LEGAL DISCREPENCIES IN RATIFICATION AND INCORPORATION OF INTERNATIONAL CONVENTIONS ON PRISONERS

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of
LL.M International Law
(Faculty of Shari'ah and Law)
in The International Islamic University
1429/2008

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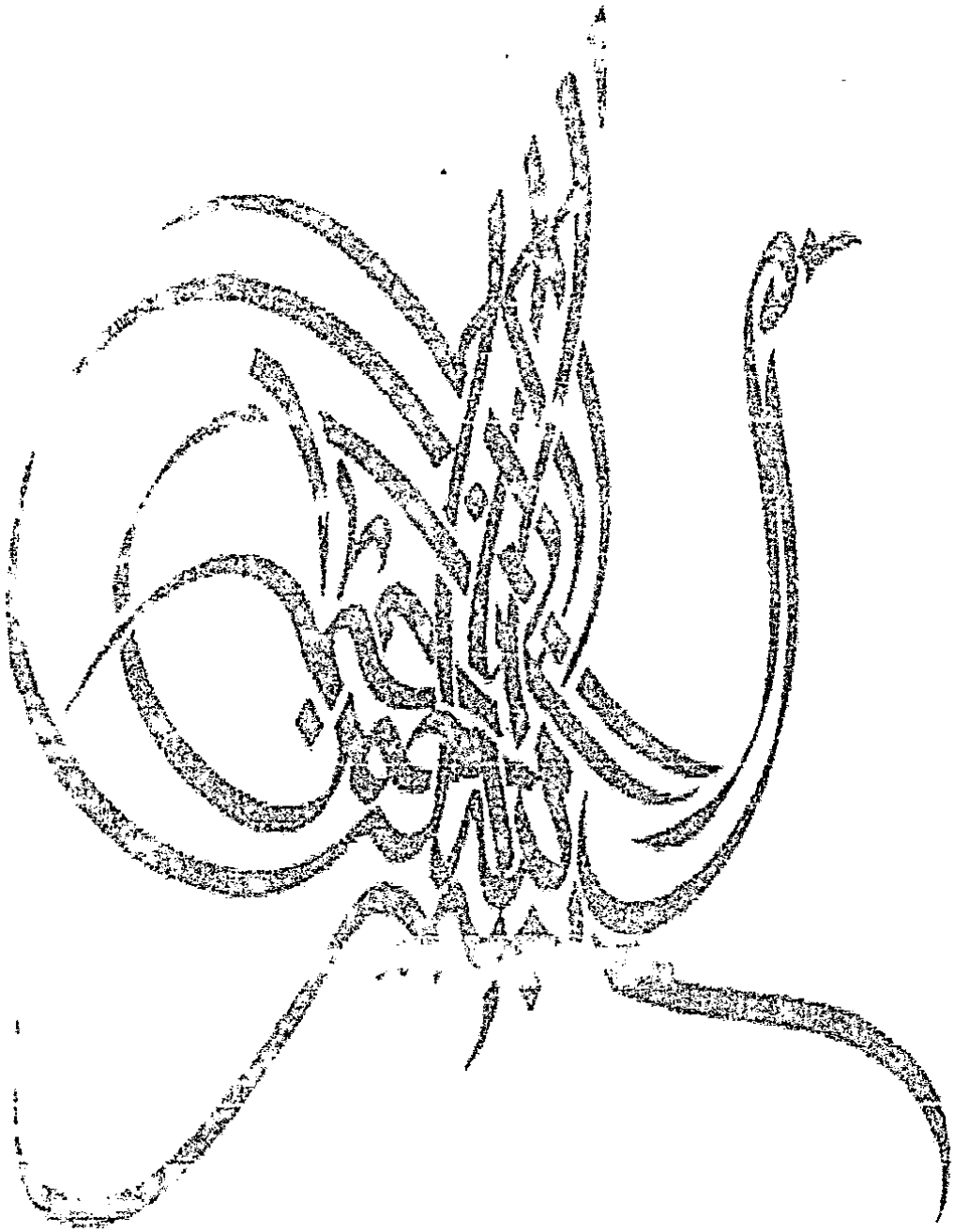

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LIST OF ABBREVIATIONS

BRTP Basic Rules for the Treatment of Prisoners

ECHR European Convention on Human Rights

ECPT European Committee for the Prevention of Torture

EPR European Prison Rules

EU European Union

FPSCP Federal Public Service Commission of Pakistan

HEC Higher Education Commission of Pakistan

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

NGO Non Governmental Organization

UDHR Universal Declaration on Human Rights

UN United Nations

UNSMR (SMR) United Nations Standard Minimum Rules for the Treatment of Prisoners.

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DEDICATION

The thesis is dedicated to my parents and teachers; their guidance and advice has always been effective in my character and personality building.

ACKNOWLEDGEMENTS

First of all I am very thankful to Allah almighty.

With much gratitude, I acknowledge my indebtedness to Mr. Afzal Ahmad Kakakhel, my supervisor. He has always been very supportive and co operative, and put a lot of effort in facilitating me for the completion of my work.

I would also like to express my gratitude to Professor Imran Ahsan Khan Nyazee for his expert advice on research methods, and for his Thesis Hand Book that I consulted frequently during my research. I am especially grateful to Mr.Mushtaq Ahmad who has always been very kind and helpful in many respects. I owe a lot to him. I am indebted to Ms. Samia Maqbool, Mrs. Sayeda Fatima and my friend Ms.Hajrah Saboor for their unflagging co-operation and help.

Finally, this research would not have been possible without the support and encouragement of my parents and brothers. They are a constant source of inspiration for me.

ABSTRACT

LEGAL DISCREPENCIES IN RATIFICATION AND INCORPORATION OF INTERNATIONAL CONVENTIONS ON PRISONERS

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Prisoners can be divided in two different categories, Prisoners of War and the Domestic Prisoners of States. Plenty of work is available about Prisoners of War, but the second area is still waiting for attention. The main idea behind this research is to highlight some of the problems of states' prisoners. The UN offers various Conventions on this topic. However, it seems that states are reluctant to observe these obligations completely. This paper is exclusively dealing with certain important provisions of the UN Conventions on rights of prisoners and breaches and evasions involved in their implementation on domestic level.

The most important concern is to highlight the discrepancies in ratification of international laws related to the protection of prisoners and their incorporation in municipal laws of countries. States commit themselves to observe the international

obligations by ratifying international treaties and conventions but usually evade their responsibilities by rather attaching reservations to sensitive provisions or they incorporate them in their domestic laws according to their political whims.

The first chapter highlights two different but very basic rights of prisoners guaranteed under International law. Firstly, the provision of proper space and related amenities to every prisoner; this part is based on the idea of discouraging over-crowdedness of prisons on the basis of International law. A brief comparison of Pakistani national laws with UN and EU Conventions is given in this chapter. Secondly, the chapter discusses the right of rehabilitation after prisoners' release with an imperative need to educate the society to accept and adjust the released prisoners.

Chapter Two deals with ambiguities involved in the definition of "Torture, Cruel, Degrading and Inhuman Treatment or Punishment of Prisoners". There is no clear description of these terminologies available in international or regional conventions, due to which the courts of signatory states and international and regional judicial bodies explain the circumstances according to their discretion. They normally, give their decisions by applying objective tests for certifying the apt use of terminologies covering the particular case. This situation is alarming because discretion may be exercised some times incorrectly. So, a clear description of these expressions is required to fulfill and implement the intention of international law makers on national levels.

Last chapter is related to the prisoners' right to complain in case of violations of their other rights. Two things are important in this regard: the provision of proper complaint mechanisms and the knowledge of these rights to the prisoner with clear access to related authorities. On international and regional levels various such bodies are

working, their procedures are elaborated within the chapter. Most of them offer the right of complaint on individual level in case of human rights infringements but the citizens of non-signatory states or the States which put their reservations on complaint mechanisms can not file any complaint to these bodies. It is emphasized that if the states do not let their citizens to exhaust such remedies, they must themselves offer impartial alternative. All these actions are essential to remove discrepancies present between national and international laws regarding prisoners' rights.

CHAPTER I

LEGAL DISCREPENCIES IN CERTAIN PROVISIONS OF INTERNATIONAL, REGIONAL AND PAKISTANI PRISON LAWS

1.1- Introduction

> The way in which society treats its vulnerable members is a reflection of its social health and conscience: Prisoners are in the control and therefore at the mercy of their jailers. That is why it is so important that national, regional and international norms and policies safeguarding the human rights of prisoners be promoted and protected fully. (B.G. Ramcharan)[1]

Prisoners are one of the most vulnerable parts of society. All states are therefore legally and morally bound to treat prisoners in an appropriate way with full respect for their person and dignity. The obligation to treat prisoners in a humane and respected manner begins at the time of their admission to custody and continues until the moment of their release. This is the basic and inherent right of detainees, not gift nor privilege offered by states.

There are various legal entities, both on national and international level, working for the protection of prisoners. The world has been transformed in to a global village, which stimulates the need of harmonization of at least certain laws. To achieve this purpose, the United Nations has developed a range of principles in the shape of

[1]As quoted in an article written by Amanda Dissel, Human Rights and prison Conditions. Report of a Pan-African Seminar, Kampala, Uganda. *Criminal Justice* 19 - 21 September 1996. http://www.csvr.org.za/articles. accessed: October 21, 2006.

International Conventions for treating persons held under the authority of states. Though these instruments are not legally binding, they morally compel states with practical assistance, in their conduct. Their legal value is determined by the number of participant states. Some of their provisions have the element of 'Peremptory Norms' (Universally Recognized Principles of International Law) and are thus obligatory. In the United Nations bodies, all states are requested to attend and contribute in the drafting, so as to guarantee that the final document reflects the views of the entire regions of the world and all major legal systems. Whether for a binding treaty or for an authoritative declaration, every proposal is closely scrutinized and debated, until a final text is eventually agreed upon.[2]

1.2- Particular International Conventions related to Rights of Detainees

International Conventions on Prisoners provide some basic rules which are expected to be observed by signatory states as minimum non-obligatory standards for confining their prisoners.

The following Conventions have been passed by the UN in this regard;

1-Standard Minimum Rules for the Treatment of Prisoners;

2- Basic Principles for the Treatment of Prisoners;

3-Body of Principles for the Protection of All Persons under any Type of Detention or Imprisonment.

Being a Regional Body, the European Union observes its own prison rules, called:

"The European Prison Rules."

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[2]See. A Trainer's Guide on Human Rights Training for Prison Officials United Nations, *Professional Training Series No. 11.* p 36, 37. available online at: www.ohchr.org/english/about/publications/docs/train11. accessed: December 15, 2006.

Almost all the UN member states have *ratified*[3] these Conventions, what is needed is that he states should be obliged to *incorporate*[4] these principles in their *Municipal* or local laws according to their real spirit.

This study will not touch or comment on all provisions of these Conventions. The idea is to discuss some very prominent areas of infringements. Two major points of importance in this study are:

1- The rules dealing with the problem of over crowdedness, with special reference to the generally designed space for accommodation of prisoners under different laws, and

2- Rehabilitation Programs for prisoners and their practical applicability.

1.3- Over crowdedness: A Prominent Area of Violation of Prisoner's Rights

The special terminology 'over crowdedness' is used in terms of prisoners when they exceed the place and facilities prescribed for the prison. International as well as National rules of States dealing with prison services demand specific amenities for all inmates, but generally prisoners are kept deprived of most of these services due to their excessive numbers. It is seldom found that new prisons are established to divide inmates in various penitentiaries. Overcrowding in prisons is a major source of administrative problems which also badly affects prisoner's health, activities, and spirits. Violation of prisoner's human rights can by no means be justified on the basis of lack of resources.

In late 20th century, efforts were being made to abolish unhygienic and demoralizing prison conditions by reforming them, which included individualization of

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[3]"Ratification". "acceptance", "approval" and "accession" means in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty. *Vienna Convention on the Law of Treaty, Article 02.*

[4]The basic meanings of 'Theory of Incorporation of International Laws' is incorporation or integration of international laws in to municipal laws of states, or to make them an active part of state laws to assure their execution.

treatment. psychiatric assistance, constructive labor and vocational training programs.[5] Since then International Community had started to revise its Prison administrative systems, so that detention centers could be converted in to better places for rehabilitation and ought not to make prisoner's criminal skills more sharp and polished. Prisoner's accommodation is considered one of the most important and vital step in prison reforms and rehabilitation.

1.3.1-Rules relating to Accommodation under UN Standard Minimum Rules for the Treatment of Prisoners (1955)

The UN had introduced certain standards regarding Prisoner's accommodation in UNSMRs. According to the Preamble[6] of this document, the rules provided in this Convention are the minimum standards to be followed by the signatory states and that they should maintain their Prisons in a better and more effective manner.

This is the foremost and mandatory requirement of International laws on Prisons to divide prisoners in categories.[7]The first requirement is to divide men and women prisoners in different institutions and different places[8]. This is made mandatory on individual level to provide each prisoner a separate room for living, except if it is not

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[5]See *The Columbia Encyclopedia*, s.v. "Prison".

