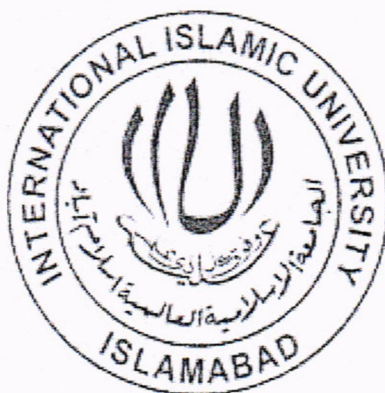


POST TRAUMATIC STRESS DISORDER AND INTERNATIONAL HUMAN RIGHTS LAW: CRIMINAL LIABILITY OF THE WAR VETERANS AND THE DRONE ATTACK VICTIMS

A thesis submitted in partial fulfillment
of the requirements of the degree of
MASTER OF LAWS IN HUMAN RIGHTS LAW
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In The International Islamic University Islamabad

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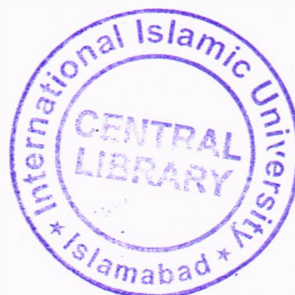
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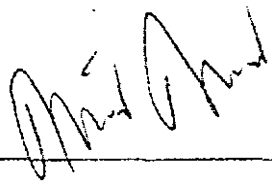
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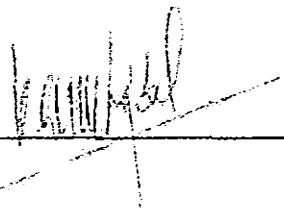
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ACRONYMS

ALI	American Law Institute
ATCA	Alien Torts Claims Act
BVA	Board of Veteran Appeals
CAT	Convention Against Torture
CRPD	Convention for the Rights of Persons with Disabilities
DSM-IV	Diagnostic and Statistical Manual
DVA	Department of Veteran Affairs
GAFS	Global Assessment of Functioning Scale
GBMI	Guilty But Mentally Ill
GRF	General Rating Formula
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Person
IDRA	Insanity Defense Reform Act
IHRL	International Human Rights Law
MPC	Model Penal Code
NGRI	Not Guilty by Reason of Insanity
PPC	Pakistan Penal Code
PTSD	Post Traumatic Stress Disorder
SUD	Substance Use Disorder

TBI	Traumatic Brain Injury
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations Higher Commissioner for Refugees

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ABSTRACT

Combat is a trauma that results into the development of Post Traumatic Stress Disorder in those who are exposed to it. It is a violation of human right to peace which leads to further violations when the persons suffering from PTSD indulge in criminal conduct owing to their disorder.

The issue of legal insanity comes under question that whether or not it includes disorders such as PTSD in its ambit and provides exemption from punishment. The thesis analyzes that the insanity defense standards and other standards such as the diminished responsibility defense, defense of automatism and the self defense used for the cases where defendants with PTSD were charged with crimes as serious as murder have not always been successful. Thus, the need to have a standard defense especially legislated for PTSD cases, and equipped to deal with all kinds of PTSD, arises. The thesis also analyses the issue of treatment for the acquitted defendants as well as their right to receive compensation which arises following the violation of their human right to peace.

The net conclusion of the thesis is that the war veterans and the drone attack victims with PTSD are entitled to certain right, i.e. the right to defend themselves against criminal charges, the right to treatment and the right to compensation. These rights can only be met by legislating a PTSD defense, creating proper treatment facilities designed to cope with the problem of PTSD and establishing Review Boards to examine the applications for the PTSD claims of compensation.

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INTRODUCTION

Post Traumatic Stress Disorder is an anxiety disorder that develops in a person after he/she has been exposed to a traumatic event.¹ The explanation of traumatic event has been declared as an incident which induces the threat to one's life, or the life of a loved one as well as creating likelihood of serious injury.² Combat is one of those events in which a person who has been exposed experiences the threat to his and his loved one's lives. It is a situation which is the violation of one's right to peace. Every human has an inherent right to peace and when these rights are violated by the war or war-like situation, the persons exposed develop many kinds of mental disorders and PTSD is one of them. When a person meets such a traumatic event as war, he feels as if he has no control over the situation and is met by extreme fear.³ Thus, he develops psychological disorders and one of these disorders is Post Traumatic Stress Disorder. PTSD symptoms include nightmares, flashbacks, avoidance of trauma related stimuli, and emotional and physical numbing.⁴ The worst of these symptoms is flashbacks. The flashbacks can be for minutes and at times even for several days.⁵ These flashbacks cause the sufferer to believe that he is back in the situation of war and he may go to lengths to prevent himself from the dangers of war. Although, these dangers are just a figment of their perception, still to them they are real. It is when the war veteran or drone attack victim reacts with violence in the state of a flashback then their actions have legal bearings.

¹ Michael W. Passer and Ronald E. Smith, *Psychology: The Science of Mind and Behavior* (Boston: Tata McGraw-Hill Publishing Co., 2007) 539.

² "Handout on PTSD", the United States Department of Veteran Affairs' National Center for PTSD, 1, <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp>, accessed on 12-08-2011 at 10:05 pm PST.

³ Ibid.

⁴ Ibid, 2.

⁵ Douglas A. Bernstein et al, *Psychology* (Boston: Houghton Mifflin Company, 1997), 438.

The issues which arise from such acts have been the agenda of discussion in this thesis. The questions, which arise after criminal conduct has been committed by the PTSD suffering war veterans and drone attack victims, are as follows:

- 1- Does PTSD come under the ambit of disability under the International Convention for the Rights of Persons with Disabilities?
- 2- Assuming the answer to the first question is affirmative, what defenses are provided to the criminally charged defendants who suffer from PTSD?
- 3- Should the defense standard be met by a complete or a partial acquittal?
- 4- If the verdict is given for complete acquittal, should the person with PTSD be let free in the society as a danger to innocent civilians? And if the verdict goes for partial acquittal, then would the defendant be sent to normal prison or a correctional institute?
- 5- Do the PTSD suffering defendants have a right to treatment or not?
- 6- Realizing the fact the sufferers of PTSD have a hard time finding employment, should they be provided compensation by the government?

These questions are discussed in detail in the chapters. The question number two is directly related to the legal connotation of the PTSD as a defense in our system.

As a general principle of criminal law, the insane people are not accountable for their actions and thus, they are not liable to punishment. PTSD although does not border on insanity, covers certain situations where a person loses sense of reality. The war veteran who believes himself to be in the situation of war, owing to the flashback he is experiencing, is going to react with violence to protect him from the dangers which he perceives. In such a situation, he must

not be held accountable for his actions, because his situation borders on insanity, although only temporarily.

Although, the standards for bringing about a defense of such cases have been developed and used, it is also noticeable that they are not applied free from prejudices. The juries are biased and prejudiced towards such defendants and there have not been many cases where a defendant has been successfully acquitted.⁶ Let alone, the jury, even the public is not ready to receive such verdicts with acceptance. The famous case of *Hinckley*, was met by a public uproar when the defendant was found not guilty by reason of insanity (NGRI).⁷ Such was the outrage of public, that a bench was formed to scrutinize the insanity defense standards. It was felt that insanity defense is too lenient and anyone who pleads it can be acquitted.

Later the Insanity defense Reform Act was passed which changed the verdict of NGRI to Guilty But Mentally Ill (GBMI). This satisfied the public as the defendant was not acquitted but had to serve his time in prison. The defendants who received treatment also had to server the remaining time in the prisons.

This did not prove to be a good standard for those defendants who actually deserve to be acquitted. Also, sending to prisons just adds to the suffering of the mentally ill defendants as the conditions of prisons are not suitable for their requirements.

Other than the Insanity Defense standards, other defenses have also been used; diminished responsibility defense, automatism, and self defense. In the diminished

⁶ Constantina APrikalis, "The Warrior Returns: Struggling to Address Criminal Behavior of Veterans with PTSD",

⁷ *United States v. Hinckley* 33 US DC 356 (1989).

responsibility defense the defendant receives a mitigated punishment, while the other two defenses can be used only in situation of dissociative state of PTSD.

