detention camps but hundreds of such cases of disappearances have been reported.

⁷⁹ Non-refoulement is a principle of international law that precludes states from returning a person to a place where that person might be tortured or face persecution. The principle is codified in Article 33 of the Refugee Convention of 1951.

⁸⁰ Latheef farooq, *How democracy is destroying in Pakistan*, Sri Lanka Guardian, Monday, Nov 2, 2009.

⁸¹ Rule of law in armed Conflicts project, *Pakistan- Current Conflicts* (Switzerland: Geneva, January 12, 2010).

⁸² Ibid.

being held responsible for all these disappearances.⁸³ The detained persons are either in Pakistan or handed over to American authorities where they are placed in Bagram detention center in Afghanistan or in Guantanamo bay detention center in Cuba (both are under American control).

1.3.1 Consequences after the involvement of Pakistan in WOT

After Pakistan's involvement in the US-led war on terror, hundred of Pakistanis has been abducted, tortured and detained.⁸⁴ Our former President General Pervaiz Musharaf has mentioned in his book "In the Line of Fire": we have captured 689 people and handed over 369 to United States and those who criticize us that we are not fighting against terrorism should ask CIA that how many dollars we have received in reward? The answer is clear that how much we have worked to stop terrorism.⁸⁵

Most of the people who are enforcedly disappeared are believed to be under the American detention but the following information about them is still unknown i.e.

- Why the people are displaced?
- Whether they are under the control of American authorities or under control of our own government i.e. Pakistani authorities?
- Who cause their detention and under which law they are detained?
- Why they are not brought before the court of law and why they are denied of their right to legal assistance?
- Why the Families are not informed about their condition and whereabouts?

⁸³Ali Palh, Dr *Afia's Case: Gov of Pak violates both National and international laws*, Indus Asia Online Journal (July 23, 2008), <https://iaoj.wordpress.com/dr-aafia's-case-government-of-pakistan-violates-both-national-and-international-law> (accessed December 12, 2009) (Hereinafter Dr Afia's Case by Ali Palh)

⁸⁴ Abdul Sattar Ghazali, *The issue of 10,000 disappeared persons haunts Pakistan government* (January 9, 2010), www.countercurrents.org/ghazali090110.htm (accessed July 23, 2010).

⁸⁵ Pervaiz Musharaf, *In the line of fire, a memoir* (Pakistan: Lahore, September 25, 2006), 297

When a government detains any person, that detention is subjected not only to its domestic laws but also to international law.⁸⁶ Under IHL it is the duty of the detaining party to answer the above questions. It is also the right of families to know about their missing relatives as it is enshrined in different provisions of IHL.

1.4 Status of Detainees in the light of Geneva Convention

There are three categories of detainees⁸⁷ in the war on terror and these categories are discussed below in the light of Geneva Conventions.

1.4.1 Article 3 Common to all Geneva Conventions

CA3 detainees are entitled to all those rights which are mentioned in Article 3, common to all Geneva Conventions and APII. It does not include the detainees of armed conflict in Afghanistan and Iraq but includes the detainees apprehended outside of these conflicts in the name of war on terror. For example in Pakistan many persons are apprehended on the basis of their alleged link to Al-Qaida and Taliban.

CA3 include the persons who are no longer participating in hostilities. These persons include the members of armed forces who have laid down their arms due to sickness or any other cause.⁸⁸ This Article also prohibits the violence to life and torture, humiliating and degrading treatment.⁸⁹ It emphasizes that the sentences should be passed by regularly constituted courts that provides all judicial guarantees to the citizens.⁹⁰

⁸⁶ Margaret D. Stock, *Detainees in the Hands of America: New rules for a New kind of War*, Terrorism and International Law: Challenges and Responses(2002), 120.

⁸⁷ HR: *Defining the status and rights of "war on terror" detainees under domestic and international law, an international bar association* (November 2008), 7.

⁸⁸ Article 3(1) of all Geneva Conventions 1949.

⁸⁹ Ibid.

⁹⁰Ibid, 3(1) d.

The Second Additional Protocol was designed for the better protection of the persons already protected under CA3.⁹¹ It was enforced on 8 June 1997.⁹² It provides greater detail of fundamental guarantees enjoyed by the person protected under the protocol.⁹³ CA3 along with AP2 are comprehensive in providing protections for the detainees falling within the ambit of this category.⁹⁴

APII is not ratified by USA and Pakistan therefore, it is not considered as binding law on these countries. Under these conditions detainees held in the custody of USA are entitled to the basic protections provided by CA3.⁹⁵

In the context of war on terror the provision of CA3 (1) d should specifically be followed. The sentences should be passed by the proper courts that provide all the guarantees. The court in *Hamdan v Rumsfeld* relied upon the interpretation of CA3 that the formations of the military courts by Bush administration to try the detainees are illegal.⁹⁶ These military courts were not established according to the process provided by CA3.

1.4.2 Article 2 Common to all Geneva Conventions

Common Article 2(CA2) detainees are those, who are apprehended during an IAC i.e. Afghanistan and Iraq. GCIII and API are applicable on them.

Article 2 is common to all Geneva Conventions. According to CA2 “the Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”⁹⁷

⁹¹ HR: *Defining the status and rights of “war on terror” detainees under domestic and international law, an international bar association* (November 2008), 8-9.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid, 4.

GCIII deals with POWs in IAC. IHL provides basic distinction between Combatants and Non-Combatants.⁹⁸ Combatants are those who actively take part in an international armed conflict while non-combatants are civilians under IHL.⁹⁹

Customary International Law (CIL) provides four conditions for the person to take part in war. The person is said to be a combatant if he is under responsible command, having distinctive emblem, carrying arms openly and following the rules of war.¹⁰⁰ These four conditions are mentioned in Hague Regulation of 1907 and in the Article 4(2) d of GCIII.¹⁰¹ The person who fulfills these conditions is said to be a combatant and in case of apprehension get the status of POW.¹⁰²

The first two conditions of combatants can be suspended only if the attack of enemy is spontaneous and inhabitants of that particular territory have no time to organize themselves in to regular armed groups but they have to carry arms openly and obey the rules of war. This kind of situation is called *levee en masse*.¹⁰³

According to the AP1 of 1977, it is not possible to wear distinctive emblem through out the war but last two conditions should be satisfied i.e. carry arms openly and follow the rules of war.¹⁰⁴ If there is any doubt regarding the legal status of POW then the status should be determined by a competent tribunal.¹⁰⁵ The US administration has not yet initiated the procedure for the

⁹⁸ Muhammad Mushtaq Ahmad, *Jihad, Resistance and Rebellion from the perspective of Islamic and International Law* (Gujranwala: Al Shariah academy, December 2008), 303.

⁹⁹ Ibid, 304.

¹⁰⁰ Ibid.

¹⁰¹ Ibid, 304-305.

¹⁰² Ibid, 305.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Article 5 of GC3.

determination of POWs.¹⁰⁶ According to US administration Taliban and Al-Qaeda detainees are not combatants therefore they should not be given the status of POW.

In respect of the members of the Taliban forces, the reason for denying the status of POW is that they did not fulfill the four conditions mentioned in Article 4 of GCIII.¹⁰⁷ If they are not given the status of POW then they are protected under GCIV. However, Article 4 of GCIII mentioned that members of militias or volunteer corps are considered as POW if the said conditions are satisfied.¹⁰⁸

Therefore, CA2 detainees are POWs. GCIII provides numerous protections to POW and provides fundamental guarantees in respect of judicial proceedings.

1.4.3 Civilian under Common Article 2

The detainees apprehended during an IAC but who are not combatant i.e. civilians. Fourth Geneva Convention (GCIV) is applicable on them. GCIV deals with the protection of civilians in international armed conflict.

Every member of armed forces is combatant unless *hors de combat* and every civilian is a non-combatant unless he takes an active part in hostilities.¹⁰⁹ Any person captured during the conflict who is not combatant then such person may be entitled to the status of “protected persons”.¹¹⁰

GCIV provides fundamental rights to the protected persons. This position is supported by the commentary to Article 4 which was published by the ICRC in 1958. It states that: “Every person

¹⁰⁶ HR: *Defining the status and rights of “war on terror” detainees under domestic and international law, an international bar association* (November 2008) 9-11.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Muhammad Mushtaq Ahmad, *Jihad, Resistance and Rebellion from the perspective of Islamic and International Law* (Gujranwala: Al Shariah academy, December 2008), 304.

¹¹⁰ Definition of protected person is given in Article 4 of GCIV and it states that “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

1.5.1 Common Article 3: A minimum standard of humane treatment

Article 3 common to four Geneva Conventions is applicable to those conflicts which are not of an international character¹¹⁸. It provides the minimum standards of human treatment and fair trial.

Common Article 3 laid down certain rules which should be applied by the parties to NIAC including non-state armed groups¹¹⁹. CA3 provides that all persons detained have rights in all circumstances whether the detained person is a terrorist or prisoner of war¹²⁰.

CA3 prohibits “taking of hostages”, it also prohibits three different forms of ill-treatment i.e. torture, cruel and inhuman degrading treatment, and outrages upon personal dignity¹²¹. Similarly IHRL also prohibits all forms of ill-treatment, which I will discuss in the second chapter.

It also obliged the state to treat the detained persons humanely which is also enshrined in some human rights treaties¹²². Acts prohibited in CA3 constitute criminal offences under International law¹²³. This Article is also supported by the provisions of many treaties and by customary humanitarian law.¹²⁴

The persons detained in the war on terror are denied of their fundamental rights and due process of law. The most important principle enshrined in CA3 is “passing of sentence and carrying out of executions by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people”, is not followed while making detentions.¹²⁵ The

¹¹⁸ Michelle Mack with contributions by Jelena Pejic, *Increasing respect for International Humanitarian Law in Non-International Armed Conflicts*, International Committee of Red Cross (Geneva, February 2008): 7 (Hereinafter increasing respect for IHL in NIAC)

¹¹⁹ Ibid, 4.

¹²⁰ Jordon J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror*, Cambridge University Press, 3

¹²¹ Cordula Droegge: *In truth the leitmotiv: the prohibition of torture and other forms of ill-treatment in IHL*, International review of red cross, vol, 89, no 867(September 2007), 517.

¹²² Ibid 535

¹²³ Elihu Lauterpacht and C.J. Green Wood, *International Law Reports* (Cambridge: Cambridge University press, 1999), 447

¹²⁴ Increasing respect for IHL in NIAC, 4.

¹²⁵ Article 3(d) of all Geneva Conventions.

word “regularly constituted court” is defined by ICRC as the court which is established and organized in accordance with the laws already prevailing in the country.¹²⁶

Torture or cruel, humiliating or degrading treatment of the detained persons is a subject of discussion in the context of war on terror. The detainees interned by United States in Guantanamo Bay and Abu Guraib are subjected to torture and degrading treatment. In Pakistan there are 52 illegal torture and detention centers where the missing and detained persons are held for a long time.¹²⁷

Under International Law torture is not permitted under any circumstances because it has a status of *jus cogens*.¹²⁸ IHL also prohibits all forms of torture and all the persons detained, whether in IAC or NIAC, enjoy this protection.

1.5.1.1 Common Article 3 and Customary International Law

Customary International law is considered as one of the important sources of International law as is treaty law. The Statute of International Court of Justice (ICJ) also described it as a “general practice accepted as law”.¹²⁹ Treaties are binding only on those states who are party to that particular treaty but the law which is based on custom binds every state.¹³⁰ Important areas of customary international law have now been codified into widely accepted treaties but this does not mean that custom is on the lower side then treaties.

Customary international law results from a general and consistent practice of states followed, so much so that it becomes custom. As such, it is not necessary for a country to sign a treaty for customary international law to apply.

¹²⁶ HR: *Defining the status and rights of “war on terror” detainees under domestic and international law, an international bar association* (November 2008), 8.

¹²⁷ AHRC, *Pakistan: 52 illegal torture and detention centers identified*, (June 5, 2008).

¹²⁸ HR: *Defining the status and rights of “war on terror” detainees under domestic and international law, an international bar association* (November 2008), 8.

¹²⁹ Jean-Marie Henckaerts, *Study on Customary international humanitarian law: A contribution to understanding and respect for the rule of law in Armed conflict*, International Review of Red Cross, vol 87 no 857 (March 2005): 178.

¹³⁰ Muhammad Mushtaq Ahmad, *Jihad, Resistance and Rebellion from the perspective of Islamic and International Law* (Gujranwala: Al Shariah academy, December 2008), 297.

CA3 reflects customary international law.¹³¹ It was developed in 1949 to protect the persons during NIAC, and it provides a minimum set of customary rights and obligations¹³².