[6]In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

[7]The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. *UN Standard Minimum Rules for the Treatment of Prisoners*. Article 08

[8]Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate. *Ibid*. Article 08(a)

possible due to some special reason, for example, temporary over crowdedness.[9] Hence, it is momentarily possible to adjust prisoners in same rooms but this methodology is discouraged as permanent practice. It is essential to provide proper and separate accommodation to each prisoner. The UNSMR's clearly require that each prisoner should sleep in his or her own cell. Special selection procedures are stipulated where it is necessary to accommodate more than one prisoner in dormitory accommodation.[10] All lodging should meet the requirements of health, climatic conditions, cubic content of air, sanitation,[11] minimum floor space, lighting, heating and ventilation.[12] The Rule stipulates that prisoners shall have at least one hour's exercise outside the cell, in open air per day[13]. Again overcrowding and shortage of staff is stated as one of the reasons for non-compliance with the rules prescribed by the UNSMRs.[14]Overloading has the greatest effect on the health of prisoners detained in cells, despite the presence of all laws on the topic; many countries are housing prisoners many times more than the original requirement. These states are not only signatories of International Conventions but also have corresponding domestic laws for discouragement of overfilling of Prisons.

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[9]Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room. *Ibid.* Article 09(01)

[10]Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution. *Ibid.* Article 09(02)

[11]The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. *Ibid.* Article 12.

[12]In all places where prisoners are required to live or work,
(a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;
(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight. *Ibid.* Article 11.

[13] *UNSM* Rule 21(01)

[14]See. Amanda Dissel, "Human Rights and prison Conditions". Report of a Pan-African Seminar, Kampala, Uganda. *Criminal Justice* 19 - 21 September 1996. http://www.csvr.org.za/articles last visited on: October 21, 2006.

Sometimes it becomes very important to treat prisoners on individual level for their rehabilitation and to change their psychological state of mind[15]; over crowdedness is a great hindrance to accomplish this object of imprisonment. Usually prison managements use the plea that they have no resources to minimize the numbers of prisoners coming to prison. There is no doubt that jail authorities solely can not tackle all the situations but as a minimum, they can provide humane conditions to prisoners.

UNSMR lays down that prisons should not be built in such a way that they can not provide adequate facilities to the prisoners. So, not only the proper residing place is important but also the prisoners should be provided with all the basic and fundamental needs.[16] This is an expensive solution to build new penitentiaries. The UN has provided various alternatives to imprisonment in its non- custodial measures to deal with this end. These measures or solutions include early releases of prisoners, automatic reduction of sentence and parole, or devise strategies for rotating sleeping times in the cells.[17]

1.3.2-Incorporation of Rules Relating to Accommodation in European Prison Rules

While the UN has provided some international standards to deal with prisoners, Regional regulations are also passed in this regard, such as European Prison Laws, which is infact an incorporation of UNSMR within European laws with some changes.[18]

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[15]The fulfillment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; it is therefore desirable that such groups should be distributed in separate institutions suitable for the treatment of each group. (3) It is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered. In some countries it is considered that the population of such institutions should not exceed five hundred. In open institutions the population should be as small as possible. Ibid. Article 63(01,03)

[16]On the other hand, it is undesirable to maintain prisons which are so small that proper facilities cannot be provided. *UN Standard Minimum Rules for the Treatment of Prisoners.* Article 63(04).

[17]*UN Standard Minimum Rules for Non Custodial Measures*

[18]11(01). In allocating prisoners to different institutions or regimes, due account shall be taken of their judicial and legal situation (untried or convicted prisoner, first offender or habitual offender, short sentence or long sentence), of the special requirements of their treatment, of their medical needs, their sex and age. 02. Males and females shall in principle be detained separately, although they may participate together in

1.3.2.1-Comparison between the UN Prison Rules and European Prison Rules relating to Accommodation

There are some clear dissimilarities between both the documents. A brief comparison of Art 08 of UNSMR and Art 11 of EPR indicates that there is no difference between them, except that EPR is elaborating the prisoners' categories in more explicit manner. However, EPR is relatively strict in relation to providing separate accommodation for men and women, it is portraying this idea by using the words: *"Males and females shall in principle be detained separately"* whereas relevant provisions of UNSMR state, *"Men and women shall so far as possible be detained in separate institutions"*. Although both sentences are representing the same perception but there is a clear difference in the approaches. EPR is declaring the requirement as mandatory while UNSMR is providing discretion to authorities by using the words 'so far as possible'. UNSMR is an Internationally applicable Convention which is prepared by keeping all the member countries and their diversified economic, social and religious situations in contemplation, whereas EPR is significant only

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organized activities as part of an established treatment programme. *European Prison Rule* 11 14. 1. Prisoners shall normally be lodged during the night in individual cells except in cases where it is considered that there are advantages in sharing accommodation with other prisoners. 02. Where accommodation is shared it shall be occupied by prisoners suitable to associate with others in those conditions. There shall be supervision by night, in keeping with the nature of the institution. *Ibid* 14 15. The accommodation provided for prisoners, and in particular all sleeping accommodation, shall meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially the cubic content of air, a reasonable amount of space, lighting, heating and ventilation. *Ibid* 15 16. In all places where prisoners are required to live or work: a. the windows shall be large enough to enable the prisoners, inter alia, to read or work by natural light in normal conditions. They shall be so constructed that they can allow the entrance of fresh air except where there is an adequate air conditioning system. Moreover, the windows shall, with due regard to security requirements, present in their size, location and construction as normal an appearance as possible; b. artificial light shall satisfy recognized technical standards. *Ibid* 16 17. The sanitary installations and arrangements for access shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in clean and decent conditions. Ibid 17 18. Adequate bathing and showering installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week. Wherever possible there should be free access at all reasonable times. *Ibid* 18 19. All parts of an institution shall be properly maintained and kept clean at all times. *Ibid* 19

in Europe. The European Union obliges member states to observe these rules. In addition to it, the EU can also provide funds and facilities for complying with such rules.

Article 09 of UNSMR and Article 14 of EPR have an enormous difference. UNSMR is completely negating the idea of permanent overcrowding in prisons, it says in this context *"where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room."* Under UNSMR this is the strict duty of prison administration to provide a cell or single room to every prisoner. There can be temporary overcrowding as a special reason and it will be only an exceptional situation applicable only for a short time, while permanent overcrowding is not allowed at all. However EPR is not providing such firm rules in this sensitive issue, relatively it is authorizing shared places in Rule 14(02) by saying; "Where accommodation is shared it shall be occupied by prisoners suitable to associate with others in those conditions. There shall be supervision by night, in keeping with the nature of the institution".

1.3.3- Incorporation of rules relating to Accommodation in Pakistani Law

Pakistan is a developing state with limited economic resources, but economic reservations do not stop the authorities to exercise their powers humanely, thus, this is very important to safeguard the basic human rights and dignity of the prisoners as a minimum. Over crowding is already an impediment in the provision of most of the rights of prisoners.

In Pakistan, the Prisons Act, 1894, The Prisoners Act, 1900 and the subordinate legislation in the form of Prison Rules, administer the legal regime for prisons. These laws having been drafted and passed approximately a century ago have become outdated and obsolete. They are not capable to cope with contemporary situation and the requirements of changed circumstances. The provisions in the Prisons Act, 1894 relating to accommodation, are limited to separation of prisoners without providing any assurance of principles of humanity and perpetuation of dignity. The Remission system under the Prison Rules, gives such a wider discretion to the authorities, which is basically neither mandatory nor required and it leaves the door open for its abuse.[19]

Rule 746 to Rule 760 of "Pakistan Prison Rules" are generally applicable for accommodations of all prisons. However "The Prison Act 1894" provides detailed laws in this regard, therefore these regulations have been particularly discussed here. There is an obvious inconsistency between Rule 09(01)[20] of UNSMR and section 07[21] of Prison Act 1894. UNSMR plainly emphasizes on individual spaces for every prisoner in normal circumstances and even during special times it is desirable to have maximum two prisoners in a cell or room. However the Prison Act 1894 oddly delegates all powers for prisoners' accommodations in the hands of 'Director of Prisons', while it must be a

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[19]See. Overcrowded Prisons. "Athar MinAllah". *Paper presented in Seventh ACPF World Conference on Crime Prevention & Criminal Justice* 23 – 26 November 1999. New Delhi. available online at:www.acpf.org/WC7th/Papersitem3/PakistanMinallahfre. accessed: January18, 2007

[20]09. (1) where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

[21]07.Whenever it appears to the [Director of Prisons] that the number of prisoners in any prison is greater than can conveniently or safely be kept therein, and it is not convenient to transfer the excess number to some other prison, or whenever from the outbreak of epidemic disease within any prison, or for any other reason, it is desirable to provide for the temporary shelter and safe custody of any prisoners, provision shall be made, by such officer and in such manner as the [Provincial Government] may direct, for the shelter and safe custody in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in the prison.

responsibility taken by Federal or Provincial Government which should mention accommodation capacity of each prison and it also must be very clear that this number might not be exceeded except in special circumstances of temporary nature. Secondly, even if this is the discretion exercisable by Director of Prisons, a few words should be more precisely elucidated; for instance, how to determine the number of prisoners conveniently adjustable at one place, the word 'conveniently or safely' can vastly be interpreted and may become a reason of infringement of various human rights of prisoners. The same provision is demanding that this is mandatory for the Prison administration to facilitate the prisoners by creating proper space and shelter for exceptional cases because prison conditions that violate the prisoner's human rights are not defensible by lack of resources.

The segregation of female and male prison population is usually professed as a measure in supplementary to the justifiable security goals of the institution[22]. Section 27 to 30 of the Prison Act 1894 and Rules 224 to 249 of the Pakistan Prison Rules 1978 require the division of prisoners' categories which is not only an internationally valid provision but also a social and religious requirement of the Pakistani Society. Regretfully, due to over-crowdedness and excessive numbers of prisoners in Pakistani prisons, it is very difficult to implement this provision with letter and spirit and there are a lot of discrepancies in this regard in legal and factual situation. The facility of separate prisons for women is available only in Multan, (Province of the Punjab), Larkana, (Province of Sindh) and Peshawar, (North West Frontier Province). Similarly, the facility of separate jails for juveniles exist only in Landhi (Karachi in the Province of Sindh) and in Bahawalpur,

[22]See. David Rudovsky, Contributors: Alvin J. Bronstein, *The Basic ACLU Guide to Prisoners' Rights* Southern Illinois University Press, Carbondale, IL, 1988.p. 72.

(Province of the Punjab). Elsewhere in the country, segregation is effected through separate enclosures for women and juveniles within the same premises.[23]

1.3.3.1- Practical Situation of Prison Laws relating to Accommodation in Pakistan

Pakistan Prison Rules is a common prison manual applicable all over the country. Its development source was federal government's Jail Reforms Conference of 1972; it was adopted by the provinces in 1978.[24]

Pakistan's eighty-nine prisons are classified into several categories, based on administrative level, size, and function. At the apex of the prison system are the twenty-two central prisons, which are designed to house over one thousand inmates each.[25] Although they were originally intended for the confinement of convicted prisoners.[26] the central prisons presently accommodate both convicts and under trial prisoners. The district jails represent by far the largest category, numbering over forty, and typically have capacities of three hundred to five hundred prisoners each.[27] In Punjab, district jails can hold prisoners undergoing trial as well as convicts sentenced to terms of less than two months: convicts sentenced to longer terms are transferred to central prisons.[28].Below these are sub-jails, most of which are in the North-West Frontier Province, and judicial lockups, where criminal suspects may be detained on judicial remand. In addition, there are few special prisons, including the juvenile institutions at Bahawalpur and Karachi and

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[23]See. http://www.ljcp.gov.pk/Menu%20Items/Publications/Reports. accessed: September 01,2007
[24]See. Human Rights Commission of Pakistan, *A Penal System Long Overdue for Change, Lahore*, (1996). accessed: September 19,2005
[25]*Pakistan Prison Rules*, Rule 5(I).
[26]*Pakistan Prison Rules*, Rule3 (ii)
[27]Some of the larger district jails have higher rated capacities. Lahore District Jail, for example, is designed to accommodate one thousand prisoners
[28]See. Human Rights Watch interview with Captain Sarfraz Mufti, Deputy Inspector-General of Prisons, Government of Punjab, Lahore, May 8, 1998 accessed: October 08,2006

the women's jails at Multan in Punjab, and Larkana in Sindh.[29] Some statistics collected through various reports are presented here for the accurate appreciation of Pakistani Prisons concerning their accommodations;

> "There are 89 jails in the country where 88,659 inmates kept against a capacity of 36,557, out of these 89 jails, 30 are in Punjab, 18 in Sindh. 22 in the NWFP, 10 in Baluchistan, six in Azad Jammu and Kashmir and three in the Northern Areas. These include 22 central jails, 40 district jails, 13 sub jails, two juvenile jails, three women's jails and one open jail. The report revealed that there were only 14,300 staffers to control 89 prisons with one official for seven inmates which was very nominal according to international standards. Only In the Province of Punjab jails, there are 52,332 inmates against a capacity of 17,637."[30]

There are certain reasons for these crammed Pakistani prisons; e.g,

1- Delayed Investigation Reports

2- Restrictive Application of Bail Laws

3- Frequent Adjournment of Hearings

4- Limited Use of Probation and Parole

5- Lack of Counsel

This is essential to remove all these hurdles for fulfilling the duty of proper Incorporation of International standards as a signatory state, the only possible solution is powerful legal and judicial system.