Thus, this issue requires thorough analysis of the defendants' mental condition and their conduct and requirements. Only then, can a perfect PTSD defense standard be formed. Also it will also provide with a better understanding for the treatment which will be most suitable for their needs.

LITERATURE REVIEW

Many scholars have written on various aspects of this issue. George M. Platt, in his article *Choosing A Test For Criminal Insanity* discusses the standards of insanity defense. He starts by recognizing the four purposes of punishment, i.e. rehabilitation, deterrence, protection of society, and retribution.⁸ He further comments that these purposes can not be met effectively unless the person who's being punished is actually responsible for his actions.⁹ Therefore, punishing a mentally disorder person, who is not accountable for his actions by reason of his insanity, does not serve that purpose. Although, Platt does not mention PTSD as a disorder in his article, his main argument is that the legal approach to the concept of insanity should be in accordance with its effects and not its nature.¹⁰ The article however, does not discuss other defenses used in cases of insanity, which are discussed by other scholars.

⁸ George M. Platt, "Choosing A Test for Criminal Insanity", taken from *Concepts of Criminal Law* (Minnesota: West Publishing company, 1975), 541.

⁹ Ibid.

¹⁰ Ibid, 542.

One such author is Richard Card, who discusses the Diminished Responsibility Defense and the defense of Automatism in his book *Introduction to Criminal Law*. He states the criticism made on the M'Naughten Test of insanity defense that it does not define the word "wrong".¹¹ Therefore, there is no consensus that whether it means "legally" wrong or "morally" wrong. According to Card, these criticisms are of no importance due to the infrequent pleas of insanity defense in courts.¹² This is not an adequate reason to ignore the criticism on M'Naughten Test, as the need of a foolproof standard subsists even if there is one single case of insanity to which it could apply. Similarly, while commenting on the difficulty of deciding whether the abnormality of mind arose from a disease of mind or any other cause, i.e. intoxication, in a diminished responsibility defense, he states that the jury must be instructed to ignore other probable causes.¹³ Ignoring other probable causes does not seem a pragmatic solution, as it increases the chance of acquitting a person whose abnormality of mind was not due to a disease of mind.

Glanville Williams in *Textbook of Criminal Law* takes a different approach in addressing the issue, by posing certain questions on various aspects of the defenses used in cases of insanity. He questions the assumption that it can be determined whether a mentally disordered person is responsible for his actions or not. He states that "responsibility" is not a scientific term or an objective fact.¹⁴ Thus a psychiatrist cannot determine whether a person who's mentally disordered is responsible for his conduct or not. He states that the law needs to supply a "factual criteria of responsibility" which must be followed to ascertain the

¹¹ Richard Card, *Cross and Jones Introduction to Criminal Law* (London: Butterworths, 1984), 96.

¹² Ibid, 97.

¹³ Ibid, 102.

¹⁴ Glanville Williams, *Textbook of Criminal Law*, (London: Stevens & Sons, 1983), 640.

responsibility of an accused.¹⁵ He also goes on to describe the difference between a mistake and delusion and states that if a person believed himself to be acting in self defense, due to his delusion, he must not be punished.¹⁶ Thus, he brings into focus the perception of the defendant at the time of committing of the crime. His focus is also on the consequences of the acquittal, and he states that the verdict of acquittal must be followed by order of mandatory commitment of the defendant in a correctional institution; otherwise he poses a threat to society.¹⁷

In *Psychology and Law: Theory, Research and Application*, Curt R. Bartol and Anne M. Bartol discuss the standards of insanity defense. They elaborate the features of the Insanity Defense Reform Act which followed the public uproar met by the acquittal of Hinckley in *Hinckley Case*. These features were different from the previous standards and meant to be a stricter form of insanity defense. The changes brought by IDRA were: 1) shift in the burden of proof, 2) elimination of the volition prong, 3) alteration of the form of verdict, and 4) limitation on the role of experts.¹⁸ The authors discuss the change in the form of verdict from Not Guilty by Reason of Insanity (NGRI) to Guilty But Mentally Ill (GBMI). They state that the verdict of GBMI provided a “middle ground” to the jurors, which means that they acknowledge the fact that the defendant committed a crime but also accept the idea that he/she needs help.¹⁹ The authors, noting that the purpose of GBMI verdict was that the defendant will not be let free in society but would be institutionalized in a correctional facility, take a look at the statistics of the

¹⁵ Ibid.

¹⁶ Ibid, 644-645.

¹⁷ Ibid, 645.

¹⁸ Curt R. Bartol and Anne M. Bartol, *Psychology and Law: Theory, Research, and Application* (Australia: Thomson Wadsworth, 2004), 123.

¹⁹ Ibid, 124.

defendants who received the verdict of GBMI. Their studies show that only 3 defendants out of 150 who received GBMI verdict were hospitalized, in Georgia.²⁰ None of the GBMI verdict receiving defendants were hospitalized in Illinois.²¹ Their studies point out gaping holes in the system where GBMI verdicts are carried out.

J. C. Smith and Brian Hogan, in their book *Criminal Law*, discuss the elements of the M'Naughten Test: 1) disease of mind, 2) defect of reason, 3) nature of quality of the act, 4) knowledge that the act is wrong, and 5) at the time of committing the act.²² Out of these the disease of mind is said to be not the physical malfunctioning of the brain but the psychological problems arising from it. It has been discussed that the "mind" does not connote the "brain" as stated by Lord Devlin in *Kemp*.²³ The authors further discuss insane delusions, which provide a ground for establishing PTSD defense.

In *Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD* Constantina Aprikalis discusses the factors which contribute in the development of PTSD in a person exposed to war.²⁴ She discusses the impact of PTSD on a veteran and how it influences their lives post war. She approaches the issue with the view that despite the fact that PTSD is a disorder which can hinder a person's perception of reality, most veterans are not likely to be acquitted if they used a PTSD defense.²⁵ The problem, according to her, is that the mental disorder does not negate *mens rea*, therefore, a person with PTSD who, owing to false

²⁰ Ibid, 125.

²¹ Ibid.

²² J.C. Smith and Brian Hogan, *Criminal Law* (London: Butterworths, 1983), 189-174.

²³ Ibid, 170.

²⁴ Constantina Aprikalis, "Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD ",

²⁵ Ibid.

perception attacks another person in self defense, will have the *mens rea* to attack, and therefore in a *mens rea* based approach, the defense is most likely to fail.²⁶ The author also deems IDRA as insufficient standard as it only applies to “serious” mental illnesses.²⁷ She points out the flaws in the existing legal system dealing with insanity defense and concludes by stating “Although veterans who engage in criminal behavior as a result of PTSD will undoubtedly face conviction, increased public awareness of the disorder and increased understanding in the legal community may help some veterans get the medical and legal help they need.”²⁸ It is true that the defendants suffering from PTSD face conviction in most cases, but there have been cases where PTSD defenses were successfully pleaded.

Erin M. Gover takes a look at such cases in her article *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*. She examines the positives and the negatives of all the defenses used in PTSD cases and suggests the need of a new defense which would cover the “full spectrum” of PTSD symptoms.²⁹ She suggests a defense for PTSD that would protect the interests of the society by not enabling the malingerers to misuse it, but also provide to be capable to be used by the veterans who deserve to plead successfully.³⁰ However, she does not favor the idea of a complete acquittal. According to Gover, the idea of criminally insane veterans lurking out in the society is a threat to innocent civilians, therefore, mandatory treatment must be provided to

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Erin M. Gover, “Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans”,

³⁰ Ibid. 35

them before they're let free.³¹ She has provided a defense using her own language which should cover all symptoms of PTSD, but a close look at the language of the defense shows that it is based on the "self defense" as used in earlier case.³² The words "perceived as a threat of force" eliminate the sensation seeking syndrome and the depression suicide syndrome. It also does not completely cover the defendant who suffers from dissociative state or the state of automatism. It further strengthens the need of a PTSD defense.

Harry W. More Jr discusses the issue of rehabilitation vs. custody in his book *Criminal Justice Management: Text and Readings*. He analyses the opposite views regarding treatment of mentally ill offenders. On the one hand, there is the point of view of scholars who are in favor of punishment free treatment.³³ On the other hand, there are those who believe that violators must be punished.³⁴ He also describes that middle ground approach taken by scholars that treatment and punishment should go side by side.³⁵ A person can be held in an institution which can serve as a prison as well as provide treatment for his recovery. More further discusses that correctional facilitations have so far failed in serving their purpose. He attributes these failures to the "inadequate management and leadership."³⁶

³¹ Ibid.