In *Nicaragua Case*¹³³, ICJ decided that CA3 is considered as a part of CIL¹³⁴ and recognized its applicability to NIAC. ICJ also declared CA3 as a “minimum yardstick”,¹³⁵ applicable to both IAC and NIAC. The protections provided by CA3 are considered as so fundamental that they must be observed in all circumstances as a matter of customary international law and it acts as a baseline, from which no one departs.

In *Prosecutor v Tadic Case*¹³⁶, International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that the character of the conflict is not relevant because the basic considerations of humanity are applicable to any armed conflict under customary international law and it is also reflected in CA3 irrespective of IAC or NIAC.¹³⁷

In *Hamdan Case* Supreme Court of United States of America held that CA3 would be applied as a matter of customary international law rather than the treaty law.¹³⁸ U.S. Supreme Court also held that the military commissions formed by the Bush administration to try the Guantanamo Bay detainees violated the provisions of Geneva Convention to which USA is a party.¹³⁹

¹³¹Amnesty International, *USA: 'War on terror' detentions at a crossroads*, September 18, 2006, <http://www.unhcr.org/refworld/docid/45179dc74.html>

(accessed August 7, 2009)

¹³² Jordan J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses In the "War" on Terror* (Cambridge University press), 2-3.

¹³³ Military and Para Military Activities in and against Nicaragua (Nicaragua V United States of America), jurisdiction and admissibility, 1984 ICJ REP. 392 June 27, 1986.

¹³⁴ Elihu Lauterpacht and C.J. Green Wood, *International Law Reports*, (Cambridge university press, 1999), 447

¹³⁵ Nicaragua Case (Military and Para Military Activities in and against(Nicaragua V United States)), ICJ Reports 1986, 114, Para 218.

¹³⁶ Prosecutor v Tadic, Case No IT-94-1.

¹³⁷ HR: *Defining the status and rights of "war on terror" detainees under domestic and international law, an international bar association* (November 2008), 5.

¹³⁸ John B. Bellinger, *Legal issues in the war on terror- A reply to Silja N.U. Voneky*, German law journal. vol.08 no.09(2007), 873

¹³⁹ Mark W.Vorkink and Erin M. Scheick: *The "War On Terror" and the Erosion of the Rule Of Law: The US Hearings of the ICJ Eminent jurist panel*, Human Rights Brief, vol.14, no.1 (2006), 4.

Hamdan was a Yemeni national. He was apprehended from Afghanistan in November 2001 due to his alleged links to Al-Qaeda.¹⁴⁰ He was a driver and body guard of Osama Bin Laden and now in the custody of US detention camp at Guantanamo Bay in Cuba.¹⁴¹ Hamdan claimed that military commissions have violated CA3 (d).¹⁴²

In the light of the judgment of Hamdan case, the office of the Secretary and Defense requested in a memorandum of July 7, 2006 to ensure that every department would follow the standards mentioned in CA3.¹⁴³ The memorandum also noted that "[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda."

With respect to the ruling in the *Hamdan Case*, it is noted that the trials must be carried out by a regular courts that provides all the guarantees which are considered as necessary by people.¹⁴⁴ The provisions of Article 75¹⁴⁵ of API and CA3 are part of the customary law¹⁴⁶, so it has a binding force independent of ratification. Pakistan and USA are bound to follow its provision while making detentions during War on terror.

¹⁴⁰ John p Cerone, *Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld*, The American Society Of International Law Insights, vol 10, issue 17(July 14,2006)

¹⁴¹Marko Milanovik, *Lessons for human rights and humanitarian Law in the war on terror: Comparing hamdan and Israeli Targeted killings case*, International Review of Red Cross, vol. 89 no.866, (June 2007), 374.

¹⁴² CA3(d) discusses about the passing of sentences without previous judgment pronounced by proper courts, affording all the judicial guarantees which are recognized as indispensable by civilized peoples

¹⁴³ Ibid.

¹⁴⁴ Amnesty International, *USA: 'War on terror' detentions at a crossroads*, - 18 September 2006, at: <http://www.unhcr.org/refworld/docid/45179dc74.html> (accessed August 7, 2009)

¹⁴⁵ Article 75 of AP1 prohibits violence to life. It prohibits murder and all kinds of torture and the acts mentioned in Article 75 of AP1 are similar to the acts mentioned in Common Article 3 of Geneva Conventions.

¹⁴⁶ Anthony Dworkin, *America's Interrogation network: Rules on the treatment of prisoners in International law*, The Crimes of War Project (May 17, 2004).

1.5.1.2 Protection under Customary International Humanitarian Law (CIHL)

Many of the rules provided by IHL, which regulate the conduct of hostilities in international armed conflicts, also regulate non-international armed conflicts,¹⁴⁷ because they are customary in nature.¹⁴⁸

1. Fundamental guarantees:

Customary international humanitarian law provides rules regarding fundamental guarantees, which are applicable in international and non-international armed conflicts.¹⁴⁹ These guarantees have strong basis in IHL.¹⁵⁰ Humane treatment¹⁵¹ is required in respect of civilians and persons *hors de combat*¹⁵²; therefore CIHL prohibits ill treatment of the persons displaced in the course of armed conflicts.¹⁵³

No distinction should be made on the basis of race, color, sex, language, nationality or any other status¹⁵⁴ whether it is IAC or NIAC. CIHL also prohibits all forms of torture, humiliating and degrading treatment¹⁵⁵ and requires fair trial.

2. Missing Persons

In almost every conflict, whether it is international or non-international or any situation of internal violence the people disappear and their whereabouts remained unknown.¹⁵⁶ They may be apprehended, abducted or killed during conflicts.¹⁵⁷ They could be held incommunicado or in secret

¹⁴⁷ Michelle Mack, with contributions by Jelena Pejic, *Increasing respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC (Feb 2008), 9.

¹⁴⁸ Workshop 1, 28th international conference of red cross and red crescent, *IHL and the challenges of contemporary armed conflicts* (Geneva, 2- 6 December 2003).

¹⁴⁹ Jean-Marie Henckaerts and Louise Doswald-beck, *Customary international humanitarian law*, vol 1 RULES, 299 (hereinafter the rules of customary IHL)

¹⁵⁰ Jean-Marie Henckaerts, *Study on Customary international humanitarian law: A contribution to understanding and respect for the rule of law in Armed conflict*, vol 87 no. 857 (March 2005), 195.

¹⁵¹ Ibid, Rule 87, 307.

¹⁵² The person who takes no more active part in hostilities is hors de combat

¹⁵³ The rules of customary IHL, 308.

¹⁵⁴ Ibid., Rule 88.

¹⁵⁵ Ibid., Rule 90, 315.

¹⁵⁶ Monique Crettol and Anne-Marie La Rosa, *The missing and transitional justice: the right to know and the fight against impunity*, International Review of Red Cross, vol. 88 no. 862, (June 2006), 35

¹⁵⁷ Ibid.

detentions for a long period of time.¹⁵⁸ They may be a member of armed forces or civilians or displaced persons.¹⁵⁹ The families and loved ones of missing persons suffer more than anyone else.

During war on terror many persons went missing and yet their whereabouts remained unknown. Pakistani authorities refused to give any information regarding these missing persons. Each party to the conflict is duty bound to take all measures regarding the missing persons and provide full information to their family members.¹⁶⁰

In 1974, UN General Assembly¹⁶¹ called upon the parties to the armed conflict to provide assistance regarding missing persons during armed conflicts¹⁶². United Nations High Commission for Human Rights has passed a resolution, which requested the States to follow the rules of international humanitarian law and the resolution repeats the provisions of Geneva Conventions and Additional Protocols. It also ensures the right of the families to know the whereabouts of their relatives missing during armed conflicts.

It also requests the states to take effective steps, determine the fate of the persons missing in the course of armed conflict and to cooperate with ICRC as well as the other organizations in establishing the fate of missing persons.¹⁶³

CIHL provides the fundamental rules which help to prevent the person from going missing in the situations of armed conflict or internal violence.¹⁶⁴ If the members of armed forces or civilians, who are wounded, sick and deprived of their liberty, would be treated according to the fundamental rules then minimum number of persons disappears and the suffering of the families would also be reduced.¹⁶⁵

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, 356

¹⁶⁰ The rules of Customary IHL, Rule 117, 421.

¹⁶¹ UN General Assembly, Res.3220(XXIX)

¹⁶² The rules of customary IHL, 427.

¹⁶³ Commission on Human Rights resolution 2002/60, 55th meeting (April 25, 2002)

¹⁶⁴ ICRC, *Guiding principles/ Model Law on the missing*, Advisory service on International humanitarian law, 3

¹⁶⁵ Ibid.

3. Persons deprived of their liberty

These people must be provided with sufficient food, water, health and medical assistance.¹⁶⁶ Women and children must be held in separate places¹⁶⁷ during IAC and NIAC. They must be allowed to contact their family members¹⁶⁸ and the government should release them as early as the reason of deprivation ends.¹⁶⁹

Therefore, Pakistan is under obligation to disseminate IHL and implement its fundamental principles into its national legal system and practice.¹⁷⁰

1.5.2 Second Additional Protocol

Second Additional protocol to the Geneva Convention deals with the protection of the victims of NIAC. It came into force on 8 June 1977. It was designed to provide better protection for the people covered by Common Article 3. It includes detained persons, wounded, sick and civilian population.¹⁷¹

This protocol had been ratified by 163 countries; Pakistan and United States of America have signed it on 12 December 1977 with the intention of ratifying it. The provisions of CA3 are relatively comprehensive in nature then APII. Neither Pakistan nor United States have ratified it therefore, it is not considered as binding on those countries.¹⁷²

However, some of the provisions of APII are customary in nature and are binding. It is the duty of the state to respect the fundamental rights of the civilians and protect the rights of the persons who are not actively participating in conflict.¹⁷³

¹⁶⁶ The rules of customary IHL, Rule 118, 429.

¹⁶⁷ Rule 119, 431.

¹⁶⁸ Rule 126, 448.

¹⁶⁹ Rule 128(c), 451.

¹⁷⁰ ICRC, *Guiding principles/ Model Law on the missing*, Advisory service on International humanitarian law, 3

¹⁷¹ HR: *Defining the status and rights of "war on terror" detainees under domestic and international law, an international bar association* (November 2008), 8.

¹⁷² Ibid.

¹⁷³ Jean-Marie Henckaerts, *Study on Customary international humanitarian law: A contribution to understanding and respect for the rule of law in Armed conflict*, International Review Of Red Cross, vol 87 no 857 (March 2005), 188.

In these circumstances the detainees held in the custody of Pakistan and America are entitled to the basic protections mentioned under CA3 and it is the duty of Pakistani government to follow these principles while making detentions. As the provisions are customary in nature so they have a binding force irrespective of ratification.

1.6 Implementation and Enforcement of IHL

For its implementation and enforcement;

- The parties involved in conflict must assure the respect of IHL by its armed forces.¹⁷⁴
- Each state must provide legal advisors to advice military commanders on the application of IHL when needed.¹⁷⁵
- A state is under an obligation to stop the violations of IHL.¹⁷⁶

The Geneva Conventions and the Additional Protocols give numerous rights and freedoms which should be applied to the people caught during armed conflicts.¹⁷⁷ The rules contained in Geneva Conventions are designed to prevent the persons from enforced disappearances during Armed Conflict.¹⁷⁸

Respect of these rules and principles means to respect the integrity and dignity of detained persons.¹⁷⁹ It is the primary duty of the Pakistani Authorities to respect international humanitarian law, prevent enforced disappearances and take steps to know the where about of missing persons.¹⁸⁰

¹⁷⁴ Ibid. 210.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ HR: *Defining the status and rights of "war on terror" detainees under domestic and international law, an international bar association* (November 2008), 14.

¹⁷⁸ ICRC, *Missing persons- A hand book for parliamentarians*, Inter-Parliamentary Union (2009), 3

¹⁷⁹ Ibid., 13.

¹⁸⁰ Ibid., 3.

CHAPTER 2

HUMAN RIGHTS LAW: ITS VIOLATION AND APPLICATION

The detentions made in Pakistan violate many fundamental rules of International Law. It is evident that Pakistan has violated large range of human rights, and thus violated obligations under Human Rights law in context of its cooperation with US-led “War on terror”.

International law requires the States to take all measures appropriate to guarantee the right to life, and other essential freedoms, to all within their jurisdiction¹⁸¹. Torture, enforced disappearances, arbitrary arrests, secret detentions, unfair trials and illegal transfers are severe human rights violations. These violations erode the whole structure of International human rights legal framework.¹⁸²

This chapter contains discussion about the violation of International laws by Pakistan during War on terror regarding detentions. These violations would be discussed in the light of International Human Rights law and the provisions of the treaties. International Human Rights Law (IHRL) is also applied to analyze the situation of detained persons in Pakistan during global war on terror¹⁸³. The applicable international law could also be the Statute of International Criminal Court¹⁸⁴, which treats enforced disappearances as “crimes against humanity”.