1.4- Reasons for Non-Fulfillment of International Legal Requirements against Over-Crowdedness of Prisons

There should be consistency in International, Regional and National Laws and implementation procedures must also correspond to these laws. There is a need of

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[29]Available online at: http://www.hrw.org/reports/1999/pakistan2/Pakistan. accessed: July 25,2006

[30]Available online at: http://www.dailytimes.com.pk/default.asp?page=story_22-6-2005_pg7_29. accessed: December 06, 2006.

'Harmonization of Laws'. The idea of harmonized laws is very striking but extremely difficult to achieve due to certain serious reasons.

EU is trying to synchronize laws only for Europe but it is still felt very hard to completely implement these laws even in the whole Europe and to remove all the reservations made by different EU states. The reason is that it is always difficult to create similar situations at different places and that each country has its own political whims. There are vast differences between developed and developing countries or even between America and Europe. Consequently, all states can not be compelled to follow same methods to be used in their institutions since they are bound to work by keeping themselves within their own cultural, political and administrative framework.

Nonetheless, despite all differences and practical difficulties, states should strive to implement 'Jus Cogens'[31] and the UN system should support the states in their endeavors in this regard.

1.5-Rehabilitation Charms and their Practical Applications

> Society has not yet made the choices that will be necessary to resolve the problems. Do we want prisons only to punish? Or do we want prisons to educate and train offenders to aid their adjustment in society? Are we going to continue to ignore the problems in prisons until mass riots, with their extensive destruction of property and human life, force us to look at our institutions?[32]

Rehabilitation programs are considered as an essential part of imprisonment requirements. Their basic purpose is to make prisoners the helpful and productive part of society. However it happens seldom. Prison can be defined as; "a place of confinement

[31]The internationally accepted human rights norms.
[32]Nitai Roy Chowdhury, *Indian Prison Laws and Correction of Prisoners*, Deep and Deep Publication Private Limited, New Delhi, 2002.p. 1(Introduction)

for the punishment and rehabilitation of criminals."[33]

1.5.1- Different Definitions of Rehabilitation

During the eighteenth century, the idea and logics behind imprisonment started to be changed. Jurists began to work on the idea of rehabilitation rather than punishment. Two Prison Reformers are well known in this regard; namely, John Howard (1726-1790) and Jeremy Bentham (1748-1832). Both shared a revolt against traditional punishment. They expressed that institutions could be built that would rehabilitate criminals and prevent crime. Their detailed proposals shaped the rise of the penitentiary by providing an essential belief that properly designed prisons might transform felon into productive citizens.[34] According to some jurists the goal of imprisonment is not only punitive but curative to make a person from criminal to a non criminal. Rehabilitation is a prized purpose of prison hospitalization. Since prison is meant for restoration, a criminal must be cured and cruelty is not restorative at all. Social justice and social defense ask for enlightened habilitative measures.[35]

Gresham Sykes says in his book "*The Society of Captives*";

> "Prisons are in their true essence, institutions which perform conflicting tasks of-
> a) Punishment to those offending laws of the country; and
> b) Providing for their rehabilitation during their stay in prisons."[36]

The essence of above statement is that under contemporary philosophy there is a dire necessity of a combination of prisoner's rehabilitation with punishment because the object of imprisonment is basically reformation oriented rather than punitive. The main

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[33]See *The Columbia Encyclopedia*, s.v. "Prison".
[34]Ibid
[35]Nitai Roy Chowdhury, *Indian Prison Laws and Correction of Prisoners*, Publisher: Deep and Deep Publication Private Limited, New Delhi, 2002.p. 81
[36]Khalid Ranjha, *Overcrowding of Prisons and non Institutional Treatment of Offenders*. available online at: http://www.acpf.org/Asia/Pakistan/PpPakistanRanijaltem3.pdf. accessed: August 23, 2006.

purpose of Criminal Justice System is prevention of crime so the treatment of an offender should be such that he may return to normal life. Summarily, there are two essential tasks of incarceration, i-e, to penalize the offender as well as rehabilitative training for his repatriation in the society.

Thus, the idea of offender's rehabilitation may be elaborated in following manner;

1-To make him psychologically reformed and to import him such training that can make him a useful member of the society; and

2-The society at large should be accommodative towards individuals, released after facing their lawful exhaustive punishments.

The second part of rehabilitation process is vital as well as of more significance in relation to this research. In this paper, there will be an analysis of international and regional laws relating to rehabilitation followed by a detailed discussion on Pakistani rehabilitation laws and their practical implementation in Pakistani society.

1.5.2- Laws Relating to Rehabilitation of Prisoners

1.5.2.1- Basic Principles for the Treatment of Prisoners

These principles clearly require from signatory states and their prison authorities to incorporate the rehabilitation laws and make their implementation possible.[37]There are various methodologies followed for prisoners' rehabilitation, which vary from case to

[37]"(06) All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.
(08) Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labor market and permit them to contribute to their own financial support and to that of their families.
(10) With the participation and help of the community and social institutions, and with due regard to the interests of victims, favorable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.

case. Other factors which can be kept in mind in this regard are the economic situation of the incarcerating country, the imprisonment institution, the criminal record of prisoners and the reasons of imprisonment.

1.5.2.2-Standard Minimum Rules for the Treatment of Prisoners

It can be well understood in the light of this Convention that the main idea behind imprisonment is to transform a criminal in to a fruitful and beneficial part of society. This purpose can only be achieved if he is properly rehabilitated according to his given circumstances and capability as this is the only way to train him for leading a respectable and meaningful life after release.[38] There are two important factors in this context which are the pre-release training of prisoner for peaceful settlement in the society and that the society should also be ready to accept the person as an effective and useful part of society. So, there should also be training programs for citizens living outside the prison.[39]

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[38]Rule 58. The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
Rule 59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

[39]Rule 60(2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.
Rule 61. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.
Rule 64. The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

1.5.2.3- The United Nations *International Covenant on* Civil and Political Rights

This International Convention also emphasizes on the need of rehabilitation of prisoners as an essential requirement of Imprisonment.[40]

1.5.2.4-Pakistani Prison Laws on Rehabilitation

Pakistani Prison Laws do not prescribe exactly the rehabilitation measures to be established for prisoners but they only deal with the Prisoners' labor requirements. Nonetheless, Pakistan Prison Rules[41] and The Prisons Act 1894[42] stipulate certain provisions in this regard.

1.5.3- Practical Situation of Prisoner's Rehabilitation in Pakistan

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[40]The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. *The United Nations international covenant on civil and political rights*, Article 10(02)

[41]Rule 810- The Superintendent should provide suitable labour for every class of prisoners sentenced to rigorous imprisonment confined in the prison. Such labour may be Industrial or non- Industrial. While establishing an Industry in any prison the following two main objectives shall be kept in view:-
(a)- Impairing vocational training to the prisoners to enable them to earn respectable livelihood after their release
(b)- The said Industry is locally available in the hinterland.

[42]Section34. *(1) Civil prisoners may*, with the Superintendent's permission, work and follow any trade or profession.
(2)Civil prisoners finding their own implements, and not maintained at the expense of the prison shall be allowed to receive the whole of their earnings; but the earnings of such as are furnished with implements or are maintained at the expense of the prison shall be subject to a deduction to be determined by the Superintendent, for the use of implements and the cost of maintenance.
Section 35.(1) No criminal prisoner sentenced to labour or employed on labour at his own desire shall, except on an emergency with the sanction in writing of the Superintendent, be kept to labour for more than nine hours in any one day.
(2)The Medical Officer shall from time to time examine the laboring prisoners while they are employed, and shall at least once in every fortnight cause to be recorded upon the history-ticket of each prisoner employed on labour the weight of such prisoner at the time.
(3)When the Medical Officer is of opinion that the health of any prisoner suffers from employment on any kind or class of labour, such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the Medical Officer may consider suited for him.
Section 36.Provision shall be made by the Superintendent for the employment (as long as they so desire) of all criminal prisoners sentenced to simple imprisonment; but no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such a prisoner.

Until 19th century, labor system was introduced in prison primarily as punishment. With the passage of time, however, the concept has been changed and such work is now considered a necessary part of rehabilitation of the criminal. It is also used to keep discipline and reduce the costs of prison maintenance.[43]

It is elaborated in the beginning of this chapter that international and regional laws can be effective only if they are incorporated in municipal laws of member states. The basic emphasis here is that Prisoner's rehabilitation is imperative but this is also extremely important to change general conceptions and social notions of the society towards prisoners. Rule 64 of "United Nations Standard Minimum Rules for the Treatment of Prisoners" indicates in very precise words that, *"the duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation."*

Rule 08 of the same Convention states, *"with the participation and help of the community and social institutions, and with due regard to the interests of victims, favorable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions".*

Hence, the duty of governmental, social or non- governmental organizations does not end on the arrangement of rehabilitative programs within the prisons. Rather this task should be more significantly fulfilled on the level of society at large and after the release of prisoner. This is essential to educate the society for dealing with people who come out

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[43]See. *The Columbia Encyclopedia*, s.v."Convict Labor"

of prisons after completing their sentences. This is a mandatory part of prison rehabilitation system to train the prisoner for his future confident movement in the society but this is more vital that he is accepted by the society. It is very much probable that a person after facing a painful punishment wants to leave the world of crime but the fact is that it is not simple to change the mind set of the people, even of his own family regarding his criminal past. Notions are difficult to change but it is not difficult to change the legal practices.

Pakistan is a signatory to the above mentioned documents on prisoners but unfortunately it has not incorporated even a single provision of these conventions relating to rehabilitation within its municipal laws. Pakistani laws indeed mention labor by prisoners but there do not exist provisions like rehabilitation programs and trainings.

Pakistan is a signatory to UDHR[44] which again and again highlights the importance of dignity and respect for all the human beings available on equal level.[45] As

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[44]*Universal Declaration of Human Rights.*

[45]"All human beings are born free and equal in dignity and rights." Article 01
"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." Article 02
"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Article07
"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Article 22(01)
"(01) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. (02) Everyone, without any discrimination, has the right to equal pay for equal work." Article23
"Everyone has duties to the community in which alone the free and full development of his personality is possible." Article 29.(1)

a signatory to UDHR, Pakistan has also recognized to embody these principles in its municipal laws.

The 1973 Constitution of Pakistan also invalidates any kind of discrimination in its institutions and society. Unfortunately, practical situation is different altogether. Moreover, convicts are not accepted by the society in any way after their release. They are looked down upon by the whole society even if they have completed their sentences. All the legal guarantees given in UDHR and the Constitution are sabotaged by the people against a released offender. This is a common practice in Pakistan not to offer any earning facilities to released people. Convicted people can not be appointed after their release on government job through legally provided force, same is the situation in private job sector. This is indeed a very discriminatory behavior towards released prisoners. Rule 61 0f "Basic Rules for the Treatment of Prisoners" says; *"The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners"*

Under Article 68 of Qanoon-e-Shahadat Ordinance 1984 (Pakistan), previous criminal records and bad character of an accused are irrelevant in case of a new accusation. However, he is rendered ineligible for employment opportunities and the

governmental and public institutions can deny this legal right to previously detained people.

The easiest way to assess an offender's change in the community is to review his legal and employment performance after release. However, the stigma of imprisonment, and long absences from work on CVs, has a tendency to put employers off hiring former prisoners which intensify social exclusion, and increases the risk of a return to crime.[46] This phenomena is exemplified here through certain instances practically implemented in Pakistan.

a- Questions put by Application Form for Competitive Examination for Civil Services of Pakistan

Q 13- Disciplinary Action/ Conviction: Was any disciplinary action, ever taken against you in any educational institution or department or were you ever debarred from government service or any examination/ selection held by FPSCP[47], or were you ever convicted for any crime other than a minor traffic offence?

b- Eligibility criterion for grant of Commission Officer

g. Must not be a person who has been convicted by a court of law for an offence involving moral turpitude.

c- Ineligibility criterion for 10 Corps Officers and other ranks in Pakistan Armed Forces

[46]See http://www.politics.co.uk/issue-briefs/public-services/prisons/prison-rehabilitation/prison-rehabilitation. accessed: September 01, 2007.
[47] Federal Public Service Commission of Pakistan.

d. Who has been convicted by any court of law.[48]

d- Ineligibility criterion for Enrolment in Mujahid Force of Pakistan

j. He shall not be a person who has at any time been sentenced to a term of transportation or imprisonment or whipping or who has been ordered under the provisions of the Code of Criminal Procedure 1898 to furnish a security for his good behavior, such sentence or order not having been subsequently revised or remitted or the offender pardoned.

e- Questions put for Visa Applications for various Countries

An entire section of application forms require the information about Criminal History Record of the applicant and ask in the end for its details.

f- Higher Education Commission of Pakistan's prerequisites for getting Foreign Degrees Scholarships:

"You are required to submit the following documents within ONE month after receipt of this communication:

Police Clearance Certificate (with a minimum of six month validity)."[49]

1.6- Concluding Remarks and Suggestions

Here, it should be kept in contemplation that all such provisions are enforceable through internal laws of all these departments and the consequence of these inquiries is the total ineligibility of previous convicts from the relevant job. If these provisions are inquired

[48] Available online at: www.pakistan.gov.pk/ministries/ContentInfo.jsp. accessed : October 10, 2007
[49] Higher Education Commission of Pakistan's Provisional Offer Form for PhD Scholarships.

more deeply, it will also be unfolded that these are making the person ineligible from all government posts of Pakistan. On the one hand, it is covering the entire Armed Forces posts and on the other hand all Civil/Public Posts are not allowed for previous convicts. Another sad aspect is that the main focus of rehabilitation process is on obtaining education during imprisonment to get these prisoners adjustable in the society after their release as well as for securing the employment opportunities. However, the fact is that previously convicted person is not even eligible for Higher Studies abroad as mentioned above. Their Prison records would follow them wherever they go, making a return to non criminal behavior more difficult.[50]

This is a discriminatory behavior of society as well as of law and a clear infringement of all the International laws relating to rehabilitation. If the society, social institutions and above all government is not ready to engage these people in different works or to provide them the basic necessity of living a respectable life, which includes the employment and work opportunity, then the cure of a criminal can not be expected.