³² Ibid, "Affirmative Defense: It is an affirmative defense to a prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a proven extreme trauma which caused Post-Traumatic Stress Disorder as defined by the American Psychiatric Association, acted in response to what the defendant perceived as a threat of unlawful force, in response to an involuntary compulsion, or without requisite intent due to diminished mental capacity."

³³ Harry W. More Jr., *Criminal Justice Management: Text and Readings* (Minnesota: West Publishing Co., 1977) 234.

³⁴ Ibid, 235.

³⁵ Ibid.

³⁶ Ibid.

Gordon E. Misner further discusses the issue of the failure of correctional institutions in *Criminal Justice Studies: Their Transdisciplinary Nature*. The biggest reason is perhaps that all the mentally ill persons cannot receive the same kind of treatment for their mental illnesses are not same.³⁷ He states that "offenders differ from each other not only in the form of their offense but also in the reason for and the meaning of their crime."³⁸ He analyses and states that answering the question that which kind of treatment should be provided by the correctional institutions is a complicated task to do.³⁹ The reason for this is tat every mentally ill offender requires a different kind of treatment.⁴⁰ Therefore, the needs of the patient must be met according to the mental disorder he suffers from.

Hence, there is a need of an in depth analysis of the defense of PTSD and its consequences in relation to the criminal law, keeping in focus the rights of the defendants suffering from PTSD as well as the people to whom he poses a threat.

OUTLINE OF THESIS

For analyzing the complex issues related to the *criminal liability of the war veterans and drone attack victims*, the thesis has been divided into four main Chapters:

Chapter One defines Post Traumatic Stress Disorder and analyses its kinds and symptoms. It, then, explains the International Human Rights instruments dealing with the persons with disabilities and establishes that PTSD is a disability under the IHRL. It further

³⁷ Gordon E. Misner, *Criminal Justice Studies: Their Transdisciplinary Nature* (London: The C.V. Mosby Co., 1981) 307.

³⁸ Ibid.

³⁹ Ibid, 308.

⁴⁰ Ibid.

describes that the relation of PTSD with human rights is two-fold; both as a result and as a cause of the violation of human rights.

Chapter Two discusses PTSD in war veterans and the drone attack victims. It describes the factors, other than combat, that contribute to the development of PTSD in a person who has been exposed to war or war-like situations. After this, it examines the types of PTSD in war veterans. It further continues to discuss the effects PTSD has on the war veterans. In the last part, the Chapter discusses PTSD in drone attack victims; its cause and development.

Chapter Three discusses the standards of defenses which have been used in the cases of PTSD. The first part discusses the Insanity Defense and its standards. Then Diminished Responsibility Defense, Defense of Automatism and Self Defense have been discussed. The Chapter describes these defenses at length with respect to their implication in PTSD cases as well as their applicability under the Pakistani Law. In last part the Chapter discusses the problems which hinder in creating a PTSD Defense.

Chapter Four deals with the consequent circumstances of an acquittal, based on a PTSD defense. It explains the right to treatment of the defendants, after they have been acquitted. It also discusses whether or not admission in a correctional facility must be voluntary. In the end, the Chapter establishes the rights of the war veterans and drone attack victims with PTSD to compensation.

These Chapters are followed by a conclusion and findings of the study are recorded in the precise manner.

Chapter One

PTSD AND HUMAN RIGHTS

INTRODUCTION

The issue of PTSD in the people who have been exposed to war is not a novel one, but it has always existed. To understand how it affects its sufferers, it is better to analyze its causes, elements and kinds.

Furthermore, it has to be checked whether or not it qualifies as a disability under the UN Convention for the Rights of Persons with Disabilities.

1.1 WHAT IS POST TRAUMATIC STRESS DISORDER?

Following are some definitions of PTSD given in several psychology books: “(Post Traumatic Stress Disorder is) a disorder that follows a distressing event outside the range of normal human experience and that is characterized by features such as intense fear, avoidance of stimuli associated with the event, and reliving of the event.”¹ The definition characterizes PTSD as a disorder which develops after one has experienced “distressing events” that were beyond his/her control.

¹ Spencer A. Rathus, *Psychology: Concepts and Connections* (USA: Thomson Wadsworth, 2007), 453.

“Post Traumatic Stress Disorder is an anxiety disorder in which the individual has the feelings of social withdrawal accompanied by untypically low level of emotion caused by prolonged exposure to a stressor, such as catastrophe.”² This definition adds “social withdrawal” to the symptoms of PTSD.

“(PTSD) is a state of anxiety, depression and psychological “numbing” that follows exposure to a severe trauma, such as warfare, rape, the violent death of a loved one, or a catastrophic natural disaster.”³ The author describes the kinds of traumatic events that can result in development of PTSD as well as adding to the symptoms the “numbing” which makes the PTSD sufferers indifferent in emotional situations.

From these definitions it is concluded that PTSD is a severe stress disorder that develops in a person after he/she has been exposed to a severe traumatic event. The traumatic events have also been mentioned and one of those traumas is combat. PTSD is mostly found in soldiers who have gone through the experiences of combat.⁴ But not only have the soldiers who have participated in the warfare developed PTSD, but also the civilian population that has been exposed to combat.⁵ Therefore, the drone attack victims in Pakistan are most likely to develop some form of stress disorder and in severe cases even PTSD.

1.1.1 Symptoms of PTSD

² Neil R. Carlson and William Buskist, *Psychology: The science of Behavior* (Boston: Allyn and Bacon, 1997), 544.

³ Camille B. Wortman et al, *Psychology* (New York: Alfred A. Knopf Inc., 1988), 416.

⁴ Peter Gray, *Psychology* (New York: Worth Publishers, 1999), 613.

⁵ David G. Myers, *Exploring Psychology* (New York: Worth Publishers, 2005), 480.

Following are the symptoms of PTSD:

- 1) Reliving the Traumatic event
- 2) Numbing and Avoidance symptoms
- 3) Hyper arousal

The people who have been exposed to combat experience the reliving symptoms in different ways. Some have "upsetting memories of the traumatic event."⁶ It means that some people only experience the disturbing memories of their combat related experiences. The reliving symptoms also include nightmares and frightening thoughts but the most severe of these experiences are the flashbacks.⁷ Flashbacks are the reliving experience in which the person feels that the traumatic event is happening again.⁸ It means that a person experiencing a flashback will believe himself to be in the situation of combat. These flashbacks can last for "minutes, hours, or days."⁹

The second category of symptoms includes numbing and avoidance. Numbing symptoms occur when the person suffering from PTSD shows lack of interest in activities that used to interest him before the occurrence of traumatic event¹⁰, and also the feelings of

⁶ "Handout on PTSD", the United States Department of Veteran Affairs' National Center for PTSD, 2, <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp>, accessed on 12-08-2011 at 10:05 pm PST.

⁷ "Booklet on Post Traumatic Stress Disorder by UD Department of Health and Human Services", National Institute of Mental Health, 3 http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/nimh_ptsd_booklet.pdf accessed on 20-02-2012 at 08:17 pm PST.

⁸ "Post Traumatic Stress Disorder: Symptoms, Treatment and Self Help", taken from <<http://helpguide.org/mental/post-traumatic-stress-disorder-symptoms-treatment.htm>> accessed on 20-02-2012 at 08:16 pm PST.

⁹ Douglas A. Bernstein et al, *Psychology* (Boston: Houghton Mifflin Company, 1997), 438.

¹⁰ Roxanne Dryden-Edwards and Melissa Conrad Stöppler, "Post Traumatic Stress Disorder", taken from <<http://www.medicinenet.com/posttraumatic-stress-disorder/page4.htm#signs>> accessed on 20-02-2012 at 08:22 pm PST.

indifference. The PTSD sufferers do not enjoy the activities that they used to before the occurrence of the traumatic event. They also have the feelings of a foreshortened future.¹¹ This means that they feel hopeless about the future.

The avoidance symptoms include the avoiding of the stimuli that remind the person of the trauma that he/she went through. The person would avoid “sights, smells, sounds, conversations” that remind him of the traumatic event.¹² The sufferer would avoid any kind of stimuli which is associated with the traumatic event in order to not think about it.