¹⁸¹ International Commission of Jurists, *Assessing damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva, 2009), 1.

¹⁸² Council of Europe, Commissioner for Human Rights, “*After the human rights breakdown during the 'war on terror', the damage must be assessed and corrective action taken*” (March 16 2009).

¹⁸³ Reports of the working group on arbitrary detention, *International service for human right the reports in short*, 6.

¹⁸⁴ Dr.Tariq Hassan, *Supreme Court Of Pakistan: The case of Missing Persons*, Criterion, vol.4, no.3(February 15, 2011) (hereinafter Dr.Tariq Hassan, *Supreme Court Of Pakistan: The case of Missing Persons*)

Under HRL a person apprehended should be informed of the reasons for his arrests and immediately be brought before the judge.¹⁹⁴ Detainees are free to challenge the lawfulness of the detention¹⁹⁵ and are entitled to compensation.¹⁹⁶ Nothing can justify indefinite detention; either it is war on terror or any national policies.¹⁹⁷

Since Pakistan became an ally of US, it has started the practice of enforced disappearances which includes foreign and Pakistani nationals suspected to be linked with Al-Qaeda and Taliban¹⁹⁸.

Hundreds of people have been arbitrarily arrested and detained; some of these have been unlawfully transferred to USA without any judicial procedures and in violation of principle of Non-refoulement¹⁹⁹. Detainees are also tortured, ill treated and held incommunicado. It is the duty of the Government to arrest all those persons who violates the fundamental rights and freedoms of its citizens.²⁰⁰

2.1.1 Issues under IHRL

There are certain questions regarding the application of International Human Rights Law, which should be answered first:

2.1.1.1 Applicability of IHRL to protected Persons under IHL

It is the principle of modern international law that IHRL is not only applicable in peace times and it is not justifiable to suspend the basic human rights during an armed conflict. This principle was affirmed by ICJ²⁰¹ in the Nuclear Weapons Advisory opinion in 1996 and it stated that “The

¹⁹⁴Jean-Marie Henckaerts and Louise Dosworld-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press), 349.

¹⁹⁵ Ibid.

¹⁹⁶ Alfred de Zayas, *Human Rights and Indefinite Detention*, International Review of Red Cross, vol 87 no 857, (March 2005), 15.

¹⁹⁷ Ibid.

¹⁹⁸ AI, *25 years remembering the disappeared*, (August 29, 2008)

¹⁹⁹ AI, *Pakistan: Human rights ignored in the war on terror*, (September 29, 2006), 1.

²⁰⁰ Mark W.Vorkink and Erin M. Scheick: *The “War On Terror” and the Erosion of the Rule Of Law. The US Hearings of the ICJ Eminent jurist panel*, Human Rights Brief, vol 14, no 1(2006), 2.

²⁰¹ Silvia Borelli, *Casting light on the legal black hole: International law and detentions in “the war n terror”*, International Review of Red Cross, vol 87 no 857 (March 2005), 53 (hereinafter Casting light on the legal black hole: International law and detentions in WOT)

protections offered by human rights convention does not cease in the case of armed conflict” and it also states that “As regard to the relationship between international human rights law and humanitarian law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

In a case²⁰² the Inter-American Commission state that:

While international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a ‘common nucleus of non-derogable rights and a common purpose of protecting human life and dignity’, and there may be a substantial overlap in the application of these bodies of law

According to above discussion it has been proven that IHRL is not only applicable in peace times but also in the time of war. The persons who were under the protection of IHL are also protected by IHRL because human rights of a person are protected in all circumstances and are absolute.

2.1.1.2 Obligation of States under IHRL

United states have refused to apply human rights law to the detainees in its detention center because they are out side its jurisdiction but most of the human rights treaties require the State to ensure full exercise of the rights and freedom to all persons subject to their jurisdiction. A State is bound under IHRL when the act is performed outside its own territory and outside its own jurisdiction.²⁰³

²⁰² CASE 10.951 COARD AT EL, United States, (September 29, 1999), Para 39.

²⁰³ America has kept the detainees outside the American Jurisdiction to avoid Scrutiny of law by its Court. See Case of Abu Ali v. Ashcroft.

A State may be held responsible for the acts performed outside its national territory but in an area over which it exercises its authority and control.²⁰⁴

In May 2002 the Inter-American Commission, on the issue related to the treatment of the persons detained in Guantanamo Bay held that

It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. And that in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another. And both have same bases and purpose i.e. promoting human life and dignity.²⁰⁵

According to USA the detainees at Guantanamo Bay are not subjected to its domestic law, because Guantanamo Bay is not under United States territory but this statement of USA was disapproved by the US Supreme Court. In the case *Rasul v. Bush*, the US Supreme Court decided that the US Courts have no jurisdiction to hear the petitions of habeas corpus.²⁰⁶

In *Abu Ali v. Ashcroft*²⁰⁷ a US court held that the executive is responsible for the detention of persons outside the territory of USA. The US Executive argued that the Ahmed Abu Ali was detained by a foreign state therefore right to habeas corpus is not available.

According to the judgement the courts of United States of America have jurisdiction to deal with the petition of habeas corpus. The person detained by the foreign government has a right to

²⁰⁴ Guantanamo Bay is situated in Cuba and it is under the control of American authorities. Therefore USA is held responsible for all kind activities that takes place in Guantanamo Bay

²⁰⁵ *Casting light on the legal black hole: International law and detentions in "WOT"*, 66

²⁰⁶ *Ibid.*, 67

²⁰⁷ <http://www.cdi.org/news/law/abu-ali-habeas-order-121604.pdf>

move the petition of habeas corpus when there is an enough evidence of the involvement of United States of America and the persons will be release only on the request of United States.²⁰⁸

Therefore the detainees held by the United States outside its jurisdiction are fully protected under international human rights law and even under domestic law of United States.

2.1.1.4 Non-Refoulement and the detainees of war on terror

The Principle is defined in Article 51 of Refugee Convention and this principle is an established principle of International Law.²⁰⁹ In the light of International Covenant on Civil and Political Rights, the Human Rights Committee has stated that:

...the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, (...) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.²¹⁰

The principle of Refoulement prohibits the state to hand over its individual to the states where there is a great risk of violation of its basic rights. It also prohibits to handover the individuals to the countries that transfer those persons to the third state where there is a danger of violation of fundamental rights²¹¹ as happened in Abu Ali's²¹² case.

²⁰⁸ *Casting light on the legal black hole: International law and detentions in the "WOT"*, 67

²⁰⁹ International Commission of Jurists, *Assessing damage, Urging Action: Report of the Eminent jurists panel on Terrorism, Counter-terrorism and Human Rights*, (Geneva, 2009), 12

²¹⁰ *Casting light on the legal black hole: International law and detentions in the "WOT"*, 63.

²¹¹ *Ibid*, 64

²¹² *Abu Ali v. Ashcroft*(DCT, D.C, 16 December 2004)

Therefore the people handed over by Pakistani authorities or by other authorities to American Authorities with knowledge that they will not be treated in accordance with law was a serious violation of this rule. And similarly America itself has violated this rule for example United State was aware of the fact that the US citizen Abu Ali was tortured by Saudi authorities and it was under the control of the American Government to release him but they didn't and hence violated this very principle.

Customary international law also prohibits the handing over of anyone in any matter to the country where there is a serious risk of violation of human rights. Pakistan is also bound by it as discussed above that this principle is binding on all states irrespective of specific treaty violations.²¹³

According to above analysis it is proved that the persons detained during war on terror are always protected under IHRL.²¹⁴

2.2 Human Rights Treaties

7/18/05
The United Nations Charter is the first international treaty that promotes and protects the human rights. Article 1(3) of the Charter states: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

United Nation promotes universal respect and observance of fundamental human rights without any distinction²¹⁵ and come up with a number of Declarations, Treaties and Conventions dealing with various aspects of human rights.²¹⁶

²¹³ Ahmed Warraich., *ICJ-HRCP Anti-Terror Hearings*, 6-7.

²¹⁴ AI, "War on terror" *Human Rights Issues US Obligations under International law* (USA: 2010), www.amnestyusa.org/waronterror/detainees/us_obligations.html

²¹⁵ Article 55 of United Nations Charter.

²¹⁶ Ahmed Warraich, *ICJ-HRCP Anti Terror Hearings*, 3.

Along with other rules and laws, several Human Rights treaties prohibits the enforced disappearances, safeguard the rights of the unlawful detainees, accede to them right of liberty, fair trial, and human treatment and prohibits torture and ill treatment. The following treaties are discussed below.

2.2.1 Universal Declaration of Human Rights

Basic norms of International human rights are provided in UDHR. It was passed on December 10, 1948 by the General Assembly of the United Nations. Although this treaty is not legally binding on states but some of the provisions of this declaration are considered as a part of international customary law.²¹⁷

All Human beings are equal in terms of rights²¹⁸ and entitled to all those rights and freedoms provided in this declaration without any discrimination.²¹⁹ All kinds of Torture, cruel and inhumane treatment are prohibited under this declaration.²²⁰ Arbitrary arrest, detention and, exile is also prohibited²²¹ and every person is entitled to a fair public hearing by an independent and impartial tribunal.²²²

2.2.2 International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights (ICCPR) was adopted on December 16, 1966.²²³ This convention also prohibits arbitrary detention and ensures due process and rights for the detained persons. The convention provides that every one has inherent right to life and no person

²¹⁷ Rosa Ehrenreich, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, University of Pennsylvania Law Review, vol. 153, no. 2 (Dec., 2004), 748. <http://www.jstor.org/stable/4150665> (accessed, October 7, 2009).

²¹⁸ Article 1 of UDHR.

²¹⁹ Article 2 *ibid.*

²²⁰ Article 5

²²¹ Article 9

²²² Article 10.

²²³ General Assembly Resolution 2200A (XX1).

shall be arbitrarily detained.²²⁴ Torture, cruel, in humane and degrading treatment is prohibited under this convention. No one is allowed to medical experimentation without consent.²²⁵

Every one has right to liberty and security and no one should be deprived of his liberty. Due process of arrest should be adopted and the person arrested should be brought promptly before judge.

2.2.3 UN Declaration on the Protection of All Persons from Enforced disappearance²²⁶

Pakistan became a member of United Nation Human Rights Council in May 2006. This Council unanimously adopted the draft International Convention for the Protection of All Persons from Enforced Disappearance in the same year. This Convention bans on enforced disappearances and considered it as “crimes against humanity”.²²⁷

This declaration provides that enforced disappearances are contrary to human dignity and violates fundamental human rights.²²⁸ These disappearances are not justified under any circumstances whether it is state of war or state of emergency.²²⁹ It is a duty of every state to take effective measures in order to stop the acts of enforced disappearance in their respective jurisdiction.²³⁰

The main hurdle for the enforcement of this Declaration in Pakistan is an amended Army Act of 1952, which was amended during Musharaf’s regime²³¹ and unfortunately Pakistan fails to incorporate its provisions into its domestic laws.

²²⁴ Article 6 of ICCPR

²²⁵ Ibid. Article 7

²²⁶ General Assembly Resolution 47/133, (December 18, 1992)

²²⁷ Rasheed A. Razvi, *Cases of enforced disappearance in Pakistan*, Pakistan Bar Council, 2007.

²²⁸ Article 1 of United Nation Declaration on the protection of all persons from enforced disappearances.

²²⁹ Ibid., Article 2.

²³⁰ Ibid., Article 3

²³¹ I have mentioned the relevant provision of this Act on p.51 and for more details see Article of Dr. Tariq Hassan, *Supreme Court of Pakistan: the case of missing persons*, 15.

2.2.3.1 International Convention for the Protection of All Persons from Enforced Disappearances

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN general assembly on 20 December 2006.

This Convention is considered as one of the strongest human rights treaties.²³² This convention highlights the principles regarding enforced disappearances. It states that no one shall be subjected to enforced disappearance²³³ even in if there is a state of war or a threat of war, internal political instability or any other public emergency. Article 2 of this convention gives the definition of enforced disappearance i.e.

‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or group of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of the liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of law.

According to above definition enforced disappearances includes; arrest, detention or any form of deprivation of liberty by State or any other person acting on behalf of state. Such persons are placed outside the protection of law and their whereabouts remained unknown. Pakistan, as a key ally in the war on terror has made many violations during this war.

²³² AI: *25 years remembering the disappeared*, (August 29, 2008).