> While in the past, rehabilitation may have been directed at 'reforming the character' of prisoners, its focus is now on preventing reoffending. The success that prisons achieve is hampered further by many prisoners lacking basic skills or suffering from social and psychological problems. Thousands of prisoners are released every year without anywhere to live, worsening problems of homelessness. Whatever rehabilitation takes place inside prison, many former inmates experience considerable difficulty reintegrating into society because of the attitudes of others.[51]

So, the basic point is that laws can never be fruitful if they are not being implemented properly. There is no need to paint rosy pictures to imprisoned people

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[50]Thomas J. Sullivan, *An Introduction to Social Problems.* Allyn and Bacon, a Viacom Company, United States of America. 1997.p. 339.

[51]Available online at:http://www.politics.co.uk/issue-briefs/public-services/prisons/prison-rehabilitation/prison-rehabilitation. accessed on: September 01, 2007.

through rehabilitation programs if social institutions are not ready to accept them as the productive part of society.

"The Rehabilitation of Offenders Act 1974 of UK" deals with the disclosure of criminal convictions and allows, in certain circumstances and after a period of time, many past convictions to be regarded as 'spent' and do not need to be declared.[52] This method should also be used in Pakistan to overcome this problem at certain extent.

[52] ibid

CHAPTER II

DIVERSIFIED DEFFINITIONS ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT FOR PRISONERS

> Torture flourishes on silence and impunity. It nurtures its head when the legal obstacles against it are excluded, feeds on discrimination and fear and expands when official condemnation of it is less than absolute.[1]

Basically laws are meant to be implemented not just to beautify statute books. Though it is easy to declare certain basic rights but difficult to specify what is or ought to be incorporated in their definition. Torture and Cruelty are the most awful violations of human rights that are usually endured by prisoners. All over the world, legislations related to treatment of prisoners deal with this issue and stipulate that sympathetic, civilized and humane treatment is moral as well as legal right of captives. However, human rights are not only a pledge unfulfilled rather it is a promise betrayed.

The prohibition of torture and inhuman or degrading treatment or punishment is probably the most well attested form of right in the entire human rights catalogue. Torture is a serious breach of human rights and is sternly forbidden by International law. It was one of the first issues dealt with by the United Nations in its development of human rights

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[1] *Amnesty International Report* 2005. Available online athttp://www.amnestyusa.org/news/document. accessed: October 02, 2007.

standards, as the use of torture hits at especially the very core of civil and political freedoms. Various International and Regional Conventions have been passed to condemn torture, cruel and inhuman treatment towards prisoners. The Universal Declaration of Human Rights (UDHR) is considered as the most authentic and recognized document passed by the UN. It was anticipated to be a common standard of achievement for all peoples and states rather than a source of legal obligation. The motivation and cogent behind proposing this Convention was prevention rather than punishment. Article 5 of UDHR states that: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

Article 7 of the "International Covenant on Civil and Political Rights", Article 3 of the "European Convention on Human Rights", Article 5(2) of the "Inter-American Convention on Human Rights", and Article 5 of the "African Charter on Human and Peoples Rights" also draw upon the wording of the UDHR and provide further confirmation of the universal disapproval of torture and ill treatment. In 1975 the UN General Assembly adopted, by consensus, Resolution 3542 (XXX), the "Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment". It was resulted in 1984 in the shape of "UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", The Organization of American States has adopted the "Inter-American Convention to Prevent and Punish Torture", while the Council of Europe has adopted the "European Convention for the

Prevention of Torture and Inhuman or Degrading Treatment or Punishment". Other standard-setting documents promulgated by the UN also ask for the prohibition of torture.[2]

In consequence, it is generally accepted that the prohibition of torture has passed into customary international law and, as such, applies to all states irrespective of whether they have become a party to a particular international instrument or not. The fact is that, no one has the power to terminate unilaterally the Convention against Torture because treaties that embody human rights norms (especially peremptory norms like torture) are essentially dissimilar from other sorts of treaties. Also torture is included in the list of Jus Cogens[3] which are not possible to be disregarded or ignored. Treaties dealing with peremptory norms are downright different from other treaties.[4]Despite all this, there are several ambiguities present in National as well as in International laws relating to this subject. This is also a reality that so far there is no comprehensive and harmonized definition available on international or domestic level (even under major legal systems), or particular "test" used to decide whether a punishment is torturous, cruel and inhuman or not. It gives the impression that states are deliberately overlooking this subject and there is a lack of will to stop torture for carrying out their political objectives.

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[2] Jeffrey C. Goldman, Of Treaties and Torture, How the Supreme Court Can Restrain the Executive, *Duke Law Journal*, Volume: 55. Issue: 3. 609 . accessed: October 17, 2007

[3]Certain norms under international law are deemed to be Jus cogens, or "compelling law which is binding on parties regardless of their will and that does not yield to other laws." As such, jus cogens norms should be, and usually are, accorded greater protection than other rights. A norm cannot be jus cogens unless both the principle and its universal, binding character are accepted by the international community. Torture is prohibited in all major legal systems and by almost all international human rights instruments. Congress. Research Survey, Library of Congress., 106th cong., *Treaties and other International Agreements: the Role of the United States* senate 54. 2001.

[4]Jeffrey C. Goldman, Of Treaties and Torture: How the Supreme Court Can Restrain the Executive. *Duke Law Journal.* Volume: 55. Issue: 3.p.609. accessed: October 17, 2007

This part of study will specifically discuss various definitions provided by different states, statutes and jurists and that how these extended ideas are implemented on domestic level.

2.1- Different available Definitions on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for Prisoners

2.1.1- Definitions Provided by International and Regional Conventions

These terminologies are defined under different International and Regional Conventions as:

1-"*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"[5]

2-"*Torture is, the purposeful infliction of severe pain or suffering on a detainee by public officials or with their acquiescence to gain information, to obtain a confession, to punish, to intimidate, or to terrorize.*"[6]

3- Torture includes "*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 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*

[5] *Universal Declaration on Human Rights*: Article 05
[6] *U.N Standard Minimum Rules for the Treatment of Prisoners*: Rule 01

or other person acting in an official capacity. Inhuman or Degrading Treatment includes: *acts that inflict mental or physical suffering, anguish, humiliation, fear or debasement, but that fall short of torture."*[7]

The word 'severe pain' is bringing out ambiguous meanings and provides clear loop holes for misusing this particular terminology. The use of word 'severe' emphasizes that infliction of pain itself is not prohibited if it is not crossing the limits of 'severity', 'Intentional' is also an unclear and vague word, which can be exploited as an excuse. This is not always important for security agencies to achieve only the *'purpose'* of collecting information or extracting evidences from the accused, sometimes this act is only done to satisfy an urge to torture others or just to fulfill personal interests. Article 1 of the "UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" is often referred to as it excludes *"pain or suffering arising only from, inherent in or incidental to lawful sanctions".* Some states have exploited this provision by arguing that legally authorized criminal penalties which can result in physical harm do not constitute torture.[8]

Thus under these definitions, Torture stands at the apex of a pyramid of suffering and is categorized as the highest form of infliction of pain.

4- *"No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be*

[7] *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 1
[8] See. http://www.hrea.org/learn/guides/torture.html

invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

7(1) - *States should prohibit by law any act contrary to the rights and duties contained in these principles make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.*

The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."[9]

5- "*For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.*

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[9] *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*: Principl 06,07.(01)

2. *Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.*"[10]

It shows that Law Implementing Agencies are bound to take care of prisoners in the widest possible way and these terminologies will be interpreted in their extensive and ample meanings.

6- "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"[11]

7-"*No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person*".[12]

8- "*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*"[13]

All definitions are putting a clear and categorical ban on all types of cruel, inhuman or degrading treatment or punishment. Even in the most complicated situation, internal political instability, or any other public emergency, fight against terrorism or any type of

[10] *UN Declaration on the Protection of all Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: Article 01, 01(2).
[11] *European Convention on Human Rights*: Article 03.
[12] *American Convention on Human Rights*: Article 05.2
[13] *African Charter on Human and Peoples' Rights*: Article 05.

crime, even in the occurrence of a public emergency threatening the life of the nation, the Conventions completely prohibit torture or inhuman or degrading treatment or punishment.

> International human rights law contains no more basic prohibition than the absolute, unconditional ban on torture and what is known as cruel, inhuman, or degrading treatment. Even the right to life admits exceptions, such as the killing of combatants allowed in wartime. But torture and inhumane treatment are forbidden unconditionally, whether in time of peace or war, whether at the local police station or in the face of a major security threat.[14]

But the drafting history corroborates that there was no clear understanding of what was exactly meant by these terms, it is not possible to find out any precise, exact and significant meanings. There are no immutable propositions that circumscribe their range of activities. It leaves the door open for the abuse of it and provides an obvious excuse to exercise of excessive powers for collecting information from suspects. This is the reason that diversified definitions on national level are also available but they are misused by the jail authorities in many states. Whatever the merits of this view, it fails to make it clear that what amounts to ill-treatment.

2.1.2- Definitions Provided by Courts

> The Conventions may, at any given moment, reveal the current understanding of the key terms but it does not, and cannot, point to their perimeters. In consequence, the courts remain free to test those limits by exploring and illuminating the range of circumstances which potentially might be considered as within its sphere.[15]

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[14]Available online at: http://www.washingtonpost.com/wp-dyn/articles/ accessed: September 20, 2007
[15]Available online at: http://www.hrea.org/learn/guides/torture.html. accessed: July 14,2007

Definitions provided by Conventions are normally broken down into three constituent parts: 'Torture', 'Inhuman', and 'Degrading' each invested with their own implication. A multifarious jurisprudence has emerged around each of these terms. All are having their different legal meaning and diversified applicability requirements. But no proper classification or explanation is available in legal systems, it should be clearly explained; what does the ban on humiliating and degrading treatment actually mean? In the interests of self-preservation, law making agencies want to know the limits of what they can do to unfriendly civilians. Short answer to the question posed, can be articulated as a positive compulsion, or, treat all persons not participating in hostilities with the same respect that a person would hope for himself if he would have been captured or detained under the same circumstances. This advice is based on the widely accepted, moral principle: "Do to others as you would want them do to you." But it is not so simple; there are a lot of technicalities involved in it which are big encumbrances for courts while they are deciding the cases related to these breaches.[16]

The courts have elaborated those acts and circumstances in various cases which can come under the headings of Torture, Cruel and Degrading Treatment. An act of torture or ill-treatment whether it is cruel, inhuman or degrading treatment or punishment, must attain a minimum level to fit this particular qualification.[17] European Court of Human Rights deemed

[16]Stephen Erikkson, Humiliating and degrading treatment under international humanitarian law: criminal accountability, state responsibility, and cultural considerations. *Air Force Law Review*. Spring. 2004
[17] See. http://www.omct.org/pdf/OMCT_Europe/2004

in a Case that it depends on the duration of the treatment, its physical or mental effects and on the sex, age and state of health of the victim.[18]

The impression; 'inhuman' treatment or punishment is the least well developed of the three categories from a theoretical perspective. On the one hand, it stands as that category into which included acts are not 'crossing the threshold' and amounting to torture , on the other hand, it is used as a point of reference while deciding whether treatment is to be deemed degrading, in the sense that the level of suffering reached is not sufficient to be categorized as inhuman. In several cases, however, a finding that 'inhuman and degrading' treatment has taken place is made without any real consideration of which is the more apposite label.[19]

Degrading treatment is considered on the lowest level of all these three categories. It is a behavior which causes the person concerned humiliation or debasement attaining a minimum level of severity 'either in the eyes of others or in his own eyes'. This is assessed in the light of the circumstances of the case. Generally there are three criterions adopted in this regard; treatment which is degrading in the opinion of the Court, in the eyes of others, and in the eyes of the victim. Once it has been accepted that the practice is degrading per se, the precise circumstances of its application become irrelevant. If it has not been so decided, the full range of background factors come into play, including, the degree of injury sustained,

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[18] See. Ireland v. The United Kingdom, Judgment of 18 January 1978, para 162. As quoted in "*Interpretation of the Definition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment in the Light of European and International Case Law*". Available online at http://www.omct.org/pdf/OMCT_Europe/2004

[19] See. Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Oxford University Press. 1998.p. 93

the purpose of the treatment or punishment and the justifications advanced for its use. So, basically this is not only the nature of act which can put it under the definition of 'degrading treatment' rather particular circumstances are also important in this regard.[20]

As far as the other two categories, i.e. 'torture' and 'inhuman treatment' are concerned probably they co-exist on the same plane, distinguished only by the purposive element. If there is any amalgamation of emotions and purpose in inhuman treatment and if a greater emotive value is attached to it, then this will be held 'torture' and not 'inhuman' conduct, this reflects, perhaps, an inherent sentiment that the infliction of pain or suffering for predetermined purposes of interrogation or punishment is a greater wrong than the infliction of pain or suffering itself. It may rightly be said that 'torture' is considered more blameworthy than 'inhuman' treatment.[21] In addition to the objective nature of the treatment and its effects on the person who faced it, the intention of the authority which inflicted the pain may also be of relevance in deciding whether it fulfils the essential elements of treatment prohibited by Article 3 of European Convention on Human Rights or not! In this regard Courts are free to decide about the application of these expressions in the widest way.[22]The nature of practice rather than its effects is important and significant in a particular case.