The person suffering from PTSD may experience hyper arousal symptoms which include outbursts of anger and exaggerated responses to being startled.¹³ The PTSD sufferer is hyper vigilant and expects attack at any time, therefore, when startled his response is much more exaggerated than that of a normal person. Due to hyper vigilance, he/she also has trouble sleeping.¹⁴

1.1.2 Kinds of PTSD

There are three kinds of PTSD:

- i- Acute PTSD
- ii- Chronic PTSD
- iii- Delayed Onset PTSD

¹¹ Ibid.

¹² “PTSD Symptoms, Signs, Causes, DSM Criteria Checklist”, taken from <<http://depressiond.org/ptsd-symptoms/>> accessed on 20-02-2012 at 08:31 pm PST.

¹³ Henry Gleitman et al, *Psychology* (London: Norton & Company Inc., 2007), 625.

¹⁴ Ibid.

Acute PTSD is the slightest form of PTSD. In this kind the duration of symptoms is less than 3 months.¹⁵ It means that the sufferer experiences the symptoms for a period of less than three months and eventually recovers.

In Chronic PTSD the symptoms last for 3 months or longer.¹⁶ The PTSD sufferer sometimes experiences lapses in symptoms for days or even weeks, but the symptoms always return.¹⁷

In this kind of PTSD, the symptoms appear after at least 6 months have passed since the traumatic event occurred.¹⁸ Most of the war veterans suffer from the delayed onset PTSD as they do not experience the symptoms until they return to their homes.¹⁹

1.1.3 Some facts about PTSD

About 8 % of men and 20 % of women develop PTSD after a traumatic event and 30% of them develop the chronic PTSD.²⁰ It is not necessary that every person who experiences a traumatic event will develop PTSD. Some factors play a role in the development of PTSD. These factors are 1) risk factors, and 2) resilience factors.²¹ Risk Factors include the severity of the traumatic

¹⁵ "PTSD Symptoms, Signs, Causes, DSM Criteria Checklist".

¹⁶ Mark I. Levy, "Stressing the Point: When is a Post Traumatic Stress Disorder Claim Legitimate... and When is it Not", taken from <<http://expertpages.com/news/ptsd.htm>> accessed on 05-03-2012 at 11:50 pm PST.

¹⁷ "Post Traumatic Stress Disorder", taken from <http://www.epigee.org/mental_health/ptsd.html> accessed on 05-03-2012 at 11:33 pm PST.

¹⁸ "PTSD Symptoms, Signs, Causes, DSM Criteria Checklist".

¹⁹ Bernie Andrews et al, "Delayed-Onset Posttraumatic Stress Disorder: A Systematic Review of the Evidence" (*Am J Psychiatry* 2007;164:1319-1326.), taken from <<http://ajp.psychiatryonline.org/article.aspx?articleID=9886>> accessed on 05-03-2012 at 11:38 pm PST.

²⁰ "Handout on PTSD", 2.

²¹ "Booklet on Post Traumatic Stress Disorder by UD Department of Health and Human Services", 3.

event.²² The severity of the risk to which the person was exposed plays an important role in the development of PTSD.

Resilience factors include the positive attitude of a person after a trauma, such as meeting support groups and feeling good about one's actions to deal with a dangerous situation.²³ The social support a person receives helps him to recover from the negative effects of the trauma.

Some other factors that have been described by Aprikalis include biological factors, and developmental factors. Biological factors include the physical differences in persons who do and do not develop PTSD after a traumatic event.²⁴ Developmental factors include the education one has received as well as cognitive and emotional maturity; thus younger, uneducated and cognitively and emotionally immature persons are more likely to develop PTSD.²⁵ These factors have been discussed in chapter 2.

1.2 PTSD AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS DEALING WITH PERSONS WITH MENTAL DISABILITIES

²² Ibid, the development of PTSD also depends on lack of social support. The more support a person receives after a trauma, the least likely he/she is to develop PTSD.

²³ Ibid.

²⁴ Constantina Aprikalis, "The Warrior Returns: Struggling to Address the Criminal Behavior by Veterans with PTSD" (hereinafter mentioned as *The Warrior returns*), *The Georgetown Journal of Law & Public Policy*, 3 (2005), 541-566.

²⁵ Ibid.

In 2006 the UNGA Resolution 61/106 was adopted as a Convention on Rights of Persons with Disabilities (CRPD). Article 1 of the Convention describes the persons with disabilities as those persons who “have long-term physical, mental, intellectual sensory impairments.”²⁶ The persons who have these impairments must be unable to participate in the society on an equal basis with others due to their impairment.

The definition of the “disability” is not a proper or exhaustive one and the reason for that has been described in the preamble of the Convention.²⁷ Mainly, the reason for not having an exhaustive definition of disability is to have flexibility in the law for the new kinds of disabilities that have not yet been recognized. Different countries have defined disability differently in their legislations.

In China, the disability has been referred to as “disabled persons’ refers to those with visual, hearing, speech or physical disabilities, mental retardation, mental disorder, multiple disabilities and/or other disabilities.”²⁸

In Canada the disability has been defined as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or drugs.”²⁹

It concludes logically that there cannot be consensus on one definition of disability. The reason for this could be that “a conclusive definition has the risk of leaving out people in need

²⁶ See for full text “Article 1, UN Convention on Rights of Persons with Disabilities (2006).

²⁷ Preamble UNCRPD, “(e) *Recognizing* that disability is an evolving concept....”.

²⁸ Article 2, Law on the Protection of Disabled Persons, China (1990).

²⁹ Canadian Human Rights Act (1985).

of protection and may become outdated.”³⁰ When there’s one specific definition of disability, it does not have the flexibility to include any new diseases that might be recognized over time.

The question is whether or not PTSD is a disability under the present Convention. As has been discussed before, PTSD is a disorder that affects their sufferers in such a way that they are unable to live their lives normally. They are so affected by this disorder that it is hard for them to function in the society like other normal persons. Due to their hyper vigilance, the persons with PTSD are always on full alert and have exaggerated startle response. They find it very hard to mingle with other people and even have trouble finding jobs. Thus, PTSD is a “mental impairment” that hinders the full participation of the sufferer in the society on equal basis with others.

Although, PTSD is just a disorder and is not a complete disability, therefore the person suffering from PTSD is not considered legally insane. The CRPD in its preamble accepts such new concepts of mental disorders as impairment in its preamble. The concept of disability has been described as an “evolving” concept and it has also been recognized that there is a diversity of persons with disabilities.³¹ As it has been stated that disability is an evolving concept then it means that the scientific advancements that take place in recognizing new physical and mental diseases and disabilities must be taken account of in order to bring the

³⁰ Marianne Schulze, “*Understanding the UN Convention on the Rights of Persons with Disabilities (A Handbook on the Human Rights of Persons with Disabilities)*”, Handicap International, (2010), 36. taken from <<http://hrbportal.org/wp-content/files/1286466464hicrpdmanual.pdf> > accessed on 06-03-2012 at 04:20 pm PST.

³¹ Preamble UNCRPD, “(i) *Recognizing further the diversity of persons with disabilities...*”.

newly recognized impairments under the ambit of CRPD. Therefore, it is logically concluded that PTSD is a form of disability under CRPD.

Now that it has been established that PTSD is a disability under the Convention, the rights that a person suffering from PTSD is entitled to are as follows:

a) The Right to Equality and non-discrimination:

The persons with PTSD are entitled to the equal protection and equal benefit of law without any discrimination.³² In criminal litigation where the persons with PTSD are defendants, they would have all the rights that any other accused person has. Therefore, they have a right to consult with legal help to represent them in court and to bring evidence to plead innocence.

b) Right to be free from stereotyping:

Article 8 of the Convention states that State Parties shall take measures to raise awareness about the disabilities and shall promote the dignity of persons with disabilities.³³ The State Parties will also strive to eliminate the stereotypes and prejudices against the persons with disabilities. The persons with PTSD who are involved in criminal conduct have the problem of the stereotypes and prejudices aimed at them, which also affects their criminal proceedings and bars their acquittals even where they deserve to be acquitted. Under this Convention, these prejudices must be eliminated.

c) Equal Recognition before Law:

³² See for full text Article 5, UNCRPD (2006).

³³ See for full text Article 8, UNCRPD (2006).