²³³ Article 1 of International Convention for the Protection of All Persons from Enforced Disappearance.

Each State Party shall take appropriate measures to investigate acts²³⁴ And Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.²³⁵

Enforced disappearances have severe effects not only on the victims but also on the families and relatives of such victims.²³⁶ This convention will come into force by the ratification of 20 states. Pakistan has not ratified this convention even then it is bound by prohibition of enforced disappearances as it is a rule of customary international law.²³⁷

2.2.3.2 Secret detentions and enforced disappearances

Secret detentions are prohibited under International law because it violates many norms of IHRL. It is prohibited under all circumstances. The acts of secret detentions are considered as crime against humanity.²³⁸ Before the adaptation of 1979²³⁹ Resolution, the detained persons were referred to as missing persons. However, after this Resolution the missing persons were entitled to “disappeared persons” and are protected under law.²⁴⁰

Not only are the authorities of those states responsible for the violation of IHRL who keeps the detained person in their custody but that state is equally responsible on whose order that particular person is detained.²⁴¹ According to international law a state which helps another state to commit a violation of international law is internationally responsible if knowing the circumstances of violation.²⁴²

²³⁴ Ibid., Article 3

²³⁵ Ibid., Article 4

²³⁶ International Commission on Missing Persons, *Second and Third Combined Periodic Reports of the Former Yugoslav Republic of Macedonia on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (April 11, 2008), 2.

²³⁷ AI, *Denying the un deniable: enforced disappearance in Pakistan*, (July 23, 2008), 8

²³⁸ Kanaga Raja, *Secret detentions widespread in the war on terror, say experts*, Third World Resurgence (February, 2010)

²³⁹ United Nation General Assembly Res 33/173, 1979.

²⁴⁰ Inter-sessional open-ended working group to elaborate the draft legally binding normative instrument for the protection of all persons from enforced disappearances, (first session 6th-17th January 2003)

²⁴¹ Ibid.

²⁴² AI, *Pakistan: Human Rights ignored in the “War on Terror”* (September 29, 2006), 14-15.

Abu Faraj al libbi was arrested in Pakistan on May 2005 by Pakistani intelligence agencies assisted by US, intelligence personnel.²⁴³ He was suspected of being an important member of Al-Qaeda.²⁴⁴ On 6 June the Pakistani authorities confirmed that he has been handed to USA custody in response of the request made by USA.²⁴⁵ He would be taken to US detention facility, where he is interrogated along with other suspects. Nobody knows where he has taken.²⁴⁶

Secret detention violates the right to life and liberty. It is not allowed under any jurisdiction to deprive a person of his liberty and held in secret for an undefined period without any possibility to resort to law.²⁴⁷ State authorities deprived them of their right to fair trial and due process of law and obtained confessions on the basis of torture and other forms of ill-treatment.

It is actually an incommunicado detention, which means that the person is held in an unknown place for a long period without any communication to his family members and denied all legal procedures including Habeas Corpus. The act of secret detention in the name of war on terror is not new but there are many other examples when the States resorted to secret detentions for Example the Nazi regime and the former USSR with its forced labor camps.²⁴⁸

Pakistani authorities have facilitated the abduction of the persons alleged to be linked with Al-Qaeda and Taliban and thus violated international law.²⁴⁹ Hundred of detainees have been detained by USA and Pakistani security agencies. Right of habeas corpus has been denied therefore the detainees are prevented from being produced before the court.²⁵⁰

²⁴³ Margaret Satterthwaite, *Extraordinary Rendition and Disappearances in the "War on Terror"*, Gonzaga Journal of International law, vol. 10, no.1 (2006), 10.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ AI, *Pakistan: Human Rights ignored in the "War on Terror"* (September 29, 2006), 14-15.

²⁵⁰ Cage Prisoners, *Devoid of the Rule of law, Pakistan's War on terror* (July 24, 2008), 3.

2.2.4 Vienna Convention on Consular Relation

This Convention was passed on 24th April 1963. It provides the outline of the functions of consular agents, discuss the immunities and the privileges granted to consular officials when posted to foreign country and specify the duties when citizens of their country face difficulties in a foreign nation.²⁵¹

This convention provides free communication and accession to the consular officers with the nationals of the sending State and the national of that State shall have the same freedom to communicate with the consular officers.²⁵² It is the duty of the receiving state to inform the consular post of the sending state if a national of that state is arrested or detained in any other manner.²⁵³ The consular officers shall visit to the nationals arrested and provide them with legal assistance.²⁵⁴

Pakistan has acceded to this convention on 14th April 1969 but still not signed it.²⁵⁵ United States is also a party and adopted Vienna Convention and its Optional Protocol in 1963. As a signatory, it is the duty of United States to provide consular to the detained foreign nationals and US is under an obligation to provide rights to the detained foreign nationals mentioned in Article 36 of the Convention.²⁵⁶

Therefore it is the duty of the United States to provide rights mentioned in Article 36 to Dr.Afia Siddiqui and to the other Pakistanis detained in American jails. It has already violated²⁵⁷ this convention three times²⁵⁸ and if United States or any other country violate Vienna Convention and refused to give rights to the foreign nationals that country can go to International Court of Justice. It

²⁵¹ Juan Manuel Gomez Robledo, *Vienna Convention on Consular Relations* (Vienna :24 April 1963)

²⁵² Article 36(1)(a) of Vienna Convention on Consular Relations 1963.

²⁵³ Ibid., 36(1)(b)

²⁵⁴ 36(1)(c)

²⁵⁵ United Nation, Vienna convention on Consular relation, 24th April 1963.

²⁵⁶ Dr Afia's case by Ali Palh

²⁵⁷ United States has violated three times before this and as a result Paraguay, Mexico and Germany have approached ICJ.

²⁵⁸ Michael John Garua, *Vienna Convention on Consular Relations: Overview of US Implementation and International court Of Justice (ICJ) Interpretation of Consular Notification Requirements* (May 17, 2004).

is the responsibility of the Pakistani government to claim all the rights of detained nationals from America, which are mentioned in Article 36 of the convention.

2.2.5 UN Convention against Torture and Other Cruel, Inhuman, or Degrading treatment or Punishment

Torture is considered as one of the most serious violations under International Law. It is not acceptable in any case even if it a public emergency.²⁵⁹ It violates the important principle of human dignity.²⁶⁰

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) was adopted in 1984 by United Nation's General Assembly.²⁶¹ It is most important human rights treaty that deals exclusively with torture. This Convention puts ban on torture, cruel degrading treatment²⁶² and refoulment.²⁶³

Pakistan has signed this convention on 17 April 2008. The party to the convention is obliged to follow its provisions like another domestic law. United States has ratified this convention on 21 October 1994.²⁶⁴ Article 1 of the convention provides the definition of torture:

torture means 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 or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for

²⁵⁹ Chris Sidoti, Human Rights and the War on Terrorism" (Paper presented at the Multicultural Council of the northern territory Darwin NT, March 25, 2003)

²⁶⁰ International Commission of Jurists, *Assessing damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva: 2009), 12.

²⁶¹ GA/RES/39/46 10 December 1984

²⁶² Article 2 of UNCAT

²⁶³ Ibid., Article 3

²⁶⁴ Dr Afia's case by Ali Palh

any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to above definition, the behavior adopted by the US government with Dr. Afia Siddiqui at Bagram camp comes under the definition of torture, so it is a duty of American Government to investigate that what has happened to her and provide justice to her. On the other hand Pakistani Authorities have also violated the principle of Refoulment by handing Dr. Afia Siddiqui along with other detainees to America during war on terror.

As a signatory, Pakistan is obligated to respect its provisions because torture is not allowed under any circumstances even if a country has not signed it and international customary law also prohibits torture, degrading and inhuman treatment.²⁶⁵

2.3 Conclusions

This analysis has affirmed that the detainees of War on Terror are protected under IHRL. The human rights are inalienable and protect the person's rights of liberty against arbitrary arrest and detention.

It is affirmed by United Nations Commission on Human Rights in its Resolution on Human Rights and Terrorism that "all States have an obligation to promote and protect all human rights and fundamental freedoms and to ensure effective implementation of their obligations under international law".²⁶⁶

²⁶⁵ Ibid.

²⁶⁶ Ahmed Warraich, *ICJ-HRCP Anti Terror Hearings* at <http://eip.icj.org/IMG/ICJ->

Some of the Articles of Universal declaration, the ICCPR and other human rights treaties mentioned above are accepted as “peremptory norms”²⁶⁷ of international law that are binding on all states at all times independent of ratification. Murder, enforced disappearances, illegal transfers, torture or other cruel, inhuman treatment and arbitrary arrest and detention are considered as minimum norms which are peremptory in nature.²⁶⁸

Pakistan has signed the International Covenant on Civil and Political Rights but it has not ratified it. Yet it has to ratify the UN Convention Against other Cruel, Inhuman or Degrading Treatment or Punishment, Convention for the Protection of All Persons from Enforced disappearance.²⁶⁹ It is the duty of our Government to ratify these treaties as soon as possible and incorporate these provisions into domestic law.

The United States has also signed and ratified ICCPR, which prohibits arbitrary arrest and detention. It has been accused of violating the rights of detainees in Guantanamo Bay. As the right against prolonged arbitrary detention is considered as norm of customary international law, so the USA is violating its obligation under customary international law by detaining the foreign nationals. Hence the united State and its Allies are under an obligation with regard to detained and missing persons.

²⁶⁷ Peremptory norms are those fundamental and basic principles of international law which are accepted by international community of states and from which no derogation is permitted.

²⁶⁸ Rosa Ehrenreich, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, University of Pennsylvania Law Review, Vol. 153, No. 2 (Dec., 2004), 749. <http://www.jstor.org/stable/4150665> (accessed, October 7, 2009).

²⁶⁹ Pakistan, *Amnesty International Submission to the UN Universal Periodic Review* (2008), 3.

CHAPTER 3

DOMESTIC LAWS OF PAKISTAN AND RIGHTS OF THE DETAINEES IN THE WAR ON TERROR

Global war on terror has caused more sufferings, pain and destruction to the people of Pakistan than to any other country. After September 11 attacks, Pakistan became an ally of United States of America along with international community in the war against terror.²⁷⁰ Since the war on terror has started, several hundred Pakistanis have been abducted, disappeared, detained and tortured.²⁷¹

Enforced disappearance is already a problem in countries such as Nepal and Sri Lanka, but it has emerged in South Asia especially in Pakistan after the declaration of war on terrorism.²⁷² Act of enforced disappearance violates several provisions of Constitution Law of Pakistan i.e. freedom from arbitrary detention, right to judicial review, and the prohibition of torture.²⁷³ Enforced disappearance constitutes the criminal offence of abduction and kidnapping under Pakistan penal Code²⁷⁴

Pakistan has committed numerous violations of its domestic law. Human rights, protected by the Constitution of Pakistan are being continuously violated during this war, which includes right to life and security, free from being tortured and prohibition of enforced disappearances.²⁷⁵ Due to this war many persons are unlawfully transferred to United States of America in circumvention of Extradition law of Pakistan.²⁷⁶ During this process the right to fair trial and the right of detainees to be treated in accordance with law is violated.²⁷⁷

²⁷⁰ Noor-ul-Haq, *Pakistan: A victim of terrorism* (vol 1), 5

²⁷¹ Abdus Sttar Ghazali, *The Issue of 10,000 Disappeared Persons Haunts Pakistan Government* (January 09, 2010)

²⁷² Noor-ul-Haq, *Pakistan: A victim of terrorism* (vol 1), 4.

²⁷³ AI, *Denying the undeniable: Enforced disappearances in Pakistan*, (2008), 8.

²⁷⁴ Dr.Tariq Hassan, *Supreme Court Of Pakistan: The case of Missing Persons*, 6.

²⁷⁵ AI, *Pakistan: Human Rights ignored in the "War on terror"*, 2006.

²⁷⁶ Ibid

²⁷⁷ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002),1

Pakistani law prohibits detentions without the approval of court.²⁷⁸ Most of the persons alleged in terrorism were not arrested according to the procedure provided by The Code of Criminal Procedure 1898, no official records of detention were kept and they were not brought before the magistrate within twenty four hours.²⁷⁹

In this chapter we will discuss the violations of domestic law of Pakistan in US-led war on terror and discuss that the detentions carried in Pakistan during this war violates many provisions of our domestic law due to which Pakistan is accountable to its people. We will also negate the concept “that the detainees are not protected under any law” and mention the relevant provisions related to its applicability.