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[20] See. Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* Oxford University Press. 1998 p.91

[21] Ibid, p.78

[22]See. East African Asians v UK, Commission Report, 14 Dec 1973, Para 189. (hereinafter referred to as East African Asians v UK Commission Report). As quoted in; Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* Oxford University Press. 1998.

> Of course, all forms of punishment carry with them a degree of humiliation, the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation which is inherent in judicial punishment. The assessment is in the nature of things. It depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.[23]

Ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of ECHR (*"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*).

> In the *Tyrer* case, Judge Fitzmaurice pointed out that; "since the prohibition in Article 3 of ECHR is absolute, if the intensity of pain were the only factor to be taken into account, then 'any infliction of pain severe enough in degree to amount to torture would involve a breach whatever the circumstances'; there could be no room for exceptions based on consent or necessity (for example, medical emergency operations without anesthetic). He concluded that: the gloss that has to be placed upon the literal effect of the Article relates not only to what constitutes or amounts to torture, etc, but to what may in certain circumstances justify its infliction.[24]

There are many things which can be proved as helpful for determining the right ambit of these terminologies. For example there is a specific intention of drafter behind a law, but actually when this law comes to the stage of implementation, it is got molded in different ways through various interpretations given by Judges and adjudicators according to their wisdom with the fusion of intention of drafters. The issue of how one regards "cruel, inhuman and degrading treatment or punishment" has not been satisfactorily addressed by the General Assembly of the UN, but the body suggested in 1979 that the definition be

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[23]Ibid, p.88

[24]Tyrer v UK, 25 April 1978, Dissenting Opinion of Judge Fitzmaurice, Para 5(hereinafter referred to as Tyrer v UK) As quoted in; *"Interpretation of the Definition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment in the Light of European and International Case Law"*. http://www.omct.org/pdf/OMCT_Europe/2004

interpreted so as to extend the widest possible protection against abuses.[25] Since the Convention merely codified international law and neither defined the offense nor provide any legislation for its prohibition, the Courts are certainly able to ascertain some definition of what constitutes torture. A Justice once remarked regarding obscenity, that "he knew it when he saw it". Torture, however difficult to define, is equally recognizable in the majority of actual cases.[26]

In Tyrer vs. UK, the European Commission on Human Rights (later will be called 'Commission') expressed the view that:

> The fact that a certain practice is felt to be distasteful, undesirable or morally wrong and as such ought not to be allowed to continue is not a sufficient ground in itself for holding it to be contrary to Convention. Still less is the fact that the Article fails to provide against types of treatment or punishment which, though they may legitimately be disapproved of, cannot be considered objectively and in relation to all the circumstances involved, reasonably be regarded without exaggeration as amounting, in the particular case, to any of the specific forms of treatment or punishment which the Article does provide against. Any other view would mean using the Article as a vehicle of indirect penal reform, for which it was not intended.[27]

But in Greek case the Commission said that:

> It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and all inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable. The word 'torture' is often

[25]See. Shirley Spitz, The Psychology of Torture, *Centre for the Study of Violence and Reconciliation*, Seminar No. 3, 1989.http://www.csvr.org.za. accessed: 01 July 2007.(hereinafter referred to as Shirley Spitz, The Psychology of Torture)
[26]See. Jeffrey C. Goldman, Of Treaties and Torture: How the Supreme Court Can Restrain the Executive. *Duke Law Journal*. Volume: 55. Issue: 3. 2005.p. 609+.
[27]Tyrer v UK, Para 14.

> used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions. or the infliction of punishment, and it is generally an aggravated form of inhuman and degrading treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience. [28]

In East Africa Asians case, the court accepted that an act which does not involve physical ill-treatment but which lowers a person in rank, position, reputation or character may comprise degrading treatment, provided it reaches a minimum level of severity. It is vital to establish this fact that treatment in question indicates hatred or lack of respect for the personality of the person and it was specially designed to humiliate or degrade him instead of, or in addition to, achieving other aims.[29]

The implication of 'Cruel, Degrading, and Inhuman treatment or Punishment is not restricted only to torturing the prisoners. All those things which are substandard and violate the fundamental rights of prisoners they are to be considered as Cruel, Degrading, and Inhuman. It could be physical or mental torture, crowded prisons, unhealthy system of detention centers, non-standard food, improper place of rest, or anything else which is not according to basic rights of human beings.[30] In another case, The House of Lords confirmed the basic principle that prisoners had remedies against being subjected to unbearable conditions. If the prisons are overcrowded and the prisoners are imprisoned more that the prescribed numbers, this would also be included in the meanings of degrading and inhuman treatment as well as be considered as the mental and physical torture because this is against

[28]Greek case, Commission Rep, 5 Nov 1969, ECHRYb 186(hereinafter referred to as Greek case)
[29]See. East African Asians v UK, Para 189.
[30]See. Tyrer v UK, Dissenting Opinion of Judge Fitzmaurice, Para 5

the fundamental rights of the prisoner.[31] In another case the court said that if it were to be established that the applicant as a sane person was, because of entirely administrative reasons, being subjected to in the psychiatric wing and faced disturbance caused by the mentally ill and disturbed prisoners, this might possibly be considered as a cruel and unusual punishment and one which was not deserved.[32]

A particular form of treatment or punishment can be 'torture' to a frail or elderly person, but inhuman or degrading to a healthy or younger person better able to endure it. The term 'torture' is still most often used to describe forms of treatment which will occasion severe suffering irrespective of the particular characteristics of the victim. It seems that courts are also confused while interpreting the word "Torture". Every court is completely free to give its own observations and decision based upon those surveillances. In Consequence, infinite descriptions given by the courts to these three terminologies can be found.

2.1.3- Things which are included in the Definitions according to the views of Courts

> The term "torture" encompasses a variety of methods including severe beatings, electric shock, sexual abuse and rape, prolonged solitary confinement, hard labor, near drowning, near suffocation, mutilation, and hanging for prolonged periods. Although there is no exhaustive list of prohibited acts, international law has made it clear that torture is cruel,

[31]See. R v. Deputy Governor of Parkherst Prison, exparte Haque (1991), 3 WLR 340 As quoted in; Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* Oxford University Press. 1998.

[32]See. R v. Secretary of State v. Home Department, exparte Herbage (No.2) (1987), 1 All ER 324. As quoted in; Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* Oxford University Press. 1998.

> inhuman, or degrading treatment. In addition to the types of severe pain and suffering mentioned above, torture thus also includes being forced to stand spread eagled against the wall for hours; being subjected to bright lights or blindfolding; being subjected to continuous loud noise; being deprived of sleep, food or drink; being subjected to forced constant standing or crouching; or violent shaking. Moreover, torture is not limited to acts causing physical pain or injury. It includes acts that cause mental suffering, such as through threats against family or loved ones.[33]
>
> The conditions caused by overcrowding amount to inhumanity, and blatantly violate the dignity of the persons held in confinement. The pernicious combination of overcrowding, lack of access to sanitation, and poor hygiene inevitably amounts to inhuman, cruel and degrading treatment.[34]

Solitary confinement is also considered a serious deprivation, unless it becomes essential to be opted to the same by way of punishment in accordance with law.[35] The authorities may exploit the position of prisoner when they call solitary confinement a security mean by saying that victims are sick of the human interaction and the cell provides them security. In that case, the torturer, after beatings, sends the victim to solitary confinement. Here, he or she gets a moment to for thinking how bad the next session may be and the torturers exploit this to their advantage.[36]

In East African Asians v UK, the Commission emphasized that the conclusion that degrading treatment had taken place surged from the 'affront to human dignity' which is inherent in the application rather than it actually having had a degrading effect.[37] Torture is a form of inhuman treatment intentionally inflicted to achieve certain purposes. Degrading

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[33]Available online at: http://www.hrea.org/learn/guides/torture.html. accessed: July 14,2007
[34]Athar Minallah, Overcrowded Prisons. *Paper presented in Seventh ACPF World Conference on Crime Prevention & Criminal Justice* 23 – 26 November 1999.New Delhi. Available online at:www.acpf.org/WC7th/PapersItem3/PakistanMinallahIre. Accessed: January18, 2007
[35]Saifudin Saif vs. Federation of Pakistan (PLD 1977 Lahore 1174)
[36]See. Understanding Torture and Torturers. *Journal of Evolutionary Psychology*, 2002.p. 131+.
[37]East African Asians v UK, Para 189.

treatment is not necessarily inhuman but attains that quality because of its effect upon the person in all circumstances of the case. On such a view all forms of treatment prohibited in these Conventions would be inhuman. So, the prohibition is violated even when the first step is crossed, only the severity of suffering can differentiate among these three terminologies.

2.1.4- Terminologies described by Various Jurists, Experts and States

Torture is to be totally at the mercy of those whose job it is to have no mercy.[38]Governments try to preserve maximum leeway in the interrogation by not drawing a clear line between where rough treatment ends and torture begins.

> In the process of learning to be "fully human," only some kinds of suffering were seen as an affront to humanity, and their elimination sought. This was distinguished from suffering that was necessary to the process of realizing one's humanity, that is, pain that was adequate to its end, not wasteful pain. Pain is not always regarded as insufferable in modern Euro-American societies. In warfare, sport, and psychological experimentation inflicting physical suffering is actively practiced and also legally condoned. This makes for contradictions which are exploited in public debate. When transitive pain is described as "cruel and inhuman," it is often referred to as torture. And torture itself is condemned by public opinion and prohibited by international law.[39]

Oppressive states and their officials can torture people for all types of reasons, inspirations and also provide justifications for their acts. Clyde Snow, a forensic anthropologist, who examined skeletal remains of torture victims by officials in many countries, says in his findings:

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[38]*Amnesty International Report*, Torture in the 80s, quoted in; Shirley Spitz, "The Psychology of Torture" "Centre for the Study of Violence and Reconciliation", Seminar No. 3, 1989.http://www.csvr.org.za. accessed 01 July 2007

[39]Talal Asad, "Doctors of Interrogation", *Social Research.* Volume: 63. Issue: 4.1996. p.1092. (hereinafte referred to as Talal Asad, Doctors of Interrogation)

> As for the motive, the state has no peers. It will kill its victims for a careless word, a fleeting thought, or even a poem; people are being killed for their political views, for belonging to a particular community; and a panic-stricken state looks upon even poverty as treason. All these acts are indulged in by governments and the magnitude of their crimes almost defies belief.[40]

There are certain things which can trigger and boast up the chance of infliction of torture. They may also include laws, such as in-communicado detention[41], or laws that allow confessions to be extracted under torture, general pardon laws may protect perpetrators. Torturers may choose methods to conceal their torture or they can adopt the methods which leave few physical marks. Evidence may be altered or wiped out. False reports may be filed. Or witnesses may be frightened and pressurized with physical or legal revenge.

This is quiet possible that an act which is considered as Torturous, Cruel or Inhuman in one state may not be even noteworthy in another state. For example; if a lady police officer is investigating a man in Pakistan, her proceed will be considered as Degrading but this is not yet worth mentioning in America or Europe rather it is a common practice there. Same is the case with various punishments which are being considered as cruel or humiliating in one country and in another place they are deemed normal punishments, e.g., slapping is taken as humiliating in a country where fundamental rights are specially protected but they are believed as part of duty by police in countries like Pakistan and India where even extra judicial killing under imprisonment is envisaged usual and can be tackled very easily by the Law Enforcing Agencies. This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor

[40]Understanding Torture and Torturers. Journal Title: *Journal of Evolutionary Psychology*. 2002. p. 131+.
[41] confinement without admittance to lawyers, doctors, relatives or friends

excessive varies between different societies and even between different sections of these societies.[42]

A vast change has occurred in the technology which is used for torturing a person. Now, it generally lies in psychological mistreatment of the victim, this change is due to the clear and unconditional ban on physical torture. So, the offenders of this crime usually use hidden means of torture to safeguard themselves from any blame by using psychological manipulation of feelings of powerlessness and despair than the physical tearing of bodies. It leaves few visible marks, because torture must be done in such away that it can be perfectly denied by the wrong doer. The purpose of torture remains narrowly instrumental, to gain information or force an admission of guilt, the focus being where it always has been: on the body, or nerves. Torture is no longer conspicuously ritualistic, explicit and unambiguous. Instruments of torture are generally avoided, unless the torture is to be conducted in environments without risk of intrusion by possibly critical evaluators.[43] Currently, torturers use segregation, disgrace, and psychological pressure to break down the victim, to intimidate those close to him. The UN and Amnesty International both classify the interrogation, as a main ground for torture. But another group of jurists[44] believe that it is just an excuse, not the reason. The substance of the victim's responses to questions is rarely important to the regime.