Article 12 of the Convention guarantees the persons with disabilities equal recognition as a person before law. The persons with disabilities are given the right to enjoy legal capacity on an equal basis with others.³⁴

d) Access to Justice:

Under the Convention the persons with disabilities have the right to access to justice on an equal basis with others in the society. They have the right to participate in the legal proceedings at any level. They can also be presented as witnesses in the legal proceedings.³⁵ The State Parties are obliged to take measures for the accommodation of the persons with disabilities in order to make it easier for them to participate in legal proceedings.

The other non binding instruments specifically dealing with persons with mental disabilities are the Declaration of the Rights of Mentally Retarded Persons (UNGA Resolution 26/2856 (XXVI), 1971) and the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNGA Resolution 46/119, 1991).

The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care are non binding, but they provide with a guideline to be followed for the protection of rights of persons who suffer from mental illness. There are 25 principles that describe the rights of persons with mental illness. Some of the basic rights are mentioned below:

³⁴See for full text Article 12, UNCRPD (2006).

³⁵See for full text Article 13, UNCRPD (2006).

The rights to be treated with humanity and without any discrimination have been given in Principle 1. Principle 3 states that persons with mental illness have the right to live and work in the community to the possible extent. Principle 7(3) states that every person has the right to treatment according to his/her culture. The right to treatment has further been described in Principle 9. Admission in a facility has to be voluntary. Under Principle 16, involuntary admission can only be made if the person is a threat to others or if there is a likelihood of serious harm to him. Principle 20 deals with criminal offenders and they are entitled to receive the same treatment as other mentally ill persons.

1.3 PTSD AND HUMAN RIGHTS

PTSD is directly related to the human rights both as a result and also a cause of the violation of human rights. This will be further discussed:

1.3.1 PTSD is a result of human rights violations

Post Traumatic Stress Disorder has many causes but most of these causes appear to be the violations of human rights. For example, human trafficking, sexual assault, torture, terrorism and war are all violations of human rights given by International Human Rights Law.

The first violation of human rights is human trafficking, that results in the development of PTSD in the victims. The victims of human trafficking experience many mental problems due

to being subjected to violent force used against them.³⁶ The victim of human trafficking who suffers from PTSD may experience the reliving symptoms even by looking at the picture of the person who committed violent attack against the person.³⁷

Similarly a victim of sex assault also develops PTSD as a result of the violation of his/her human rights. Although the original purpose of the construction of PTSD was to concentrate on the veterans psychological issues after returning from war, but it was realized that the diagnosis of PTSD can be applied to other kinds of traumas, such as rape.³⁸ As the symptoms of the trauma sufferers are identical therefore, traumas other than combat, must also be covered in PTSD that results from violation of human rights.

The victims of torture also develop PTSD. Torture has also been described as a violation of human rights law under article 5 of UDHR.³⁹ The same has been stated under article 7 of ICCPR and the Convention Against Torture (CAT) has defined torture in article 1.⁴⁰ Therefore, it is clear that freedom and prevention from torture is a human right. If someone develops PTSD after being subjected to torture then the PTSD is a direct result of the violation of his human right.

³⁶ Angela A. Jones, "Human Trafficking: Global and Local Perspectives", *Intercultural Human Rights Law Review*, 4 (2009), 317-354.

³⁷ Ibid.

³⁸ Laura E. Boeschen et al, "Sex Offenders: Scientific, Legal and Policy Perspective: Evidentiary and Remedial Issues: Rape Trauma Experts in the Court Room", *Psychology, Public Policy and Law*, 4 (1998), 414- 429.

³⁹ Article 5, Universal Declaration of Human Rights (1948), "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

⁴⁰ See for details Article 1, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Terrorism and war are also a violation of human rights. According to Roche, the right to peace is a "sacred right" for the people.⁴¹ The importance of this right is more than any other right, because if this right is violated then every other right is just "illusory".⁴² When this essential right to peace is violated, every other right seems meaningless. Therefore, warfare and terrorism directly violate the right of people to peace.

The people who witness incidents of terrorism develop PTSD. After the incident of 9/11, 8.5% people in Manhattan USA developed PTSD.⁴³

Similarly, the persons, soldiers or civilians, who are exposed to combat situations, develop PTSD. In fact, the combat experience related PTSD is far more severe than PTSD which develops after other types of traumatic incidence, because the combat consists of a series of traumatic events, therefore, its consequences on the minds of exposed people are far more lasting.

Those soldiers who directly participate in the combat are more likely to develop PTSD than those who do not face the war up front. The rate of PTSD symptoms is half in those soldiers who never face war as compared to those who have, and was severe in those who had experienced heavy combat.⁴⁴

⁴¹ Douglas Roche, *The Human Right to Peace*, taken from <<http://www.peace.ca/humanrighttopeace.htm>> accessed on 23-02-2012 at 09:10 pm PST.

⁴² Ibid.

⁴³ David G. Myer, *Exploring Psychology*, 481. According to the survey, 20% of the people who were residents near the World Trade Centers told that they had experienced nightmares, severe anxiety, and fear of public places.

⁴⁴ Ibid, 480.

"In the age of "new wars" even civilians living in crisis regions are affected by organized violence and human rights violations and often have experienced and witnessed a whole trauma package."⁴⁵ The civilians who are exposed to heavy combat, such as drone attacks in Pakistan, are also most likely to develop PTSD.

The trauma that the asylum seeking applicants have suffered can cause the person to develop PTSD.⁴⁶ Even the refugees and IDPs (Internally Displaced Persons) who have faced warfare in their countries and the trauma of leaving their homes to save their lives develop PTSD. This is another example of how PTSD is directly related to the violation of human rights as a product of human rights violations.

To avoid the developing of PTSD, the states must take steps to decrease the level of human rights violations. The lesser the people have their rights violated; the lesser there'll be cases of people suffering from PTSD.

1.3.2 PTSD is a cause of human rights violations

Post Traumatic Stress Disorder is also related to human rights as a cause of the violation of the latter. Those who suffer from PTSD are not only the victims of human rights violations, but also, in some cases, the violators themselves. A person suffering from PTSD, who experiences a

⁴⁵ Anett Pfeiffer and Thomas Elbert, "PTSD, Depression and Anxiety among former abductees in Northern Uganda" *Conflict and Health*, 5:14(2011), 2, taken from <http://www.conflictandhealth.com/content/5/1/14> accessed on 09-03-2012 at 09:00 pm PST.

⁴⁶ Carol M. Suzuki, "Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder", *Hastings Race and Poverty Law Journal*, 4 (2007), 235- 280.

flashback, believes himself to be in the situation of trauma. Therefore, he might take certain actions to prevent himself from the dangers that he perceives. These actions may include attacking innocent civilians which jeopardizes their lives and may cause them serious injuries and even death. Thus, the victims of human rights violations might become the violators of others' rights.

CONCLUSION

It has been established that PTSD is directly related with the violation of human rights. It is when the victim becomes the violator, when the criminal liability of the PTSD sufferer comes under question. Those who are not accountable for their actions such as children and lunatics are not liable to punishment. There are laws that even protect the insane from punishment. As it has already been discussed, PTSD can be termed as a mental disability under IHRL. However, whether or not it should be and can be used as a defense will be discussed in the second and fourth chapters respectively.

Chapter Two

PTSD IN WAR VETERANS AND DRONE ATTACK VICTIMS

INTRODUCTION

In last chapter, the symptoms and effects of PTSD were discussed. The kinds of PTSD, which the persons who have been exposed to war suffer from, have yet to be studied in detail. It is of utmost importance that these kinds must be understood and distinguished because their effects are different from each other.

The chapter deals with the kinds of PTSD and their effects on the sufferers in detail.