3.1 Enforced Disappearances in Pakistan

Since Pakistan has joined US-led war on terror, it has witnessed several cases of enforced disappearance.²⁸⁰ The cases of enforced disappearance or missing persons are growing day by day.²⁸¹ Missing persons are those whose whereabouts are unknown and whose families allege that they have been arrested or abducted by the Government of Pakistan or its agencies.²⁸²

Missing persons are deprived of their liberty, which is a clear violation of fundamental rights regarding liberty and due process of the law given in the Constitution of Pakistan.²⁸³ A large number of detained persons have been held for more than a year without any contact to their family members and lawyers²⁸⁴

²⁷⁸ The Associated Press, *Pakistan under Fire over Detentions*, New York Times, November 29, 2006.

²⁷⁹ AI, *Pakistan: Human Rights ignored in the War on Terror Executive Summary*, 2006.

²⁸⁰ Rasheed A Rizvi, *Cases of enforced disappearance in Pakistan*, Pakistan Bar Council, 2007

²⁸¹ Ibid.

²⁸² Dr. Tariq Hassan, *Supreme Court of Pakistan: The case of Missing Persons*, 1-2.

²⁸³ Ibid.

²⁸⁴ Griff Witty and Karen De Young, *Pakistan holding thousands in indefinite detention, officials say*, The Washington Post, April 22, 2010,

In Southern Baluchistan, more than 4000²⁸⁵ persons have been disappeared, in Sindh province more than 100 persons, and in Khyber Pakhtun khwa (earlier known as North West Frontier Province) more than 1000 persons have been disappeared since the war has started²⁸⁶ and more than 1000 alleged terrorists have been arrested since 2001.²⁸⁷

On 10th November 2007, former president of Pakistan General Pervez Musharaf issued an Ordinance²⁸⁸ to amend the Pakistan Army Act (PAA), 1952. This Ordinance expands the PAA and enables the military authorities to try the civilians for several offences.²⁸⁹

Under this order²⁹⁰ civilians may be tried in military courts for offences including treason, terrorism and conspiracy. Due to this amendment, it has been feared that it will strengthen the powers of intelligence forces and agencies,²⁹¹ which played a large part in the enforced disappearance of several Pakistani citizens.

The abduction and arrest of countless Pakistani affects the civil society at large.²⁹² Nobody knows the exact number of the persons missing since 9/11.²⁹³ According to Defense of Human Rights of Pakistan²⁹⁴ thousands of people have been disappeared and detained during this war.²⁹⁵

²⁸⁵ Asian Legal Resource Centre, *Submission by the Asian Legal Resource Centre to the Human Rights Council's Universal Periodic Review Concerning Human Rights in Pakistan*, (February, 2008), 2-3.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Order No.LXVI of 2007.

²⁸⁹ AI, *Pakistan repairing the damage: ensuring robust Human Rights safeguards* (March 1, 2008), 3.

²⁹⁰ Amendment of section 2: Any offence, if committed in relation to defence or security of Pakistan or any part thereof or Armed Forces of Pakistan, punishable under the Explosive Substances Act, 1908 (VI of 1908), Prejudicial conduct under the Security of Pakistan Act, 1952 (XXXV of 1952), the Pakistan Arms Ordinance, 1965. (W.P.Ord. X of 1965), the Prevention of Antinational Activities Act, 1974 (VII of 1974) or Anti-terrorism act, 1997 (XVII of 1997), sections 109, 117, 120B, 121, 121A, 122, 123, 123A, 124, 124A, 148, 302, 353 and 505 of the Pakistan Penal Code, or attempt to commit any of the said offences

²⁹¹ Commonwealth Human Rights Initiative, *A report on commitment of performances of the Commonwealth members of the UN Human Rights Council*, 2008, 65.

²⁹² FIDH, *Pakistan- A Long March For Democracy And The Rule Of Law*, (2007-2008),19

²⁹³ Abdus Sttar Ghazali, *The Issue of 10,000 Disappeared Persons Haunts Pakistan Government*, (January 09, 2010)

²⁹⁴ Ibid.

²⁹⁵ Masood janjua and Faisal Faraz are among hundreds of victims of enforced disappearance. Many of them detained after September 11 attacks.

According to Pakistani security officials vast numbers of detained persons belongs to Pakistan but some are foreigners including Uzbeks, Chechens, and Arabs.²⁹⁶ Inspite of all this, Pakistan has continuously denied the practice of enforced disappearances.²⁹⁷

3.1.1 Cases of some Disappeared persons in pakistan

After 2008 elections, the elected government promised to trace all people subjected to enforced disappearances.²⁹⁸ On 21 November, 2008 the human rights Minister Mumtaz Alam Gilani stated that there are 567 documented cases of enforced disappearance in his ministry.²⁹⁹ Some of the cases of enforced disappearances are discussed below:

Masood Janjua was apprehended by Pakistani security forces along with his friend Faisal Faraz in July 2005. Masood Janjua is a 45 years old business man and Faisal Faraz is 25years old engineer. Both left from Rawalpindi for Peshawar but never reached. The report was lodged on September 7, 2005.³⁰⁰ The case of following registration number H.R.C 965/2005 was filed in the Supreme Court of Pakistan (SCP) on the suo-moto notice taken by Chief Justice of Pakistan (CJP) in December 2005.³⁰¹ The government is continuously denying their apprehension even in the presence of testimony from several detainees.³⁰²

Dr Imran Munir was apprehended in July 28, 2006. He was a Malaysian citizen of Pakistani origin. His whereabouts remained unknown until SCP was informed in its hearing on May 2007 that he was facing a court martial. The Court ordered his appearance in court but his hearing was disturbed due to imposition of emergency in November 2007. Dr Imran Munir was released on November 2007 and he confirmed that Masood Janjua is illegally detained by Pakistan Intelligence

²⁹⁶ Griff Witty and Karen De Young, *Pakistan holding thousands in indefinite detention, officials say*, The Washington Post, April 22, 2010,

²⁹⁷ AI: *enforced disappearances in pakistan*

²⁹⁸ Amnesty International, *Amnesty International Report 2009 - Pakistan*, 28 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1fadcd.html> (accessed 15 August 2009)

²⁹⁹ Ibid.

³⁰⁰ Amina Masood Janjua, *Masood's profile*, June 9, 2010, 1.

³⁰¹ Ibid.

³⁰² AIUK, *Pakistan investigate disappearance of Masood janjua and Faisal Faraz* at www.amnesty.org.uk

Agencies.³⁰³ According to his statement he was detained at the detention center on Zakria Masjid Road in Westridge, Rawalpindi Cantt.³⁰⁴

According to the mother of Atiq-ur-Rehman, he was picked up by the intelligence agencies from Abbottabad on the day of his marriage in June 2004. His family alleges that he was apprehended by ISI and filed a petition in Lahore High Court (LHC) but his whereabouts remained still unknown.³⁰⁵ The LHC judge said that if there is any charge about person he should be produced before the court and a case should be registered³⁰⁶

Attaur Rehman was apprehended from his house by 30 men. His family informed the court about his arrest and provides the identity of the police officers. However, the police deny his whereabouts and even deny of having arrested him³⁰⁷

Dr Afia Siddiqui was arrested in Karachi by intelligence agencies in March 2003. She was a neuroscientist and was apprehended along with her three small children. Dr Afia was transferred from Karachi to Afghanistan and then was transferred to US. Her whereabouts remained unknown from 2003 to 2008.³⁰⁸ In 2010 US Supreme Court has given her a sentence of 86 years. It is the duty of the government of Pakistan to bring her back and try her under its own laws.

Dr Abdur Razak was arrested from Rawalpindi on 22 September and his whereabouts are still unknown. His wife has filed a habeas corpus petition in Islamabad High Court.³⁰⁹

Abdur Rahim Muslim Dost is an Afghan national. He lived in Peshawar for a long time. He was arrested by military authorities on 17 November 2001 along with his younger brother Badruzzaman. Both the brothers were handed over to American authorities on 8 February 2002 and

³⁰³ Amina Massod Janjua, *The fight becomes tough for my family*, The News, December 22, 2010, 1.

³⁰⁴ This was the statement given by Dr.Imran Munir on December 5, 2009.

³⁰⁵ Najam u Din, *Terrorist unless proven otherwise: Human rights implications of anti-terror laws and practices in Pakistan*, HRCP (November- December 2006), 25.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ AI, *The State of the World Human Rights* (2009), 253.

³⁰⁹ Ibid.

then transferred to Bagram and Kandahar. He was then transferred to Guantanamo Bay on 1 May 2002.

Badruzzaman and Abdur Rahim Dost³¹⁰ were released by the American authorities on 24 September 2004 and 20 April 2005 respectively. Both the brothers were released without any charge of offence. On 29 September 2006, Abdur Rahim Muslim Dost became a victim of enforced disappearance for the second time. He was arrested by police without any charge of criminal offense. Fundamental rights provided by the law have been violated and he was not brought before magistrate within 24 hours. He was not allowed to access any lawyer and his family members. His whereabouts remained unknown. His brother has filed habeas corpus petitions but the hearings have been repeatedly adjourned.³¹¹

In *Naz Bibi v Station House Officer*³¹², the petitioner said that her husband was a Pesh Imam in a Mosque. He was apprehended by Station House Officer (S.H.O) and handed over to other law enforcement agencies. By the time of apprehension, his whereabouts are still unknown and S.H.O continuously denied his apprehension. The High Court has ordered Deputy Inspector General to hold an inquiry and search the whereabouts of missing person, then submit a detail report to High Court.

3.1.2 Hearings of Supreme Court

SCP has initiated its hearing regarding missing person's case in October 2006.³¹³ The initiation of the case of missing persons is considered as an important milestone in the judicial history of Pakistan.³¹⁴

³¹⁰ Both brothers published a book *Da Guantanamo Mati Zolani* (the broken shackles of Guantanamo). The book is based upon their experiences, which they have faced during their detention. It also critically examines the role of Pakistani intelligence agencies in war on terror and describes their torture in Pakistani and US custody.

³¹¹ AI, *Pakistan: Working to stop human rights violations in the 'war on terror'*, (December, 1, 2006), 4-5.

³¹² *Naz Bibi V Station House Officer*, 2006 P.Cr.L.J. 1447 (Karachi)

³¹³ AIUK, *Pakistan investigate disappearance of Masood Janjua and Faisal Faraz*, at www.amnesty.org.uk

³¹⁴ Dr. Tariq Hassan, *Supreme Court Of Pakistan: The case of Missing Persons*, 13-14.

There are some examples³¹⁵ where courts have intervened in matters regarding the violations of fundamental rights.³¹⁶ More than hundred cases of enforced disappearance have been traced till November 2007.³¹⁷ The persons released also testified the presence of other detainees, which were held in secret locations by secret agencies.³¹⁸

Several individuals subjected to enforced disappearance were released due to the orders of Supreme Court. Provincial high courts³¹⁹ dismissed the habeas corpus petition when state denied the presence of detained person concerned.³²⁰ The number of the persons disappeared are above thousand including 485 cases³²¹ of enforced disappearance which are pending before Supreme Court.³²²

The Court has been taking a strong stand on the issue of enforced disappearances and demands the government to produce all missing persons before the court.³²³ The court has adjourned the hearings till 13th November 2007, but the hopes of the relatives of the missing persons died with the declaration of emergency by former president of Pakistan, General Pervez Musharaf.³²⁴ With the dismissal of the Chief justice of Pakistan, the issue of the missing persons went in dark. Missing persons are at serious risk of torture and ill treatment.³²⁵ The dismissed Chief

³¹⁵ In 1997, the Supreme Court of India appointed the National Human Rights Commission of India to examine the violation of fundamental rights. Similarly the Supreme Court of United States intervened directly in cases involving the missing persons found in Guantanamo Bay. In 2007, the Supreme Court of Nepal issued a verdict against the enforced disappearance of political detainees in nepal

³¹⁶ Ibid.

³¹⁷ AI, *Enforced disappearances disappeared justice in Pakistan* (August 1, 2008), 2.

³¹⁸ Ibid.

³¹⁹ AI, *Denying the undeniable: Enforced disappearances in Pakistan* (July 23, 2008), 35.

³²⁰ Abdur Rahim Muslim Dost, former Guantanamo Bay became a victim of enforced disappearance for the second time. He was arrested without a warrant on 29 September 2006 in Peshawar. His elder brother has filed habeas corpus petition in Peshawar high court on 5th October, the court has asked the federal and provincial authorities to give information about his whereabouts. He was not brought before the magistrate within 24 hours and his whereabouts remained unknown.

³²¹ The lists of 485 persons are provided by Human Rights Commission of Pakistan.

³²² AI, *Fatal erosion of Human Rights Safeguards under emergency* (November 23, 2007), 7.

³²³ Ibid.

³²⁴ AI, *Enforced disappearances disappeared justice in Pakistan* (August 1, 2008), 2.