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[42]In the case of "Mantes and others v Turkey" (Commission Rep, 7 Mar 1996, Para 190) the Commission decided that villagers had suffered Inhuman and Degrading Treatment when units of the Turkish armed forces had destroyed their homes, since it was 'an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants and their children who were left without shelter and assistance in circumstances which caused them anguish and suffering.
But this act of burning the houses is supposed an extremely valid and justified punishment in some of the areas of Pakistan however this is also believed as Inhuman in the other regions of same country.

[43]See. Rod Morgan, Preventing Torture: *A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.* p. 58

[44] For example; Elaine Scarry

Physical torture always has mental squeal. There can be however various forms of pure psychological torture. This torture is intended to damage the individual's identity and sense of self; consequently it produces a traumatized victim.[45]

States define these terminologies in altogether different meaning which are completely based upon their political whims and advantages. Despite having ratified various International Conventions many states try to find loop-holes by molding the ideas in their reservation clauses. Article 1 of the "UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", often referred to as the UN Convention against Torture, excludes pain or suffering arising only from, inherent in or incidental to lawful sanctions. Some states have used this provision to argue that legally authorized criminal penalties resulting in physical harm do not constitute torture. The same is the case with American administration which put the following Reservations upon ratification of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

> The Senate's advice and consent is subject to the following reservations: (1) That the United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments[46] to the Constitution of the United States.

[45] See. Shirley Spitz, The Psychology of Torture.
[46]These amendments signify the prevailing authority of Constitution of USA in case of any clash with provisions of International Law.

(1) (a) That with reference to article 1[47], the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. (b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control. (c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. (d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity. (e) That with reference to article 1 of the Convention, the Unites States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.[48]

All these reservations and their language shows that although USA is a signatory to the Convention which has also been ratified by it but the reality is that this ratification is entirely based upon personal merits and conditions, and the Municipal law has complete

[47] For the purposes of this Convention, the term "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 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. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

[48] Available online at; http://www2.ohchr.org/english/bodies/ratification/9.htm

prevailing authority over International Conventions. In August 2002, the American administration interpreted torture as nothing short of pain, equivalent to that connected with serious corporal injury so severe that death, organ failure, or everlasting damage resulting in a loss of important body function will likely be the outcome. In December 2004, the administration renounced this absurdly restricted definition, but it presented no alternative definition. Like the USA other states describe and construe the term 'Torture' according to their own interests, advantages and political reasons.[49]

"European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" suggested a definition in 1975 which for the first time incorporated the aspect of mental pain and distress. There was no controversy regarding first paragraph, but the reference to 'sterilization' in the second was objectionable and unacceptable for the Scandinavian members. A member from UK also expressed concern over the reference to 'beatings', on the ground that the existence of physical punishment for some offences is indispensable. However, there was little difference between the competing versions regarding the prohibition of torture. The Committee of Experts decided to adopt the exact wording of the UDHR, rather than simply make reference to it, and so the relevant Article which provided that: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*. The UK proposed to adopt similar definitional approach but it was shorter, providing: *"No one shall be subjected to torture or to inhuman*

[49] See. http://www.washingtonpost.com/wp-dyn/articles/. accessed: October 20, 2007

treatment or punishment", by deleting the words "cruel or degrading" as it was not suitable for that country.[50]

> The use of torture can no longer easily be discovered, let alone monitored. Nor can the justice and reasonableness of its application be gauged, because justice and reasonableness are no longer deemed appropriate terms to use in relation to torture. Thus torture may be applied arbitrarily, indiscriminately, or disproportionately, without cause that any external observer might judge reasonable.[51]

One of the main purposes of these Conventions is to protect a person's dignity and physical integrity. So, there may be a possibility of diversified acts coming under a definition by different people or different states but there should be certain clear things which must be incorporated as infringement of human rights.

2.1.5- Incorporation of "UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment" in Pakistani Laws

Pakistani Prison laws are not very well constructed in this regard. These are very old and outdated laws and it is essential to amend them for dealing with contemporary circumstances. As far as Pakistan's relationship with this International Convention on Torture is concerned, it has just signed it very recently, in April 2008, but so far there is no ratification done by the parliament. It will become mandatory for Pakistan to incorporate these laws into municipal law after the completion of ratification procedure, and amendments in Pakistani prison laws can be expected only after ratification.

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[50] Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. p. 71
[51] Ibid. p. 58

2.2- What may be the possible Solutions?

Each definitional aspect has been discussed but it must be borne in mind that they can not be unnaturally divided in reality. If someone is saying that a person has been treated in a manner which, though degrading and inhuman yet is not sufficiently grave as to amount to torture, tends to place the stress that these acts are less serious. But the fact is that inhuman or degrading treatment or punishment is as grave violation as is torture. Creative states and individuals can generate new ways of causing humiliation faster than new law can be formed and announced. So, this can be a solution to give liberty of interpretation to the courts because International laws are usually made as a living text, to be construed in accordance with the understandings current within society at the time of the alleged disobedience, and not limited to what was within the contemplation of the drafters of that law. However, it is also imperative to at least define some basic parameters for three main terminologies by the statute itself. This is to avoid the chance of abusive discretion.

Today, this is not necessary to prove a punishment barbarous for concluding it 'torturous' rather all those acts which are unnecessarily inflicting the pain or having no penological justification, are prohibited. There is presently no single "test" used to determine whether a punishment is cruel and unusual. Previously, courts have considered three grounds for such a determination, whether: (1) the punishment distresses the general conscience of a civilized society; (2) whether the punishment is unreasonably brutal, and (3) whether the punishment goes beyond lawful punitive intentions. However, judges are not to use simply their own views as to whether a punishment is cruel and unusual, but are to base their

judgment as much as possible on objective features.[52]Infect International law stands for everything but means for nothing because of its vagueness, so as far as Universal Norms or Jus cogens are concerned (prohibition for torture is included in jus cogens), it should provide some clear meanings of the things for protecting the dignity, honor and also the life of human beings, after all people come to prison as a punishment, not for punishment.[53]

2.3- Conclusion

There may be two broad reasons for non clarification of these terminologies;

1-That the signatory states of International Conventions relating to this issues were not serious enough to clearly declare the proper sphere of law making agencies during the performance of their legal duties so that states could exploit these laws in their favour during emergency or bad times and for using these acts as a powerful instruments in their hands against their own unfriendly citizens.

2- Secondly, being more positive and optimist by taking the explanation given by UN itself, that these categories are not elucidated so that the states can interpret them in the widest possible way.

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[52]See. David Rudovsky, *The Rights of Prisoners: The Basic ACLU Guide to Prisoners' Rights.* Southern Illinois University Press. Carbondale. 1988.p.1,2

[53]See. Erickson, Humiliating and degrading treatment under international humanitarian law: criminal accountability, state responsibility, and cultural considerations. *Air Force Law Review*, spring, 2004.p. 6, 7.

Whatever may be the case, it is essential that these acts should be clearly defined and explained, as their exploitation ratio is higher than their expanded and widened interpretations by the states and their agencies.

This is very important to prosecute the offenders, but in reality, such type of cases can hardly be found and successful prosecutions for torture are very rare. In some cases this is due to lack of political will. Torture is universally accepted as a Jus Cogen and these are made to be respected in every type of circumstances, the UN should make this observation possible in maximum situations by the development of strict laws in this regard. All these hurdles are important to be overcome for the proper implementation of above mentioned International Laws relating to Torture.

CHAPTER III

REPORTING MECHANISMS FOR PRISONERS' COMPLAINTS

> No-one truly knows a nation until he has been inside its jails. A nation should not be judged by how it treats its highest citizens but how it treats its lowest ones. (Nelson Mandela)[1]

This is significant to comprise fine laws but this is imperative to provide resources and meaningful circumstances to execute them. Appropriate laws are easy to be established but this is difficult to launch suitable mechanisms to ensure their implementation. This is not enough to introduce a set of rules for the provision of human rights but it is important to set a proper mechanism for their observation.

Prisoners should have proper ways and means to communicate the infringement of their rights and day to day problems, for this purpose they need appropriate reporting forums. This is imperative for states to provide apposite remedies to the prisoners, for achieving this purpose various methods have been introduced throughout the world on International, Regional and National levels. Apart from the internal regulatory systems of

[1]As quoted in: "*Criminal Justice Reform Bill, 2nd Reading*", A speech given by Maori Party, available online at http://www.scoop.co.nz/stories/ accessed: August 16, 2008

prisons, there are many alternative complaint mechanisms available to the prisoners for launching their grievances.

First of all, the prisoners should have sufficient information about their right to complain. The International Conventions and Declarations[2] also stipulate that every prisoner shall be advised about his having the opportunity of making complaints. Information about complaint procedures should be provided during the induction process of prisoners in very initial days, they should know the internal avenues of complaint in prisons as well as the external remedies and procedures available for them. Prisoners should also be entitled to have access to see the prison laws pertinent for them. Most of the times contacts made to the Inspectorate by prisoners are no more than queries on the situations in which the prisoners find themselves. The complaint procedures must be drawn in such a way that they may be understandable for detainees as well as possible to be implemented by the responsible. The first and primary duty of states is to introduce such type of safeguards which can preserve the human rights of Prisoners by themselves and if there transpires any contravention which is highlighted through any other National or International reporting mechanism then states should try to solve the matter by using their maximum efforts.

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[2]Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution. *United Nations Standard Minimum Rules for the Treatment of Prisoners*: Rule 35(01)
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. *Universal Declaration on Human Rights*: Article 08.

"Universal Declaration on Human Rights" is considered the most authentic document in the regime of Human Rights, since the time when it was passed UN initiated its efforts to make it incorporated in different International Human Rights Treaties. By ratifying this declaration, States willingly agree to international monitoring by independent, non-governmental experts.[3] Specific International Law[4], Regional Laws[5] as well as Pakistani Laws[6] also clearly provide provisions to launch Reporting Mechanisms in all the prisons.

> These mechanisms can include: National institutions, groups and organizations monitoring human rights, which can comprise of: Concerned government agencies and services; commission or an ombudsman, regional organizations have developed mechanisms to monitor compliance with human rights standards by countries in their respective regions. At the international (global) level, human rights are monitored by a number of international NGOs and by the United Nations. Within the United Nations, several types of monitoring are carried out.[7]

Reporting Institutions (specially International or Regional) are working on the logic that as the members of an international community, the states are answerable for their conduct, on first hand towards their own citizens, and secondly to international community.

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[3]See. Monitoring Compliance, *UN Chronicle*. Volume: 35. Issue: 4. United Nations Publications, Gale Group, 1998. p. 44+.

[4](1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him. (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present. (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.(4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay. *United Nations Standard Minimum Rules for the Treatment of Prisoner*: Rule 36(01) (03).

[5]1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. *European Convention on Human Rights*: Article 06

[6]Chapter 05 of *Pakistan Prison Rules* deal with "Appeals made by Prisoners".

[7]Training Manual on Human Rights Monitoring - Chapter IX: Visits to Persons in Detention, Available online at: http://www1.umn.edu/humanrts/monitoring/chapter9

The basic intention is to make it sure that governments are fulfilling their duties of giving respect to the human rights of prisoners. Most of the time, the international community even relies on Psychological methods to pressurize the concerned states to fulfill this obligations.

3.1- Various Reporting Mechanisms

Three types of mechanisms are working throughout the world:

1-The Internal Monitoring systems of States:

2-Extra-Conventional Mechanisms or Special Procedures (which may comprise of working groups, special rapporteurs and special representatives of the UN Secretary-General, which normally deal on prompt bases with situations);

3- Conventional or Treaty-Based Monitoring (Several human rights treaties set up a committee of experts which is called a 'Treaty Body', for examples; Human Rights Committee or the Committee on the Elimination of Discrimination against Women, the parties to the treaty submit their periodical reports to these committees regarding the implementation of related treaties).[8]

These committees have the authority to receive the complaints from individuals of the states, so, all the signatory countries (which have not put their reservations in this regard) allow these committees to accept the complaints conveyed by the prisoners. There are five Treaty bodies or Committees which have the authority to examine the individual complaints of all sorts of human rights violations coming under the scope of treaty, this procedure is called, 'Optional Complaints Procedures'. These bodies include; The Human Rights

[8] Ibid

Committee; The Committee on the Elimination of Racial Discrimination; The Committee against Torture; The Committee on the Elimination of Discrimination against Women and The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.[9] "Charter-Based' or 'Extra conventional" monitoring system is based on procedures and mechanisms established by the Commission on Human Rights or the Economic and Social Council, including a confidential procedure (known as the "1503 procedure")[10] these special public procedures scrutinize, observe and report on human rights situations in two different ways; when they work in specific countries and territories, this system is called 'country mechanisms or country mandates' but when they offer their services on explicit human rights problem on an International level, this procedure is named as; 'thematic mechanisms or thematic mandates'. These tasks are delegated to working groups comprised of professionals acting in their individual capacity called as 'Special Rapporteurs, representatives or independent experts.'[11]Every time, on an infringement, it is not possible that every type of complaint mechanism can work or will be proved as best, it all depends on given circumstances and may vary case to case that which strategy will be proved more helpful.