2.1 PTSD IN WAR VETERANS

Post Traumatic Stress Disorder is not something new to the soldiers. Although it was officially recognized in 1980, it has existed in the veterans a long time before its recognition as a disorder. PTSD in veterans has been known by many names such as Shell Shock, Soldiers' Heart, Railway Spine, War Neurosis, Combat Fatigue and Battle Shock.¹

It is clear that war is one of the causes that lead to the development of Post Traumatic Stress Disorder in people who have been exposed to it. As the soldiers are directly involved in combat, therefore, most of them develop PTSD. The number of Vietnam War veterans who

¹ Thomas L. Hafemeister and Nicole A. Stockey, "Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Post Traumatic Stress Disorder", *Indiana Law Journal*, 85 (2010), 87- 141.

suffer from PTSD varies from 500, 000 to 1,500,000.² According to another report, 70 % of the Vietnam veterans were diagnosed with PTSD.³ About 20% of Iraq and Afghanistan veterans have PTSD.⁴ The experiences of war that a soldier has to go through are not of those traumas that a normal person in life comes across. The combat experiences are full of death, danger of death, the sight of dead bodies and the threat of severe injuries. These experiences are also not a one-time experience, but they go on for days and such is the severity that it creates physical as well as psychological problems among veterans such as depression, Traumatic Brain Injury (TBI)⁵ and PTSD.

The cause of PTSD among war veterans is the war itself along with the many horrible experiences it brings with it. The fact, however, is that not all veterans develop PTSD. Thus, the war is not the only cause or factor that contributes to the development of PTSD in soldiers. There are a lot of other factors that contribute to its development in veterans. These causes or factors will be discussed hereinafter.

2.1.1 Causes of PTSD in War Veterans

Following are the factors that contribute to the development of PTSD in war veterans:

1- Biological Factors

² Peter Erlinder, "Post Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to effective Representation", *Boston College Law Review*, 1:3 (1983), 25-26, Available at <SSRN: <http://ssrn.com/abstract=1690595>>.

³ Iraq as a Psychological Quagmire.

⁴ Vanessa Williams and Erin Mulhall, "Invisible Wounds: Psychological and Neurological Injuries Confront A New Generation of Veterans", *Iran and Afghanistan Veterans of America, Issue Report (2009)*, 1, taken from < http://iava.org/files/IAVA_invisible_wounds_0.pdf> accessed on 15-03-2012 at 09:20 pm PST.

⁵ Ibid.

- 2- Developmental Factors
- 3- Severity of the Trauma
- 4- Events pre and post war
- 5- Guilt

These factors will be discussed now one by one:

2.1.1.1 Biological Factors

How a person reacts to stressor depends a lot on genetic and biological factors.⁶ The Biological factors include the genetic prong as well as the environmental effects on the veteran.⁷ The veterans whose brains are smaller than an average sized brain are more likely to develop PTSD.⁸ A study of twins who had fought in Vietnam War showed that the symptoms of PTSD were more similar in identical twins than in fraternal twins.⁹ This shows that the biological make up of the persons also contributes to the development of mental problems after facing a traumatic event. The research also shows that development of PTSD is genetic.¹⁰ The person is more likely to develop PTSD if his/her parent also had it.¹¹

⁶ "Post Traumatic Stress Disorder: Veterans Helping Veterans", *Kings County of Kings, Veterans Office*, 4 taken from <http://www.countyofkings.com/veterans_services/documents/VAPostTraumaticSstressDisorderProgram.pdf> accessed on 15-03-2012 at 09:17 pm PST.

⁷ The Warrior Returns.

⁸ Ibid.

⁹ Peter Gray, *Psychology*, 614.

¹⁰ Henry Gleitman et al, *Psychology*, 625.

¹¹ Ibid.

2.1.1.2 Developmental Factors

Developmental Factors include the age, education and cognitive faculties of a soldier.¹² Younger soldiers are more likely to develop PTSD. The young troops who face battle have higher rates of psychological injuries.¹³ One of the reasons of development of PTSD in younger veterans is that they are not fully grown and are not fit to cope with the exposure to battle.¹⁴ The younger soldiers are usually recruited against their will. Their lack of willingness also plays a role in the development of PTSD.¹⁵

Lack of education also affects the veterans and the uneducated veterans are more likely to develop PTSD. Even the soldiers who had experienced school problems are more likely to develop PTSD.¹⁶

The early childhood experiences are also factors that contribute in PTSD development in the soldier. The soldiers who experienced child abuse or neglect are more prone to PTSD development.¹⁷

¹² The Warrior Returns.

¹³ Vanessa Williams and Erin Mulhall, "Invisible Wounds: Psychological and Neurological Injuries Confront A New Generation of Veterans", 7.

¹⁴ Zeljka Vuksic-Mihaljevic et al, "Post Traumatic Stress Disorder among Croatian Veterans: A Causal Model", *Psychiatry and Clinical Neurosciences*, 54: 6(2000), 632, taken from < <http://onlinelibrary.wiley.com/doi/10.1046/j.1440-1819.2000.00764.x/pdf> > , accessed on 16-03-2012 at 12:38 am PST.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Henry Gleitman et al, *Psychology*, 625. Peter Gray, *Psychology*, 614.

2.1.1.3 Severity of the Trauma

The nature of combat experiences also contributes to the development of PTSD in war veterans.

People who are exposed repeatedly, or over a long period of time, to distressing conditions are apparently more likely to develop posttraumatic stress symptoms than those exposed to a single short-term highly traumatic event... the incidence of posttraumatic stress disorder among Vietnam War veterans correlated more strongly with long-term exposure to daily stressors and dangers of war.¹⁸

The soldiers who participate directly in the war are more likely to develop PTSD than those who were not involved in the actual experience of combat. In a study, the rate of PTSD symptoms was half in those soldiers who never saw combat as compared to those who experienced combat directly.¹⁹ The same rate was three times more in those soldiers who had experienced heavy combat.²⁰

¹⁸ Peter Gray, *Psychology*, 614.

¹⁹ David G. Myers, *Exploring Psychology*, 480.

²⁰ Ibid.

2.1.1.4 Events pre and post War

The events that occur before and after the war also affect the development of PTSD in veterans. If the soldier had any prior mental problems before the war, he is more likely to develop PTSD than those who did not have any prior mental problems.²¹

Similarly, as already mentioned, the veterans who had experienced abuse as children and had family and/or financial problems are more prone to psychological problems after war.²²

The post war events also contribute to the development of PTSD. Veterans who received support of the family are less likely to develop PTSD.²³ Also the social support is considered to be a preventive factor in the development of psychological problems in the homecoming veterans.²⁴ The reception of veterans by the society plays an important role in development of PTSD. The soldiers returning from Iraq and Afghanistan are better received than the soldiers of Vietnam War and thus they have lesser rates of PTSD development.²⁵ The soldiers of unpopular wars are more likely to develop PTSD because of lack of social support they receive when they return home. The indifference of public towards the war and the

²¹ Zeljka Vuksic-Mihaljevic et al, "Post Traumatic Stress Disorder among Croatian Veterans: A Causal Model."

²² Ibid.

²³ The Warrior Returns.

²⁴ Karin Vitzthum et al, "Psycho trauma and Effective Treatment of Post Traumatic Stress Disorder in Soldiers and Peace keepers", *Journal of Occupational Medicine and Toxicology* , 4:21 (2009), 2, taken from < <http://www.springerlink.com/content/u745046785110m66/fulltext.pdf> > accessed on 16-03-2012 at 12:25 am PST.

²⁵ Thomas L. Hafemeister and Nicole A. Stockey, "Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Post Traumatic Stress Disorder".

veterans' experiences can cause them to feel alienated and thus the veterans are more likely to develop psychological problems.²⁶

2.1.1.5 Guilt in veterans

The veterans who return from war feel guilt at their survival while their friend perished in the war.²⁷ This is the concept of PTSD development due to "moral injury".²⁸ The soldiers who feel guilt at their survival develop PTSD due to their moral injury. The development of PTSD is due to the "inner conflict" that they experience after the war.²⁹ It means that they are at constant battle with themselves for the loss of friends they have suffered while they are still alive.

2.1.2 Types of PTSD in War Veterans

Most of the veterans suffering from PTSD experience the delayed onset kind of PTSD. The symptoms begin to appear once the soldier has returned home and starts adjusting to the normal civilian life. However, there are three types of PTSD that the veterans suffer. These types are dissociative state, sensation-seeking syndrome, and depression suicide syndrome. These types will be further discussed.

2.1.2.1 Dissociative state

²⁶ Matthew J. Friedman, "Veterans' Mental Health in the Wake of War", 352:13 (2005), 1288, taken from <<http://www.nmcphc.med.navy.mil/downloads/stress/friedman.pdf>> accessed on 16-03-2012 at 12:41 am PST.

²⁷ The Warrior Returns.