³²⁵ AI, *Fatal erosion of Human Rights Safeguards under emergency* (November 23, 2007), 7.

Justice Iftikhar Chaudhry stated that there was “irrefutable proof that the missing persons are in the custody of secret agencies”³²⁶

As discussed above, the Amended Army allows the military courts to try the civilians involved in terrorist activities. This Act dashed the remaining hopes of the relatives of the missing persons the right to seek justice.³²⁷

In November 2009 the SCP resumed its hearings regarding the cases of disappeared persons.³²⁸ Supreme Court has given the deadline of two weeks to the government for tracing the missing persons.³²⁹

On 7 January 2010 the hearing of the petitions of missing person’s case resumed headed by Justice Javed Iqbal.³³⁰ These petitions were filed by Human Rights Commission of Pakistan (HRCP).³³¹ All the missing persons reappeared in Guantanamo bay that raises an important question about the involvement of United States of America in enforced disappearances in Pakistan³³²

3.1.2.1 Recent developments in the Case of Missing Persons

On 21st January, 2010 SCP asked Attorney General to locate the whereabouts of Masood Janjua, Faisal Faraz, Atiq-ur-Rehman and Muhammad Altaf.³³³ The Suo-motto case HRC965/2005 contained these names for whom the first suo-moto action was taken in year 2005 and they are still remain missing.³³⁴

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ AIUK, *Pakistan investigate disappearance of Masood janjua and Faisal Faraz*, at www.amnesty.org.uk

³²⁹ Ibid.

³³⁰ Sakib Ahmad, *The case of missing persons: A national shame*, Let Us Build Pakistan (February 8, 2010)

³³¹ Ibid.

³³² FIDH, *Pakistan- A Long March for Democracy and the Rule of Law* (2007-2008), 20

³³³ The case of Missing Masood Janjua and his witness Dr.Imran Munir in the SCP, January 27, 2010, 2.

³³⁴ Ibid.

On 11th February, 2010 the SCP heard the petitions of missing persons. The petitions of Defense of Human Rights, HRCP, independent, suo-moto case and Human rights cases were heard by the Supreme Court.³³⁵

In April 2010, the SCP shifted all the cases of missing persons to the judicial Commission.³³⁶ Judicial Commission³³⁷ was formed by the government but the commission has no power to order that abductees be brought before it. The judicial commission was formed for the period of eight months i.e. from April 2010 to December 2010.

There is no use of that judicial commission which has no power to order the abductees be brought before it. Therefore it means that the government of Pakistan is not interested to solve the core issue of missing person. The government has made the Commission to divert the attention of SC from this core issue of grave human rights violation.

Recently 11 missing persons were released from Adiyala Jail. They were held in captivity on the basis of fabricated cases.³³⁸ According to the detainee released recently that “we were in dungeons torture day and night, till we lost our senses and forgot our identity. As a result of public demonstrations, our cases opened and we were taken to jail; after three and a half years we saw sunlight and breathed fresh air”.³³⁹

3.1.2.2 Human Rights cases disposed by Supreme Court

The human rights cases disposed by SCP in the year 2009 are as follows:

1. Hafiz Sana ullah was apprehended on 10 August, 2008 by intelligence agencies. His brother Qari Atta ullah told that he was arrested for 45 days. In this time period he was tortured and

³³⁵ The hearing of Supreme Court on 11th of February, 2010.

³³⁶ Amina Massod Janjua, *The fight becomes tough for my family*, The News, December 22 and 23, 2010

³³⁷ Judicial Commission was established for the recovery of missing persons. A three-member bench of Justice Javed Iqbal, Justice Muhammad Sair Ali and Justice Anwar Zaheer Jamali and the Commission would be headed by its Chairman justice retired Kamal Mansoor Alam and assisted by two members, justice retired Miss Nazeer Iqbal of Lahore High Court and justice retired Fazal ur Rehman of Balochistan High Court.

³³⁸ Ibid. Amina Massod Janjua, *The fight becomes tough for my family*, The News, December 22 and 23, 2010

³³⁹ Ibid.

ill treated. He was released on 25 September, 2008. He was again apprehended on 11 January, 2009 and his whereabouts remained unknown. Qari Atta ullah has lodged a complaint in SCP. The court adjourned its hearing to 15 June, 2009. In the next hearing he was produced before the court by the Inspector General of the Police (IGP), Islamabad. The abductee informed that he did not know the place where he was confined. However, on 7th June 2009, he was dropped in front of his house in unconscious state. The case is disposed of accordingly.³⁴⁰

2. Najma Sana, an old lady was picked up by the agencies on 6th December 2009 for investigation. Najma Sana was the incharge of the transport services of Tehrik-e-Islami. Raja Ehsan Aziz was also arrested along with Najma Sana. He also belongs to Tehrik-e-Islami. As far as Raja Ehsan Aziz is concerned, he was released but he was again arrested on 16th December, 2009. On 13 January 2010, IGP Islamabad has produced Najma Sana and states that she was picked up by the agencies. The Court points out that only the Police can investigate a person and if any agency wants to investigate the person, it should do so through Police instead of unnecessary harassment.³⁴¹

3.2 Constitutional Law of Pakistan

According to American president Woodrow Wilson³⁴², "The Constitution of the country is not merely a lawyer's document, but is in fact the vehicles of the nation's life".³⁴³ Constitution is a body of laws, which regulate the various organs of State³⁴⁴ and also regulates the relations between the State and its private citizens.³⁴⁵

³⁴⁰ Human Rights Case No. 152-G of 2009.

³⁴¹ Human Rights Case No. 17070-P of 2009.

³⁴² Thomas Woodrow Wilson (December 28, 1856- February 3, 1924) was the 28th President of the United States of America from year 1913 to 1921.

³⁴³ Ahmer Fazeel, *The Constitution of Islamic Republic of Pakistan*, Forewords by Mr. Justice (retd.) Mohamad Haleem (Lahore: Pakistan law house, 1997), xxi.

³⁴⁴ Ibid, 1.

³⁴⁵ Ibid

The Constitution of Pakistan 1973 guarantees certain rights regarding to the life and liberty of its citizens. Article 4³⁴⁶ of the Constitutional law of Pakistan provides that every person should be treated in accordance with the law and no action against life or liberty is taken except in accordance with the law. The Government of Pakistan is unable to answer that under which law the persons are detained? This Article also provides protection to the foreigners in Pakistan, therefore the detention of the foreigners from Pakistan and their extradition clearly violates this Article.³⁴⁷

Human rights are discussed in detail in part II of the Constitution under the heading of Fundamental Rights³⁴⁸ and Principles of Policy.³⁴⁹ Fundamental Rights are given in the Constitution of Pakistan that includes right to life and security, safeguards as to arrest and detention. These rights are similar to the rights mentioned in the UDHR, 1948 and ICCPR, 1966.³⁵⁰ Fundamental Rights in Pakistan are enforceable by the superior courts of Pakistan.³⁵¹ Article 199 of the Constitution of Pakistan 1973 discussed about the writ of habeas corpus. The right of habeas corpus is available against illegal detention.³⁵²

Pakistan is not following its own constitutional provisions, that deals with fundamental human rights. It has arbitrarily arrested all those persons suspected of terrorist activities, without following due process of law, and handed them to United States of America in violation of its own extradition law.³⁵³ These violations led to the violations of the principle of equality before law, which

³⁴⁶ Article 4 of the constitution of Pakistan states that "To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan ... In particular ... no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law".

³⁴⁷ See Article 4(1) of the Constitution of Pakistan.

³⁴⁸ Article 8 to 28 of the Constitution of Pakistan 1973 deals with fundamental rights.

³⁴⁹ Dr. Pervez Hassan, *Role of Civil Society in Protecting the Rule of Law in Pakistan* (Paper presented at the regional forum on "The Role of Civil Society in Promoting the Rule of Law in the Arab Region" organized by the Arab Centre for The Rule of Law and integrity (ACRLI), Amman, Jordan, December 3-4, 2008), 10 (hereinafter Dr. Pervez Hassan, *Role of Civil Society in Protecting the Rule of Law in Pakistan*)

³⁵⁰ Ibid.

³⁵¹ See Article 8, 199(1)(c), and 199(2) of the Constitution of Pakistan 1973.

³⁵² Dr. Pervez Hassan, *Role of Civil society in protecting the rule of law in Pakistan*, 11

³⁵³ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 2-3.

is a fundamental right recognized by the Constitution of Pakistan.³⁵⁴ Pakistani constitution protects its citizens from enforced disappearance in the following Articles discussed below:

3.2.1 Arbitrary arrest and detention: Protection under Constitutional law of Pakistan

Domestic law requires arrests to be carried out in a specific manner but most of the persons detained since 2001 have not been arrested according to the provided law.³⁵⁵ As discussed earlier that the detentions in the war on terror led to the serious violations of fundamental human rights. Many persons have been arbitrarily arrested and detained for their alleged links with Al-Qaida and Taliban.³⁵⁶ Pakistan intelligence agencies interrogate these detainees along with US personals, which violates Pakistani law.³⁵⁷

Life and liberty of every person should be respected.³⁵⁸ A person can not be arrested or detained without telling him the valid grounds of his detention³⁵⁹ and he should be presented before magistrate within 24 hours of detention.³⁶⁰ The provision of this Article is never followed during this war and the detentions made by Pakistan during this war clearly violate this Article.

The persons arrested and detained due to their alleged links with Al-Qaida and Taliban have been denied of the rights guaranteed by the Constitution irrespective of their nationality³⁶¹. Use of torture is prohibited under all circumstances.

During war on terror many detained persons are subjected to torture and illegal treatment. Pakistan is a signatory to UN Human Rights Charter. According to UN Charter “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.³⁶² The

³⁵⁴ Ibid.

³⁵⁵ AI, *Pakistan: Human Rights ignored in the “War on Terror”*⁴

³⁵⁶ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May 2002), 8-9.

³⁵⁷ Ibid.

³⁵⁸ Article 9 of the Constitution of Pakistan 1973.

³⁵⁹ Article 10(1)

³⁶⁰ Article 10(2)

³⁶¹ Ahmed Warraich, *ICJ- HRCP Anti Terror Hearings* at http://ejp.icj.org/IMG/ICJ-HRCP_Ahmad_Warraich.pdf 8

³⁶² Article 5 of UDHR.

Constitution of Pakistan clearly prohibits torture,³⁶³ which has been used for the purpose of extracting evidences from the detainees. All the above provisions of the Constitutional law protect the persons from enforced disappearances, arbitrary arrest and detention, and torture and illegal treatment. Pakistan has made clear violations of all these provisions while making detentions during this war. Pakistan is under an obligation to follow the provisions of the constitution while making detentions.

3.2.2 Detention under Preventive Laws

The Constitution of Pakistan prohibits every law which contradicts the human rights provided by it.³⁶⁴ The Constitutional provision dealing with arbitrary arrest and detention also deals with the law of preventive detention.³⁶⁵ Preventive detention is the detention of a person before commission of a crime.³⁶⁶

Law relating to preventive detention is discussed in Article 10(4) of the Constitution of Pakistan. According to the Article “No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services...”

The general method of arrest is provided by the Constitution of Pakistan. A person shall be informed of the grounds on which he is arrested and should be produced before a magistrate but not in the above mentioned rights are not given when the person is held under preventive detention.³⁶⁷ The Code of Criminal Procedure 1898 also allows preventive detention. It provides that

³⁶³ Article 14(2) of Constitution of Pakistan 1973.

³⁶⁴ Najam u Din, *Terrorist unless proven otherwise: Human rights implications of anti-terror laws and practices in Pakistan*, HRCF (November- December 2006), 17.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Article 10(3) of the Constitution of Pakistan 1973.

police can arrest without warrant if the offence is cognizable and the commission of the offence can not be stopped otherwise.³⁶⁸

Under Anti-terrorism Act (XXVII of 1997)³⁶⁹ (ATA) the preventive detention is authorized for up to one year if the government is satisfied that it is essential to apprehend and detain the person.³⁷⁰ For instance Hafiz Muhammad Saeed, a leader of Lashker-e-Taiba was house arrested under preventive detention provisions of Maintenance of Public Order 1960 (MPO) for a period of one month but he was released by Lahore High Court (LHC).³⁷¹ LHC has released him because the government has provided an insufficient evidence to justify his detention.³⁷²

Under MPO the preventive detention extends to three months but it can be extended for one year.³⁷³ The person alleged of terrorism can be held for the period of one year under ATA.³⁷⁴ The preventive detention orders under ATA or MPO must fulfill the criteria i.e. the material evidence of prejudicial activities of detained person.³⁷⁵

³⁶⁸ According to Section 151 of the Code of Criminal Procedure, 1898 "A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented".