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[9] Ibid.

[10] In 1970, resolution 1503 of the Economic and Social Council established a confidential procedure involving the Commission and its Sub commission to examine communications received from individuals and groups, alleging systematic and gross violations of human rights. If reasonable evidence of a consistent pattern of gross violations is identified, the matter is forwarded to the Commission. But, as with all other mechanisms, the procedure is designed to promote, as a primary course of action, dialogue with States. In the framework of this procedure, the Government concerned has the option to present its views, before that, United Nations was compelled to act on the many individual complaints it received outside the purviews described above, which were traditionally forwarded to NGOs. As of 1959, confidential lists cataloguing complaints, but not intended for action, were circulated to the Commission on Human Rights and to the Sub-Commission on the *Prevention of Discrimination and the Protection of Minorities*. But Resolution 1503 revised this practice.

[11]See. Training Manual on Human Rights Monitoring - Chapter IX: Visits to Persons in Detention, http://www1.umn.edu/humanrts/monitoring/chapter9

International Convention which provides the legality and sanction to these committees is "The United Nations International Covenant on Civil and Political Rights".[12]

3.1.1- International Reporting Mechanisms

On international level there are various reporting mechanisms working for dealing with the violations of Prisoner's Rights.

3.1.1.1- UN Center for Human Rights

The UN pays a special attention to fundamental rights of human beings, it is evident from the fact that it has specifically established a branch of the Secretariat, which solely works for human rights all around the world, it supports all UN human rights activities whether they are related to non-governmental organizations, individuals, the press, or intergovernmental organizations, and states. It is named as "UN Center for Human Rights". Article 28 of "United Nations International Covenant on Civil and Political Rights" establishes a "Human Rights Committee", under the supervision of this Centre, which sends its commission thereafter to different states. The States parties to this Convention can also put forward their observations to the Commission provided they themselves are agreed to be supervised by the committee.[13]

This is also included in the duties of Human Rights Centre to send its Commission to various states. Commission rapporteurs and representatives are authorized to collect

[12] Article 28 to 45.
[13] *United Nations International Covenant on Civil and Political Rights*: Article 41(01).

information on the reports that reach to them, their task is to review and approve preliminary and final versions of the report and to examine, monitor and openly report either on human rights situations in particular countries which is known as "country mechanisms or *mandates*", or on major level of human rights violations worldwide, that is recognized as "thematic mechanisms or mandates".[14] These procedures are collectively called as the Special Procedures of the Commission on Human Rights.[15] The Economic and Social Council (ECOSOC) precisely passes on Commission reports and recommendations to the General Assembly after formal discussion. This is apt to say that the Commission carries out its task in the name of the whole community of member states. This thing makes it different from treaty-based organs, which do not speak on behalf of the community of states but only for states parties to the particular agreement.

Making recommendations is a different thing from making decisions, but while the General Assembly has only recommendatory authority, so certainly its subordinate body is also having only the power to recommend the things to improve and strengthen implementation procedures and institutions.[16] Some of its work is particularly sensitive, generating extensive debate and often disagreement. Its network of mechanisms; experts, representatives and rapporteurs plays an important role in reporting to the Commission annually. Commission reports are prepared on the basis of information received from Governments, non-governmental organizations and individuals. The Commission's success is

[14] Detailed procedure is provided in *United Nations International Covenant on Civil and Political Rights: Article* 42.
[15] See. http://www.unhchr.ch/html/menu2/2/chr.htm. accessed: August 16, 2008
[16] See. Patrick James Flood, *The Effectiveness of UN Human Rights Institutions.* Praeger Publishers, Westport, 1998. p. 38, 39

based on its ability to make a difference to the lives of individuals. UN Centre for Human Rights and Commission may take action at all those places where they find the infringements of human rights and have the legal mandate to deal with situation. Human Rights Commissions frequently request the Office of the High Commissioner for Human Rights to provide assistance to Governments through its programme of advisory services and technical cooperation. This assistance can include professional recommendations, human rights seminars, national and regional training courses and workshops and other activities intended for strengthening national capacities for the protection and support of human rights.[17]

Before the commission starts considering any particular complaint, various preliminary points are discussed by the concerned staff, for example, credibility of information, what kind of corroboration is required to prove the received information, which authorities of particular governments should be contacted or which countries should be visited.[18]So, basically this Centre and the Commissions working under its authority have the power to receive complaints from all the levels starting from an individual to a state, they can send their special representative on receiving the genuine complaints and can put a moral pressure to act appropriately but can not make a very special difference as they have only the power to give their recommendations for fulfilling the duties related to human rights or can only urge the better treatment on behalf of an individual who is launching the complaint. Therefore it can be said that although the centre and the Commission are having their jurisdiction but can not assure the implementation of their suggestions.

[17] See. http://www.unhchr.ch/html/menu2/2/chr.htm. accessed: August 16, 2008
[18]See. Patrick James Flood, *The Effectiveness of UN Human Rights Institutions*".p. 43.

3.1.1.2- Thematic and Country-Specific Implementation Mechanisms

> The theme mechanisms do the most important concrete work of the Commission in protecting rights in specific cases by saving lives, stopping torture, resolving disappearances, etc. Nevertheless, the theme procedures are still evolving and being improved. Both [types] are concerned with the collecting of information, as a means of keeping questions of human rights on the international agenda and enabling pressure to be put on governments to change their practices.[19]

There is a difference between these two terminologies, in a complete sense they are called; 'Country Mechanisms or Mandates', which is used when the rapporteurs report on human rights situation on country level, 'Thematic Mechanisms or Mandates' are monitoring systems working on a world wide level. The greatest advantage of Thematic approach is that it deals with a particular problem on global level, by which a country is exposed in front of the whole world regarding its human rights infringements in a particular area, e.g., the violations of Prisoner's rights, this situation can be effective as the whole International community can influence the particular state for its contraventions. On the other hand Country Specific mechanisms can also be proved helpful as well as fruitful by raising the level of discomfort of the state concerned and increasing the psychological and political price it has to pay if it chooses to continue its conduct.

Currently, Special rapporteurs have the authority to investigate and interfere in individual cases raised by prisoners or during emergencies. Historically, the UN did not allow to identify non-signatory states of a treaty on their human rights infringements thinking that it

[19]Ibid. p. 125

was not having the authority to bind them through clear standards and mechanisms. This phenomenon began to change in 1980 when the Working Group on Enforced and Involuntary Disappearances established, and it began to take up individual complaints and to seek visits to States. Now, Special rapporteurs are free to use all resources, including individual complaints and reports from NGOs in the preparation of their reports, they conduct interviews with both authorities and victims and gather on-site evidence whenever possible. But, all those countries which put their reservations or do not ratify these laws on reporting procedures, their citizens on individual level can not file any complaint against the authorities, the only remedy present in their hands is an indirect one that these international rapporteurs or mechanisms take suo- moto action on the violations done against Human Rights of individuals. Special rapporteurs can also avail an urgent action procedure to intervene with Governments at the highest level which is of sending special letters regarding complaints to the governments, in 1995-1996, the Special Rapporteur on torture sent 68 letters to 61 Governments regarding 669 cases, as well as 130 urgent appeals on behalf of nearly 500 people. Forty-two countries responded in 459 of those cases, so, this is the methodology to be adopted for emergency situations.[20] These emergency situations can include appeals and allegations made by an individual about serious human rights violation, e.g., the fear that a prisoner may be subjected to torture or a danger to his life. In this case, the particular special rapporteurs or chairperson of a working group may send a message to the Minister for Foreign Affairs of the State concerned to explain its position and to take the

[20]Monitoring Compliance, *UN Chronicle*. Volume: 35. Issue: 4. United Nations Publications: Gale Group1998.p. 44+

essential steps for the assurance of the rights of the alleged sufferer. Some of the thematic Rapporteurs that deal with urgent actions in specialized areas are: the Special Rapporteurs on torture; (his duties also include to deal with complaints made on violence against women, its causes and consequences; and on extrajudicial, summary or arbitrary executions) the Special Representative of the Secretary-General on human rights defenders; and the Working Groups on enforced or involuntary disappearances and on arbitrary detention.[21]There is a variety of attitudes available in answer to the work of Country Specific Rapporteurs; either there is no support at all or a gradual growth from non-cooperation to some cooperation, or cooperation under certain conditions and during certain periods, or limited cooperation, or a gradual evolution from non-cooperation to some cooperation.[22]But as far as the thematic procedures are concerned, it seems that they have only occasionally received the cooperation of governments. In many instances the response on the part of governments is absent or slow and not significant. There are, nevertheless, growing statements uttered in General Assembly resolutions that governments should cooperate.[23]Reality is that, the UN rapporteurs and the Human Rights Commission cannot force any state to change its policies or behavior regarding prisoners or any other area of violations but they can put a psychological pressure on a particular country by their criticism or appreciation; this can be done openly and privately, and thereby potentially affect other interests of that state.

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[21]See. Training Manual on Human Rights Monitoring - Chapter IX: Visits to Persons in Detention. Available online at: http://www1.umn.edu/humanrts/monitoring/chapter9.html"

[22]Examples can include; South Africa, Afghanistan and Iran. Chile, El Salvador respectively. For details see; Patrick James Flood, *The Effectiveness of UN Human Rights Institutions*. Praeger Publishers, Westport, 1998.p. 125.

[23]Theo van Boven, who has served as Director of the UN Human Rights Center and at other times as a member of the expert Sub commission and as Netherlands representative to the Commission, wrote in an essay published in 1992.

This is a fact that the two procedures have some similarities in their modes of operation; but thematic rapporteur exercises wider powers, e.g., he is authorized to act according to his own initiative for dealing with individual complaints, to investigate about various reported abuses, confidentially acquires information from concerned governments and institutions and tries to improve situation. He can give his own finding about how to deal with specific countries by name in his annual public report to the Commission, Commission forwards this report to ECOSOC and from there it goes to the UN General Assembly. No country is supposed to be out of the ambit of thematic rapporteur's criticism. The rapporteur can include the efforts of cooperation or non- cooperation of Government with him regarding his visit or the steps to improve respect for human rights in the public report. He can suggest and provide advisory services, training, and technical assistance. The rapporteur has discretion as to whether to report violations in detail, even lurid detail, or to describe them in more general terms. When a rapporteur is convinced that his report should be very clearly underlining the infringements of Prisoner's human rights, he may make such type of report but if he is convinced otherwise that it will be more appropriate to highlight the situation in a bit confidential manner, he can adopt that strategy. This applies to both types: country specific and thematic Rapporteurs. The duty of a rapporteur does not come to its end with the submission of his report rather he is also required to conduct follow-up visits and actions. An extension of the mandate will be sought, at least for a second year. Perhaps the major structural benefit of the thematic approach is that it addresses the real problems of affected people by going on grass root level as it can deal with individual complaints.[24]

[24]See. Patrick James Flood, *The Effectiveness of UN Human Rights Institutions*. p. 77,78,79

B. G. Ramcharan, who is considered one of the most insightful participants of the UN human rights system, says about the thematic procedures in his work;

> The thematic approach enables the examination of global dimensions of violations and enables specific situations of violations to be dealt with through the angle of a global examination as well as the identification of global strategies of action and of further standards which may be needed in the area being dealt with. It has also in some instances been successful in developing an urgent action dimension. However, it could lead to excessive generalization about problems and take the examination away from concrete issues or to insufficient attention being paid to a particular case or situation and thus detract from the quality of protection offered or lead to insufficient pressure being brought to bear upon particular governments, as their situations are ranged among several other situations of a similar nature, on a global basis. It has the merit of giving the United Nations access to a problem usually does not result in the dramatic elimination of the problem but in nearly every instance it has some mitigatory effect and cumulatively, in the long-term, does contribute to the containment and possibly the elimination of the problem and protection is afforded to some individuals and this is always worthwhile, for a life saved is justification in and of itself.[25]

That thematic Rapporteur is considered effective who can turn down the number of abuses in that particular area where he or she is working. This is definitely possible if his duties are related to Prisons because in that case his influence and better working abilities of effective reporting can make a serious difference in state's behavior towards its captives. He may at least help some actual victims as it moves toward his goal. There is no doubt that this is impossible to completely eradicate the human rights abuses within the prisons or on broader level from the whole society and probably cure is never final or universal, but serious attempts for the decline of these encroachments can be made.