²⁸ Gregg Zoroya, "Report :Guilt A Top Cause of PTSD, Study Shows", *ArmyTimes*, Nov.25, 2011, taken from <<http://www.f52i75.org/articles/Guilt%20a%20top%20Cause%20of%20PTSD.pdf>> accessed on 15-03-2012 at 09:19 pm PST.

²⁹ Ibid.

Dissociation is defined as “a deficit of integrative functions of memory, consciousness and identity, which is often related to traumatic experiences and traumatic memories.”³⁰ Thus, dissociation is a state where a person loses sense of reality due to flashback.

The veterans suffering from PTSD sometimes experience intrusive flashback where they re-experience the trauma as if it is happening again. This is known as dissociative state where the person, although, does not lose contact with reality³¹, loses the sense of reality and feels the imagery he is experiencing is real.

The veterans suffering from the dissociative state of PTSD may re-experience the trauma at the mere sound of the trauma related stimuli. For example, one veteran suffering from PTSD reported that when he rescued his friend from a tank that had met an explosion, the lower part of his friend’s body was missing. He felt like he was in a “dream where colors were blurred and he could not understand what people were saying around him.” Twenty years later when he visited the Disney land with his family, he was overwhelmed by the crowd and experienced the same symptoms and could not hear what his wife was saying.³²

³⁰ Giovanni Liotti, “Trauma, Dissociation and disorganized Attachment: Three Strands of A Single Braid”, *Psychotherapy: Theory, Research, Practice, Training*, 41(2004), 4, taken from < http://www.empty-memories.nl/science/Liotti_Trauma_Attachment.pdf> accessed on 19-03-2012 at 08:43 pm PST.

³¹ Richard L. Amdur and Israel Liberzon, “Dimensionality of Dissociation in Subjects with PTSD”, *Dissociation*, A:2 (1996), 118, taken from < http://www.empty-memories.nl/dis_9596/Amdur.pdf> accessed on 19-03-2012 at 08:48 pm PST.

³² J. Douglas Bremner and Elizabeth Brett, “Trauma-related Dissociative states and Long-term Psychopathology in Post Traumatic Stress Disorder”, *Journal of Traumatic Stress*, 10: 1(1997), 43-44, taken from < <http://userwww.service.emory.edu/~jdbremn/papers/trauma%20related%20dissociative%20states.pdf>> accessed on 19-03-2012 at 08:38 pm PST.

A study shows that the combat veterans returning from WWII continued to experience dissociative symptoms when faced with the stressors.³³

The person who faces a new stressor also experiences the dissociative state. When the veteran faces a stressor, he is reminded of the old memories of the trauma and thus he experiences double emotions related to both the past and the present.³⁴ These experiences involve “altered perception of time, space, sense of self and reality.”³⁵ It means that his perception of time, space and reality is different than they actually are.

The veteran who experiences the dissociative state may experience the arousal symptoms that he felt when he was in combat and may react as if he is in the war situation. In such a case, if he reacts with violence and harms innocent civilians then his criminal culpability comes under question, which will be discussed in the next chapter.

2.1.2.2 Sensation seeking Syndrome

Sensation seeking is defined as “trait describing the tendency to seek novel, varied, complex and intense sensations and experiences and the willingness to take risks for the sake of such

³³ Ibid.

³⁴ Onno Van Der Hart et al, “From Hysterical Psychosis to Reactive Dissociative Psychosis”, *Journal of Traumatic Stress*, 6: 1(1993), 9, taken from < <http://www.onnovdhart.nl/articles/hystericalpsychosis.pdf> > accessed on 19-03-2012 at 09:02 pm PST.

³⁵ Robert C. Scaer, “The Neurophysiology of Dissociation and chronic Disease”, 3, taken from < <http://www.traumasoma.com/excerpts/The%20Neurophysiology%20of%20Dissociation.pdf> > accessed on 19-03-2012 at 08:56 pm PST.

experience.”³⁶ The veterans have a tendency to indulge in risky activities to satisfy their need of thrill.

It was found in a study that veterans, and the individuals who had combat experience, with PTSD had high scores of sensation seeking.³⁷

The veterans suffering from PTSD tend to seek out risk inducing behavior. The veterans have a need to carry out thrilling and dangerous activities in order to feel alive.³⁸ Usually the veterans seek out the high risk careers such as joining police and firemen.³⁹

The PTSD suffering veterans experience the feelings of emotional numbness and avoidance of trauma associated stimuli and in order to overcome these feelings they look for ways to feel excited and thrilled.⁴⁰ This usually ends in “sudden trips, unexplained absences or changes in lifestyle.”⁴¹

The soldiers also satisfy their need of thrilling behavior by “going on patrol, carrying a weapon, or engaging in combat training.”⁴² In *Cocuzza*, the witnesses described that the defendant had carried a log as if it was a rifle.⁴³ This could be due to the fact that the defendant needed to satisfy his need for thrill by pretending that he carried some sort of weapon, which he ended up using to beat a police officer.

³⁶ Robin Hauffa et al, “PTSD and Sensation Seeking: Tendency to Risk Behavior as Protective or Risk Factor”, *RTO Organization*, 2, taken from <<http://ftp.rta.nato.int>> accessed on 19-03-2012 at 11:33 pm PST.

³⁷ Ibid.

³⁸ “Post Traumatic Stress Disorder”, taken from <<http://www.veterans-outreach.org/post-traumatic-stress-disorder.php>> accessed on 19-03-2012 at 11:35 pm PST.

³⁹ Ibid.

⁴⁰ The Warrior Returns.

⁴¹ Ibid.

⁴² Robin Hauffa et al, “PTSD and Sensation Seeking: Tendency to Risk Behavior as Protective or Risk Factor”, 4.

⁴³ *New Jersey v. Cocuzza*, No. 1484-79 [N.J. Super. Ct. 1981].

The need for thrill seeking behavior is not a legal problem until the veteran ends up committing crimes or offences. Most of the veterans seek out criminal behavior to release their thrill seeking habits. The veterans may seek out such activities to relive the excitement of combat.⁴⁴

“One group of veterans established a drug smuggling ring in which the former soldiers “maintained role relationships that were similar to their Vietnam combat duties.”⁴⁵

Thus, the veterans that once worked to protect their citizens become a danger for them.

2.1.2.3 Depression suicide Syndrome

Research indicates that trauma and suicidal behavior are related and evidence suggests that suffering from a trauma increases the risk of suicide.⁴⁶ The research also indicates that “the intensity of the combat trauma, and the number of times it occurred, may influence suicide risk in Veterans.”⁴⁷

⁴⁴ The Warrior Returns.

⁴⁵ Ibid.

⁴⁶ William Hudenko and Tina Crenshaw, “The Relationship between PTSD and Suicide”, taken from <<http://www.ptsd.va.gov/professional/pages/ptsd-suicide.asp>> accessed On 19-03-2012 at 11:47 pm PST.

⁴⁷ Ibid.

Some of the veterans suffering from PTSD suffer from its type: the depression suicide syndrome. Suicidal thoughts are very common in veterans suffering from PTSD and they are most likely to act on these thoughts.⁴⁸

A study shows that veterans suffering from PTSD are three times more likely to commit suicide than the veterans without PTSD.⁴⁹ Another study suggests that this difference is much more than that and the veterans suffering from PTSD are 14.9 times more likely to commit suicide than veterans without PTSD.⁵⁰

After the Operation Iraqi Freedom, 818 veterans out of 500,000 committed suicide.⁵¹

The veterans are haunted by the memories of trauma and experience extended periods of severe depression.⁵² The veterans suffering from PTSD often experience depression because they feel like they do not belong in the society and feel themselves isolated and alienated from the rest of the world.⁵³

⁴⁸ Leo Sher et al, "Posttraumatic Stress Disorder, Depression and Suicide in Veterans", *Cleveland Clinic Journal of Medicine*, 79: 2(2012), 92, taken from < <http://www.ccjm.org/content/79/2/92.full.pdf> > accessed on 19-03-2012 at 11:57 pm PST.

⁴⁹ Ibid.

⁵⁰ Bridget E. Bulman, "PTSD and suicide in Veterans and Military Personnel", *USA: Department of Veteran Affairs*, 22, taken from < http://www.mirecc.va.gov/vsn19/presentations/docs/Bulman_PTSD_Suicide_Northern_CA_SPW_9-6-11.pdf > 20-03-2012 at 12:08 am PST.