³⁶⁹ In Mehram Ali's case (PLD 1998 SC 1445), ATA has been examined by the Supreme Court of Pakistan, the Court has founded that many provisions of this Act were in contradiction with the Constitutional law of Pakistan 1973 and in need of amendment. Against this backdrop, the Government amended the act and incorporated the changes as suggested by the Supreme Court. On October 24, 1998, the Anti-Terrorism (Amendment) Ordinance was issued. Under this ordinance, anti-terrorism courts remained in place and the judges of such courts were granted tenure of office; special Appellate Tribunals were disbanded and appeals against the decision of the anti-terror courts would be submitted to the respective High Courts; and restrictions were placed on ATA 1997's provisions regarding trials in absentia to accord with regular legal procedures.

³⁷⁰ Section 11-EEE of Anti-terrorism Act (XXVII of 1997). According to this section "(1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to Section 11-EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be specified, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months...."

³⁷¹ Najam u Din, *Terrorist unless proven otherwise: Human rights implications of anti-terror laws and practices in Pakistan*, HRCP (November- December 2006), 17.

³⁷² Ibid, 18.

³⁷³ AI, *Pakistan: Human Rights ignored in the "War on Terror"* (September 29, 2006), 4.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

In Pakistan various legislations related to preventive detention provides procedural safeguards.³⁷⁶ These legislations allow the Government to arrest and detain a person acting in a prejudicial manner but not allow the Government to make arrest without following a due process of law.³⁷⁷

None of the provisions of Constitutional law or other legal procedures for arrest and detention or preventive detention have been followed in the case of missing persons by the Government and thus violated the provisions of constitution as well as the fundamental human rights norms.³⁷⁸

3.2.3 The Right to Habeas Corpus

Judiciary is responsible for the protection of fundamental rights provided in 1973 Constitution.³⁷⁹ The writ of habeas corpus is filed against illegal detention, which directs the person detained illegally to be brought before the court.³⁸⁰ The Constitutional law of Pakistan provides a right to habeas corpus in Article 199.

Prohibition of illegal detention is also a rule of customary international law, which is binding on all nations even in the time of war or emergency. It is an important concept of law which prohibits against arbitrary detention. The writ of habeas corpus is defined as:

The writ of *habeas corpus ad subjiciendum*, which is commonly known as the writ of habeas corpus is a prerogative process for effective means of immediate release from unlawful or unjustifiable detention, whether in person or in private custody. It is the prerogative writ by which the king has the right to inquire into the causes for which any of his subjects are

³⁷⁶ Dr. Tariq Hassan, *Supreme Court of Pakistan: The case of Missing Persons*, 5-6.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ AI, *Pakistan: Human Rights ignored in the "War on Terror"*, 39-42

³⁸⁰ Mian Asad Hakim, *Law Dictionary* (Lahore: Mansoor Book House, 1999), 343.

deprived of their liberty. By it the High Court and the judges of that court at the instance of the subject aggrieved command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released.³⁸¹

Therefore writ of habeas corpus is an exclusive process to release person from illegal detention. High court order the production of the detained person, if there are no legal grounds for detention, the detained person is ordered to release. Article 199 of the Constitution of Pakistan 1973, provides jurisdiction to High Court to issue the writ of habeas corpus.³⁸² It states that:

- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-... (b) on the application of any person, make an order - (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not held in custody without lawful authority or in an unlawful manner....

Article 184(3) of Constitution of Pakistan gives power to the Supreme Court to intervene in any matter, related to the enforcement of fundamental human rights provided by the Constitution of Pakistan.³⁸³ The right of Habeas Corpus is not available to all the people in Pakistan.³⁸⁴ The detaining

³⁸¹ Ibid, 343.

³⁸² Ahmer fazeel, *The Constitution of Islamic Republic of Pakistan* (Pakistan law house: Karachi-Lahore, 1997), 303.

³⁸³ AI, *Denying the undeniable: Enforced disappearances in Pakistan* (July 23, 2008), 21.

³⁸⁴ AI, *Pakistan: Human Rights ignored in the "War on Terror"* (September 29, 2006), 39-42.

authorities deliberately place the detained persons outside the jurisdiction of high court,³⁸⁵ so the aggrieved person will not be able to file the writ.³⁸⁶

Under the Constitution of Pakistan every person has an inalienable right to be protected under the law. Many relatives of the persons disappeared during war on terror filed habeas corpus petitions in provincial high courts.³⁸⁷ According to the annual report of HRCP for 2004, "these cases of disappearance [observed in 2004] brought to light the inadequacies of the habeas corpus process because the superior courts could offer no relief if the agency/force/department named as respondents denied the arrest or detention of the missing persons"³⁸⁸

According to October 2005 report of Amnesty International, 17 habeas corpus petitions had been filed in last two years. All the petitions became unsuccessful after the respondents denied of receiving any information regarding disappeared persons.

Incommunicado detention violates a number of human rights and right to challenge the legality of detention is the crucial concept of law. Prohibition of arbitrary arrest, detention, torture, and ill-treatment are very important rights, which are also protected under Pakistani law³⁸⁹. Therefore it is the duty of our authorities to follow these laws while making detentions in war on terror.

3.3 National Criminal Law and its application to the detainees

An enforced disappearance during war on terror constitutes the criminal offense of kidnapping or abduction.³⁹⁰ Conveying of any person beyond the limits of Pakistan without his or her consent is

³⁸⁵ This right is restricted to those persons living within the jurisdiction of the country's high courts. It is not applicable to the people living in tribal areas. These areas are considered to be the part of Pakistan in Article 1 of the constitution but it lays down strict separation in terms of human rights and institutions between Federally Administered Tribal Areas (FATA) of Pakistan and the rest of the country. Under Article 247(7) of the Constitution of Pakistan, FATA is excluded from the jurisdiction of country's high court.

³⁸⁶ AI, *Pakistan: Human Rights ignored in the "War on Terror"*, 39-42.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ AI, *Denying the undeniable: Enforced disappearances in Pakistan* (July 23, 2008), 21.

³⁹⁰ Dr. Tariq Hassan, *Supreme Court Of Pakistan: The case of Missing Persons*, 6.

called kidnapping.³⁹¹ Act of abduction involves force, if a person is compelled by force or by any other deceitful means to go from any place is said to abduct that person.³⁹² The court has power to try the offence of kidnapping within local limits of its jurisdiction in which the person was kidnapped.³⁹³

The families of missing persons alleged that their relatives are apprehended in a same way and the intelligence agencies are responsible for all these disappearances. The cases of Dr. Imran Munir, Faisal faraz, Masood Janjua, Dr Afia siddiqui and many more are the clear examples of this scenario. Pakistan intelligence agencies are liable for their unlawful acts and the government is continuously violating the provisions of the given law.

Safeguards relating to arrest and detentions are given in detail in the Code of Criminal Procedure, 1898.³⁹⁴ The detained person has to be brought before a magistrate within the period of 24 hours of apprehension³⁹⁵. If there are valid grounds for arrest then magistrate decides about remand to police.³⁹⁶ The detained person has a right to access the lawyer of his own choice.³⁹⁷

The Code of Criminal Procedure provides that person arrested could not be detained by police for more than twenty-four hours unless there is a special order of magistrate under S.167, Cr.P.C.³⁹⁸ Police is allowed to detain a person in custody which has been arrested without warrant

³⁹¹ Section 360 of Pakistan Penal Code, 1860.

³⁹² Section 362.

³⁹³ Dr. Tariq Hassan, *Supreme Court Of Pakistan: The case of Missing Persons*, 6.

³⁹⁴ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees*, AI Index ASA 33/014/2002, May, 8-9.

³⁹⁵ Article 10(1) of the Constitution of Pakistan 1973 states "No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice". Article 10(2) states "Every Person who is arrested and detained in custody shall be produced before a magistrate within the period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate".

³⁹⁶ Section 167(2) of the Code of Criminal Procedure 1898.

³⁹⁷ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 8-9.

³⁹⁸ Section 61 of the Code of Criminal procedure, 1898.

for a term not more than fifteen days, if the investigation is not completed within twenty- four hours and there are grounds for his accusation.³⁹⁹

Pakistan is not following these provisions while making detentions during war on terror and continuously violates these provisions. The detained or missing persons are not brought before the magistrate within twenty-four hours, instead of bringing them before magistrate they were held incommunicado and there whereabouts are still remained unknown. Therefore it is the duty of government to follow the provisions given in the domestic law while making the detentions.

3.4 Extradition Law of Pakistan and its requirements

Pakistan has handed over an unknown number of detainees to the US custody without reference to any legal requirements and in circumvention of domestic legislation governing extradition.

Extradition procedures are governed by Extradition Act of 1972.⁴⁰⁰ The Act provides that person can only be extradited if the offence has been committed within the jurisdiction of Pakistan and constitute an offence under Pakistani law⁴⁰¹. The nature of the offence should not be political.⁴⁰² When foreign country submits a request for surrender⁴⁰³ of a fugitive offender,⁴⁰⁴ a magistrate should be appointed to investigate about the allegation.⁴⁰⁵

Evidence of the requesting country should also be checked by the magistrate and defense has full opportunity to disprove the validity of the evidence provided by the requesting state.⁴⁰⁶

If no *prima facie case* has been made for the requisition of offender then magistrate can discharge the offender and if there is a *prima facie* evidence for the requisition offence then the

³⁹⁹Ibid, Section 167(1)(2).

⁴⁰⁰ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 13-14.

⁴⁰¹ Section 2(a) of Extradition Act, 1972.

⁴⁰² Ibid, Sec 5(2)

⁴⁰³ Ibid, Sec 6.

⁴⁰⁴ Fugitive Offender is defined in Sec 2(d) of Extradition Act 1973 and according to this "fugitive offender" means the person, who being accused or convicted of an extradition offence is, or is suspected to be, in any part of Pakistan

⁴⁰⁵ Ibid, Sec 7.

⁴⁰⁶ Ibid, Sec 8(2)

magistrate remand the offender to judicial custody and submits his report to the federal government.⁴⁰⁷

If the government decides to hand over the fugitive offender, it may issue the warrant for the custody of that offender and delivered him to the place or person mentioned in that warrant⁴⁰⁸.

Pakistan did not conclude an extradition treaty with the USA⁴⁰⁹ but there is an extradition treaty dating from the colonial period and it was signed on December 22, 1931⁴¹⁰. The treaty was enforced on March 9, 1942. It allows the extradition of offender only if the offence was committed on the surface of American territory.⁴¹¹

Pakistan is also bound under customary international law which prohibits the transfer of detainee to any other country where they would be a risk of human rights violation.⁴¹² Instead of all this Pakistan has handed over many detainees to USA in violation of its extradition procedures provided by law and in violation of principle of *non-refoulement*.⁴¹³

3.4.1 Handing over detainees in violation of Extradition procedures

After September 11, 2001 many detainees were unlawfully transferred to the USA and were held either in the Guantanamo Bay or in secret places. These all detained persons are victims of enforced disappearances.⁴¹⁴

Pakistani officials⁴¹⁵ have been continuously denying the transference of terror suspects to USA but on several occasions the US statements indicates that Pakistan has handed over certain

⁴⁰⁷ Ibid, Sec 10.

⁴⁰⁸ Ibid, Sec 11.

⁴⁰⁹ AI, *Pakistan: Human Rights ignored in the "War on Terror"*, 29.

⁴¹⁰ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 15.

⁴¹¹ AI, *Pakistan: Human Rights ignored in the "War on Terror"*, 29.

⁴¹² Ibid.

⁴¹³ I have discussed this principle in detail in the second chapter.

⁴¹⁴ AI, *Pakistan: Human Rights ignored in the "War on Terror"*, 29.

⁴¹⁵ Foreign Minister Khurshid Mehmood Kasuri assured in August 2005 that no Pakistani national had been handed over to USA but there are certain evidences which have proved him wrong. Dr. Afia Siddique is one of the clear examples of illegal transfer.

detainees to USA.⁴¹⁶ The transference of detainees by Pakistan to USA is without recourse to its extradition procedures.⁴¹⁷ Pakistani detainees have been handed to USA in past in circumvention of its extradition procedures.⁴¹⁸

Abducting a national of a country is a violation of international law⁴¹⁹ United States of America abduct the nationals of other countries and bring them to Jordan and Syria to torture them, it has abducted the Canadian citizen, Maher Arar and torture him without any proofs.⁴²⁰

In the case of Dr. Afia Siddiqui, the government of Pakistan and USA has not followed the extradition procedures.⁴²¹ It was the duty of Pakistani government to investigate her in Pakistani courts and if USA believed that the Pakistani courts are unable to prosecute her then American government should have made request to Pakistani government for her custody by Extradition Agreement instead of abducting her by Pakistani government and then transferred her illegally to USA.⁴²²

Musaad Aruchi was apprehended in Karachi on 12 June 2004 by Pakistani paramilitary forces in the supervision of CIA. Pakistani intelligence officials said that Aruchi was held by

⁴¹⁶ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 13-14.