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[25]B.G. Ramcharan, *The Concept The Concept & Present Status of the International Protection of Human Rights.*1989.p.192,193

There are many praises for these both mechanisms but side by side they have to bear the criticism as well. In its paper for the 1993(April 05) World Conference on Human Rights, "Facing up to the Failures," Amnesty International charged that:

> Experts (of the thematic mechanisms) are swamped with an ever-increasing flood of cases but have been unable to have any significant impact on these practices which are a blatant contradiction of the most fundamental internationally-recognized human rights norms.

So, the point is that, day by day increase in the cases coming to the attention of these rapporteurs are powerful evidence of their efficiency but side by side there are a lot of areas where the work is still pending.

3.1.1.3- Ombudsmen

This is another idea especially growing within the Europe. These are basically extrajudicial institutions established under the guidelines known as 'The Paris Principles'[26]. Ombudsmen are appointed by the UN, or if they are designated on Regional level, by the body authorizing and appointing these investigators, these bodies may include "European Commission for Human Rights", "SAARC", etc. If the ombudsmen are appointed on country level then they are elected by the Parliament, government or the head of state. A great variety of ombudsman institutions is available and they may be differentiated by their names and mandate. Some deal mainly with breaches of civil rights while others focus on cases of state mal-administration. Some are mandated to receive complaints from individuals and might

[26]According to the Paris Principles, independence must be guaranteed by law and must govern the method by which office holders are appointed. If governments fail to respect the integrity of ombudsmen, the institutions will not be able to function properly.

have the power to arbitrate between citizen and authority, while, some of them have the power to bring cases to court. Apart from national offices, there are also regional ombudsmen in some larger countries, such as Russia, Spain and Italy.[27] There are some general tasks of an ombudsman which can include his normal work load and duties, along with this there may be some specialized duties which can be assigned to him by the appointing authority. The main function of the Ombudsmen is to investigate complaints relating to matters of administration affecting persons against various bodies. A complaint or concern is not usually taken up by an Ombudsman until the prisoner has first pursued an internal remedy by seeking an interview with his or her Prison Manager. However, where there is a question related to health and safety issues or any other reasons which requires the action on prompt bases, the Ombudsmen will raise inquiries immediately with the prisoners. An "own motion" investigation by the Ombudsmen is not a common happening, and is not undertaken lightly. If a prisoner believes that his or her complaint has not been effectively resolved by the internal system, the prisoner is free to complain to the Prison Manager or the Ombudsmen. In that case an Ombudsman would not usually take up a complaint until the prisoner had sought a review through the Manger. The Managers and Superintendent are part of the Department of Corrections, and the Ombudsmen have jurisdiction to investigate these bodies as well as any other section of the Department, if the prisoners are having a feeling of distrust on these authorities they can frankly launch their complaints to ombudsmen.[28] Ombudsmen exercise an immense authority which can include

[27]See. http://www.coe.int/t/commissioner/Viewpoints/. accessed October 18, 2006
[28]See. http://www.ombudsmen.govt.nz/cms/imagelibrary/100169.doc. accessed on July 26, 2008.

their actions on the complaints made by individuals and can spread their powers of taking suo-moto actions, with an extra authority to investigate even against the Prison machinery itself.

The first Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, explained the point in his response to Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe on "the institution of ombudsman". He said:

> Even where the mandates of certain Ombudsmen do not expressly mention the protection of human rights, violations of these rights by State authorities clearly constitute serious cases of 'mal-administration' and, as such, fall within the competence of Ombudsmen.[29]

3.1.2- Regional Reporting Mechanisms

There are certain exclusive and specialized mechanisms for complaints available on Regional levels to prisoners. These mechanisms vary from region to region.

3.1.2.1- European Committee for the Prevention of Torture (ECPT)

The ECPT is unique among international human rights treaties. It establishes a visit-based mechanism, the rationale of which is to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.[30] "The European Convention for Preventing Torture" demands a body which is established under the authority of Convention, it should submit its reports about its progress. This is to achieve the basic aims of the

[29] Available online at: http://www.euro-ombudsman.eu.int/speeches/en/2007-04-12.htm
[30] *European Convention for Preventing Torture*, Article 01.

Convention. This report may establish a dialogue between the Committee and the relevant state which is working against the principles derived from above convention. Although reporting obligations are declared mandatory by almost all the UN human rights instruments, but they normally pursue the procedure of requirement of a report by the state. This report indicates the manner in which it is giving effect to the obligations contained in the relevant instrument. This is followed by an assessment of this report in the course of a formal meeting of the treaty monitoring body at which representatives of the state present their reports, answer questions, and receive 'concluding observations'. Although NGOs and others can provide material into the discussions but it is a pretty formal process over which the state exercises a considerable degree of control but the ECPT is very different. It is the Committee itself which is responsible for the production of the report upon which its dialogue with the state is conducted. In order to produce these reports each State permits visits to any place within its jurisdiction where persons are deprived of their liberty by a public authority.[31] This is a much more wide-ranging. The ECPT is free to roam where it pleases and has the right to inspect any part of any place without prior warning, where people are detained by public order.[32] For example, the Committee can, and does, turn up without warning at police stations in the middle of the night. Moreover, should the Committee in the course of its visits encounter sufficiently serious situations, the Committee may immediately communicate observations to the competent authorities of the Party concerned.[33] In sum, the burden of

[31] *Ibid,* Article 02.
[32] Article 9 of the Convention does permit states, in exceptional circumstances, to make representations against a visit being conducted at a particular time to a particular place on a limited number of grounds but this does not appear to have hampered the work of the Committee to date.
[33] *ECPT,* Article 8(5).

responsibility for the effective functioning of the Convention rests on the ECPT rather than on the states visited, whose principal task is not to initiate but to facilitate and respond.

On the other hand, and unlike the Human Rights Committee (HRC) established under the "International Covenant on Civil and Political Rights" (ICCPR), the ECPT has no judicial or quasi-judicial function: there are no procedures by which complaints can be presented to the ECPT for investigation and adjudication by either states or individuals. Like the UN member states are following the ' 1503' procedure and its Working Groups and Special Rapporteurs. The ultimate product of the ECPT's work is to provide a series of recommendations. A failure to fulfill with these recommendations carries the threat of a form of sanction or of being pilloried by a public statement under Article 10(2) of "European Convention on Human Rights".[34] This might be seen as a weakness within the UN system since the primary purpose of UN procedures is to address situations in which violations of human rights are taking place and they are, in effect, attempting to enter the vacuum created by the practical or jurisdictional inadequacy. As the UN convention in this regard does not provide any appropriate body which can work as a proper court with a defined jurisdiction rather it provides the authority of this function also to its representatives whereas ECPT is working on a quite different motto, it does not exercise any authority of a court, reason being that European system itself provides an apposite court for exclusively dealing with these matters called "European Court of Human Rights", were the Committee to exercise judicial-style functions, it would stray into the spheres of activity of the European Court of Human

[34]"If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter." *ECPT*, Article 10(2)

Rights. The framers of the Convention clearly intended that the work of the ECPT should not encroach upon that of the Commission and Court of Human Rights. The Preamble to the Convention draws attention to the ECHR machinery which operates in relation to persons who allege that they are victims of violations of Article 3 of European Convention against torture and inhuman or degrading treatment or punishment, before proceeding to state the belief that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits of ECPT. The Explanatory Report to the ECPT also stresses that "its recommendations will not bind the State concerned and the Committee shall not express any view on the interpretation of legal terms. Its task is a purely preventive one." In the Committee's first general report, adopted in 1991, in a passage which has since been used as an introductory preface to the first visit reports transmitted to each state party, the ECPT emphasizes that "whereas the Commission's and Court's activities aim at 'conflict solution' on the legal level, the ECPT's activities aim at 'conflict avoidance' on the practical level." This division of competence is ultimately dependent upon rather fanciful fiction that European states do not subject detainees to acts or conditions which violate Article 3 of the ECHR and that the function of the ECPT is simply to assist states to guarantee that this remains the case. However, since this is not true, so, the ECPT has frequently dealt with evidence of torture or of inhuman or degrading treatment, in consequence, the Committee has been unable to abstain from using legal terminology. While this is also true that the Committee is not having power to interpret legal terms, it is inevitable that others will interpret the ECPT's use of them, the proper forums are: European Commission and Court of

Human Rights. The Committee's observations and recommendations both reflect and feed into the debate concerning the legal parameters of the terminology it employs. The ECPT might reasonably be expected to have regard to at least the following: the UN Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Standard Minimum Rules for the Administration of Juvenile Justice, and the European Prison Rules. To this list might also be added the work of the UN Special Rapporteur on Torture and, indeed, the more recently established African Rapporteur. However, these sources are no more than points of brainwave or comparison: as the CPT itself has said, "The CPT is not bound by substantive treaty provisions, although it may refer to a number of treaties, other international instruments and the case law formulated there under."[35] This is obligatory on member states which are found guilty in a case or other state resorting to similar practices, to observe the decision given by European Court of Human Rights under Article 53 of the "European Convention on Human Rights". Therefore, both instruments: "The European Convention against Torture, Inhuman or Degrading Punishment" and "European Convention on Human Rights" are combine to provide enhanced effect for the protection of detained persons against all forms of ill-treatment both on a procedural and a substantive level.

So, basically ECTP is made to compliment European Convention on Human Rights, and European Court of Human Rights (ECHR) stands to compliment the reports and allegations made by ECPT.

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[35] See. Malcolm D. Evans, *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture.* Oxford University. Oxford. 1999.p. 3-9

3.1.2.2- "Inter-American Commission on Human Rights and Court of Human Rights" and "The African Commission and Court on Human and Peoples' Rights"

These Commissions also work on the same pattern as UNHCR or ECHR. The main task of both these commissions is to promote the observance and protection of human rights in America and Africa.

In pursuit of this mandate these Commissions receive, examine, and inspect individual petitions alleging violations of specific human rights protected by these Convention on Human Rights including the rights of Prisoners. They also monitor the general human rights situation in member states and, when necessary, also prepare and publically publish country-specific human rights reports. Conduct on-site visits to examine member's general human rights situation or to investigate specific cases coming to them by individuals. Encourage public awareness about Prisoner's rights and related issues throughout their jurisdictions. They hold conferences, seminars, and meetings with governments, NGOs, academic institutions, etc. to inform and raise awareness about the issues relating to human rights system. These commissions issue the member states recommendations that, if adopted, would further the cause of human rights protection, request that states adopt precautionary measures to prevent serious and irreparable harm to prisoners in urgent cases. Refer cases to the Inter-American and Inter African Court of Human Rights, and litigates those same cases before the Court, can also ask the Court to

provide advisory opinions on matters relating to the interpretation of the Convention or other related instruments. [36]

3.1.3- Pakistan's standing

"The UN Convention on Civil and Political Rights" provides individual the capacity to file complaints against their respective governments, and also provides legal sanction to the states parties to it to communicate human rights infringements against other states but on the other hand if any country is not signatory of this Convention or has reservations against the reporting mechanisms provided by this convention to deal with the infringements of this document, that will have to face all the consequences but could not be able to pursue any matter against any other state. Pakistan had not been the signatory of this convention up till March, 2008 but on April 17, 2008 Pakistan also signed the convention but so far the Parliament has not ratified it.

3.1.4- Other Complaint Bodies

Apart from all these mechanisms , there are several other bodies and Institutions which are working on country levels, these institutions and organizations work internally within the countries normally by going on grass root level, e.g., to the individual complaints of prisoners. These bodies may include Human rights groups and other non-governmental organizations (NGOs), Community-based organizations, the courts, Parliament, the media,

[36] See. en.wikipedia.org/wiki/inter-American Commission on Human Rights

Professional associations (such as lawyers' or doctors' associations), Religious organizations, Academic institutions.

Appeals from an International or National nongovernmental organization to a government are usually based on ethical grounds, but their impact is limited by the fact that these organizations represent the views of only their members. If their membership is large, and if they have access to the media and to means of rapid, worldwide communication, they may nevertheless influence state conduct. The record of Amnesty International provides the best example of this. Nongovernmental organizations also sometimes exercise significant influence on intergovernmental bodies to take initiatives by providing well-substantiated evidence.

These other institutions also play a vital role in reporting the human rights infringements within the prisons, but fact is that mere reporting is not enough in this regard, the working organization or institution can really make a difference if that is having authority to take actions, in this regard Parliament and Courts are good and powerful examples, but it happens in very rare cases that they take serious notice of the complaints made by prisoners. These are the independent bodies authorized to take actions on their part but reality is that Independence does not require the absence of accountability. Rather, it requires the existence of appropriate forms of responsibility, through which the institutions can demonstrate their effectiveness. So, this is very essential to give authority to institutions, of taking actions for prisoners but this is more important to make sure the usage of that authority because, 'Discretion must be exercised'.

towards prisoners, obviously this is impossible to completely abolish the crime but it can be minimized.

6-Last but not the least; this is easy to ratify the laws but this is really difficult to adopt and incorporate them in their real strength that is why one can find a vast difference between the Ratification and Incorporation of International Conventions especially about the Conventions related to Prisoners. For filling up this gap the constructive and serious efforts of states and UN are collectively required.

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