⁴¹⁷ Ibid.

⁴¹⁸ Mir Aimal Kasi is one of the examples. He was arrested by US Federal Bureau of Investigation (FBI) on 15 June 1997. He was arrested from Dera Ghazi Khan. He was wanted in the murder of two employs of US CIA. These employs had been shot outside CIA headquarters in Virginia in 1993. The FBI agent took him to another location in Pakistan where he was detained for next 48 hours in Pakistani custody in the presence of FBI agents. On 17 June, he went to Virginia in the custody of FBI. During his flight he was not provided with his right to seek consular assistance under international law. Mir Aimal Kasi signed a statement and admitted the shooting. He was given death sentence in February 1998. In November 1998 the Supreme Court of Virginia upheld the death sentence. The prosecutor in Virginia has admitted that FBI agents have no jurisdiction in Pakistan and he was not taken before a magistrate until he returned to USA. The argument regarding violation of extradition treaty rejected and argued that in absence of bilateral extradition treaty, a treaty between USA and UK applied to this case.

⁴¹⁹ AI, *Pakistan: Transfers to US custody without Human Rights Guarantees* (May, 2002), 13-14.

⁴²⁰ United States have abducted many foreign nationals since 1950 i.e. Morton Sobell and Humberto Álvarez Machaín from Mexico in the year 1950 and 1990 respectively. Mir Aimal Kasi from Pakistan in 1997, Martin Mubanga from Zambia in 2002 and Manuel Noriega from Panama in 1989.

⁴²¹ Dr Afia's case by Ali Palh

⁴²² Ibid.

Pakistani authorities for three days, and then he was handed over to the USA. His whereabouts still remained unknown.⁴²³

Moazzem Begg was abducted from his home in Islamabad in January 2002. He was detained at a detention centre run by Pakistan's intelligence services; he was denied access to a lawyer. He was questioned in secret detention by USA and UK intelligence officials and then transferred him to Afghanistan. From Afghanistan he was then transferred to Guantanamo Bay where he detained for two years. He was released in 2005 without any charge.⁴²⁴

In the above cases no request for extradition is believed to have been sent by USA or any other country⁴²⁵. Pakistan has handed over a number of detainees to USA without any regard of its domestic legislation⁴²⁶ and violated the provisions of its Extradition law rights and thus violated the rights of the detained persons. USA government held the transferred detainees in conditions that violate the minimum standards of detention. They tortured the detainees and prohibit them to challenge the legality of their detention in breach of principle of non-refoulement.⁴²⁷

3.5 Conclusions

In the light of above discussion we have concluded that Pakistan has violated large range of Domestic law while making detentions in the name of GWOT. Fundamental rights provided by the Constitution of Pakistan 1973 are inalienable, and are protected under all circumstances irrespective of war. These rights are being continuously violated during this war, which includes the right to life and security, prohibition of enforced disappearances, and prohibition of all forms of torture and ill-treatment. The detained persons are in clear risk of torture, inhumane and degrading treatment.

⁴²³ Ibid.

⁴²⁴ AIUK, Pakistan: *Musharraf must reveal fate of hundred's of "War on terror" detainees* (29 September, 2006).

⁴²⁵ Ibid.15-16.

⁴²⁶ Ahmed Warraich, ICJ- HRCP Anti Terror Hearings at http://eip.icj.org/IMG/ICJ-HRCP_Ahmad_Warraich.pdf, 9

⁴²⁷ Ibid, 10

GWOT results in unlawful transference of many detainees to USA in circumvention of Pakistan Extradition Act. Pakistan has deprived the detainees from the right to free and fair trial, and right to be treated in accordance with the law.

The abduction of many detainees in Pakistan made the society restless. The issue of missing persons or enforcedly disappeared persons is yet to be addressed properly by the Government of Pakistan. It has been prove from the above cases that the State intelligence agencies are responsible for the disappearance of thousands of persons since the war on terror has started.

CONCLUSION AND RECOMMENDATIONS

It is said that "war is necessary evil" so true war is an evil and sometimes it become necessary too. Wars have played havoc with the life of the people involved. Thousands of people have died and thousands of went missing.

Global war on terror has changed all old concepts of war zones. Most part of Asia and Africa has been permanently changed into war zones. The concept of unipolar world has also aggravated these conditions. The aggravation of unipolar world has turned most of the nations or groups fighting for freedom into terrorism. The detentions made in Pakistan during global war on terror violate many fundamental rules of international law as well as the domestic law.

The purpose behind the creation of international and domestic laws is to maintain harmony in the society, to protect the properties and the lives of the people in normal situation and circumstances. Domestic Law deals administration of criminal justice and it provides how all the offences are to be investigated, inquired into and tried. All the words used in those domestic laws are always construed and interpreted with reference to needs and circumstances.

The first issue was that whether the GWOT is an armed conflict or not and the answer is that the conflicts started in the name of war on terror in Iraq and Afghanistan were armed conflicts of international character. As a result of Conflict in Iraq and Afghanistan many persons were detained due to their alleged links with Al-Qaeda and Taliban. As the conflict is of international character therefore, the persons taking part in these conflicts are called combatants. Therefore, the persons captured in the course of these conflicts are considered POWs and thus they are protected under Article 4 of GC111.

Another issue was of applicability of CA3 to GWOT. The US Supreme Court in its landmark decision in *Hamdan v Rumsfeld* decided that CA3 is not only applicable to NIAC but to all types of Conflicts. It is considered as the minimum yardstick. The Court also concludes that the military

commission formed by Bush administration also violates CA3. Our study also proves that CA3 provides minimum standards and these standards should be followed while making detentions.

As a result of GWOT Pakistan has stated military operation in its own tribal areas and as far as this conflict is concerned, it is of non international character because it occurs within the state. As it is NIAC so CA3 is applicable on it. Our study confirms that Pakistan has violated large range IHL while making detention in the GWOT. As the member of the Geneva Convention Pakistan is under an obligation to follow the provisions of CA3 while making detentions and incorporate the provisions of CA3 into its domestic law.

The question regarding the applicability of IHRL is that whether it is applicable to the persons who are also protected under IHL or not. Our study confirms that IHRL is not only applicable in the time of peace but also in the time of war. The persons who were under the protection of IHL are also protected under IHRL because human rights of the person are absolute. Our study also proves that a state is bound by IHRL in a situation when the act is performed outside its own territory and jurisdiction. In the case *Rasul v Bush*, the Supreme Court held that the US courts had jurisdiction to hear the claims for habeas corpus in relation to the detainees at Guantanamo Bay.

Our study also confirms that Pakistan has violated large range of human rights while making detentions. IHRL prohibits the enforced detention and safeguard the rights of the unlawful detainees and accede to them right of liberty, fair trial and human treatment. It obliges the states to protect the people against human rights abuses by state and non-state actors. The above rights are enshrined in human rights treaties. Pakistan has violated all the above rights while making detentions during GWOT.

Therefore right to life, the right not to be subjected to torture and the right to freedom from arbitrary detention must be followed. As Pakistan has not signed many of the treaties but the above

provisions are Customary in nature and Pakistan is bound by the principles of customary international law.

Our study have also proves that Pakistan has also violated its Domestic Law while making detentions. The provisions of Cr.P.C require arrests to be carried out by police presenting a valid arrest warrant but during war on terror most of the people are not arrested and detained in this way. Many people are enforcedly disappeared, no one was charged with a recognizable criminal offence. The detentions made in Pakistan during global war on terror were not recorded in a register of a recognized detention centers. The detained persons were held incommunicado and were denied access to a lawyer of their own choice.

Our study has also proved in the light of the cases that the fundamental rights provided by the constitution of Pakistan are violated and the enforced disappearances in Pakistan violate the provisions of Constitutional law of Pakistan. Our study confirms that unlawful transfers of detainees notably to USA and other countries violate the Extraction Law of Pakistan and the principle of *non-refoulement*. The case of Dr. Afia Siddique is mentioned which clearly shows that Pakistan has violated the principles of extradition.

Therefore Pakistan is under an obligation to detain and arrest people in accordance with the domestic laws, and to follow the standards set by international law in order to stop the sufferings of the families of those detained during this war.

The net conclusion of the thesis that person who have been captured in Pakistan in the name of war on terror and are kept in inhuman conditions also have certain rights under IHL and IHRL. They are also protected by the domestic law of Pakistan and by denying the applicability of these rights; Pakistan is committing gross violations of the law.

RECOMMENDATIONS

Some of the recommendations regarding state's responsibility are given below.

1. The person's life and liberty should be safeguarded and respected in all conditions.
2. It is the duty of the government to protect its people from security threats and should follow both national and international law.⁴²⁸ It should also follow the obligations under international humanitarian law.
3. To end incommunicado detention and allow all the detainees to access their family members and lawyers. Secret detentions should be ended and detainees are ensured to be held in the detention centers which, are officially recognized. The register of detainees should be maintained.⁴²⁹
4. Torture and ill-treatment should be prevented because torture is prohibited in all circumstances. The government of the Pakistan should ratify UN Convention against Torture, ICCPR, International Convention from the Protection of All Persons from Enforced Disappearance, and ensure that the detainees should not be subjected to torture for the purpose of extraction of any evidence.
5. The government should strengthen human rights by ratifying these treaties and implement those to which Pakistan is a party.⁴³⁰
6. Besides these human rights treaties, Pakistan is under an obligation to follow its own domestic legal safeguards and international customary law.
7. Pakistan is a member of UN Human Rights Council. The Council has unanimously adopted the draft International Convention for the Protection of All Persons from Enforced

⁴²⁸Shafqat Munir, *Missing Commitment Rights*, 2.

⁴²⁹ AI, *Pakistan: Human Rights ignored in the "War on Terror"* (September 29, 2006), 15.

⁴³⁰ AI, *Pakistan: Amensety International Submission to the UN Universal Periodic review* (2008), 6.

Disappearances.⁴³¹ This draft put ban on enforced disappearances and considered it as a crime against humanity. Some of the enforced disappearances have been carried out on the behalf of the American government.⁴³² Pakistan should bear the full responsibility for the serious human rights violations.

8. The government must end the act of enforced disappearances and release all the persons that are held incommunicado or arbitrarily arrested and detained during WOT. It is the duty of the government to ensure free and fair trial to the detainees and provide them all the judicial guarantees.
9. It is the duty of the government to provide full information regarding missing people and investigate all cases. It is duty of the judiciary to investigate all the people held responsible for this i.e. the security forces and the intelligence agencies. Angelika Pathak⁴³³ said that "The Pakistani government needs to treat this issue with gravity and urgency it deserves...we are not talking about the fate of hundreds of people but also the devastating effect on their families. This situation involves serious breaches of international law"
10. When the missing persons are released they are handed over to Police, which charged them with fabricated cases. This practice should be stopped.
11. The government should stop unlawful transfers of the detained persons to USA in circumvention of Extradition law of Pakistan and the principle of non-refoulement.

⁴³¹ Amnesty International, *Pakistan: Human Rights ignored in the "War on Terror"* (September 29, 2006), 47.

⁴³² Ibid.

⁴³³ She is a South Asian Researcher at the Amnesty International.

12. It is the duty of the government to provide judicial remedies⁴³⁴ and reparations not only to the victims of enforced disappearances but also to their families.
13. Pakistani authorities are under an obligation to protect the Constitution. The fundamental human rights should not be set aside. Action should be taken against those who are responsible for the breach of Constitutional law. Legal proceedings related to arrest, detention and extradition provided by the constitution should be followed properly.
14. Recent amendment in the Pakistan Army Act (1952), which allows the military authorities to try the civilians, must be rescinded and civilians should be fairly tried by independent courts.
15. Independence of judiciary is very important for the progress of country. It should be fully secured.
16. A clear distinction⁴³⁵ should be made between the role of intelligence agencies and law enforcement agencies. Intelligence agencies have no power to arrest or detain any person.
17. The Government should make efforts to bring back the detainees of war on terror from USA and the other countries and try them under its own domestic law.

⁴³⁴Salim Jiwa, *Global War On Terror has resulted in Secret Detention and Torture* (Jan 26, 2010), www.digitaljournal.com/article/286498

⁴³⁵International commission of jurists, *Assesing damage Urging Action, Report of the Eminent jurists panel on terrorism, counter-terrorism and Human Rights* (Geneva: Switzerland, 2009), 89.

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