⁵¹ Matthew Tull, "Suicide Operation Iraqi Freedom and Enduring Freedom Veterans: Operation Iraqi Freedom and Enduring freedom Highlights Soldiers' Risk", taken from < <http://ptsd.about.com/od/ptsdandthemilitary/a/suicideOEFOIF.htm> > accessed on 19-03-2012 at 11:52 pm PST.

⁵² David L. Conroy, "Why is it so hard for us to recover from being suicidal?", taken from < <http://www.metanoia.org/suicide/ptsd.htm> > accessed on 19-03-2012 at 11:45 pm PST.

⁵³ Leo Sher et al, "Posttraumatic Stress Disorder, Depression and Suicide in Veterans", 94.

Suicide is also sought out by the veterans because of their feelings of guilt over their acts during war and due to the guilt on their survival while their friends died in the war.⁵⁴ The veterans suffering from PTSD also commit suicide because they feel like they were "agents of killing" in the war.⁵⁵

They are no longer deployed in the war and have a hard time adjusting to the civilian life; they feel that no one can understand their experiences.⁵⁶

Another cause for suicide in veterans is that they feel like there was no purpose for the war.⁵⁷

In order to get rid of the psychological pain they are going through, the veterans react with violence, knowing that they will be caught or killed as a result of their actions.⁵⁸

Thus when the veterans suffering from depression suicide syndrome act violently, they endanger the innocent civilians and if their acts harm the latter, their legal responsibility comes under question.

⁵⁴ The Warrior Returns.

⁵⁵ Robin Hauffa et al, "PTSD and Sensation Seeking: Tendency to Risk Behavior as Protective or Risk Factor".

⁵⁶ Nazanin H. Bahraini et al, "Providing Support for Suicide Survivors: Understanding Pertinent Military/Veteran Issues", 2, taken from < http://www.mirecc.va.gov/visn19/docs/Suicide_Support_Group.pdf > accessed on 20-03-2012 at 12:05 am PST.

⁵⁷ Richard Gale and Gary Null, "Gulf War Syndrome, PTSD and Military Suicides: U.S. Government's Message to America's Vets: "Drop Dead", taken from <<http://globalresearch.ca/index.php?context=va&aid=20186>> accessed on 19-03-2012 at 11:50 pm PST.

⁵⁸ Justin G. Holbrook, "Veterans Courts and Criminal Responsibility: A Problem Solving History & Approach to the Liminality of Combat Trauma", *Widener University School of Law: Legal Studies Research Paper Series no.10-43*, taken from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706829&rec=1&srcabs=1470126 accessed on 05-09-2011 at 1:52 pm PST.

2.1.3 Effects of PTSD on Veterans

PTSD has a lot of negative effects on veterans and some of these effects are long lasting, making the lives of the veterans harder for them to live. These negative effects are:

- 1- Suicide
- 2- Stigmatization and Unemployment
- 3- Unstable Family relations
- 4- Substance Abuse
- 5- Criminal Conduct

2.1.3.1 Suicide

It has already been discussed in types of PTSD that the veterans suffering from the depression suicide syndrome end up committing suicide. The rates of suicides committed by the veterans are alarming and President Obama also addressed this issue and sent condolence letters to the families of the veterans who commit suicide. Recognizing that PTSD leads to suicide President Obama said that he is "committed to continuing to improve the outreach and suicide prevention programs for troops and veterans coming back from the Iraq War and increase support for PTSD tolerance."⁵⁹

⁵⁹ "President Obama Addresses PTSD Suicide and the Stigma of Iraq Veterans" , taken from <<http://www.carefordisabledveterans.org/blog/president-obama-addresses-ptsd-suicide-and-the-stigma-of-iraq-veterans.cfm>> accessed on 20-03-2012 at 12:04 am PST.

2.1.3.2 Stigmatization and Unemployment

Stigmatization is also another negative effect on the veterans who suffer from PTSD. People regard these veterans as crazy and this also leads to veterans having no jobs. It is also noted that most veterans would not even opt for an insanity defense because of the stigma factor. They would rather be thought "bad than mad."⁶⁰ One survey yielded the results that Vietnam veterans with PTSD were less likely to be employed than the veterans without PTSD.⁶¹ The veterans returning from war and suffering from PTSD face unemployment because employers do not know how to handle with the people who do not have any apparent disability.⁶² The employers are also scared to hire them because they do not know "what to expect of them."⁶³ According to one study, PTSD raises the odds of unemployment in veterans to 150 %.⁶⁴

2.1.3.3 Unstable Family Relations

The veterans with PTSD not only have a hard time adjusting to their civilian lives, but also struggle with maintaining stable family relations. The symptoms of PTSD make it hard for the family of the veteran too to cope with this new and changed personality of the veteran. PTSD

⁶⁰ D. W. Elliott and Celia Wells, *Casebook on Criminal Law* (London: Sweet & Maxwell, 1982), 158.

⁶¹ Sandra G. Resnick and Robert A. Rosenheck, "Posttraumatic Stress Disorder and Employment in Veterans Participating in Veteran's Health Administration Compensated Work Therapy", *Journal of Rehabilitation Research & Development*, 45: 3(2008), 427-433, taken from <<http://www.rehab.research.va.gov/jour/08/45/3/pdf/resnick.pdf>> accessed on 24-03-2012 at 09:18 pm PST.

⁶² Alexandra Zavis, "Many Veterans with PTSD Struggle to find Supportive Employment", *Los Angeles Times* on Sep. 19, 2011, taken from <<http://articles.latimes.com/2010/sep/19/local/la-me-veterans-invisible-wounds-20100920>> accessed on 24-03-2012 at 09:17 pm PST.

⁶³ Ibid.

⁶⁴ Tara Galovski and Judith A. Lyons, "Psychological Sequelae of Combat Violence: A Review of the Impact of PTSD on the Veteran's Family and Possible Interventions", *USA: G.V Montgomery VA Medical Center and others*, 9 (2004), 478, taken from <<http://socialwork.usc.edu/~rastor/Military%20Children%20-%20Articles%20by%20Category/Secondary%20Trauma/GALOVSKI1.PDF>> accessed on 24-03-2012 at 09:12 pm PST.

sufferers face "high level of marital conflict, cold and unresponsive parenting style... parental depression, lack of support and lack of family cohesiveness."⁶⁵ The veteran with PTSD has dysfunctional relationship with his family which leads to lack of support from their family, making it even harder for the veteran to recover.⁶⁶

"38% marriages of Vietnam veterans were dissolved within 6 months of their return back home" and PTSD was found to be a contributing factor that lead to this.⁶⁷ "70 % of the PTSD couples reported relationship distress as compared to 30% of the non- PTSD couples."⁶⁸ Due to PTSD the veterans are not able to have stable relationships and therefore, their families abandon them.

The reason for unstable family relations is that the veteran suffering from PTSD is always anxious and hyper alert of everything that goes on around him. He feels like he can trust no one and therefore, his family members feel they are controlled and their relationship starts to deteriorate.⁶⁹

⁶⁵ Susan L. Ray and Meredith Vanstone, "The Impact of PTSD on Veteran's Family Relationships: An Interpretative Phenomenological Inquiry", 2, taken from < <http://pi.library.yorku.ca/dspace/bitstream/handle/10315/7849/Ray-PTSD-phenom.pdf>> accessed on 24-03-2012 at 08:58 pm PST.

⁶⁶ Ibid.

⁶⁷ Tara Galovski and Judith A. Lyons, "Psychological Squelae of Combat Violence: A Review of the Impact of PTSD on the Veteran's Family and Possible Interventions", 479.

⁶⁸ Ibid.

⁶⁹ "PTSD and Relationships", USA: Department of Veterans Affairs, National Center for Post-Traumatic Stress Disorder, 1, taken from < <http://www.ipac.ca/main/PDF/PTSD%20and%20Relationships.pdf>> accessed on 24-03-2012 at 09:13 pm PST.

2.1.3.4 Substance Abuse

People suffering from PTSD often have the problem of using too much alcohol and drugs. The veterans with PTSD are more likely to have an alcohol abuse problem than the veterans without PTSD.⁷⁰ The drugs or alcohol is used to get rid of the nightmares and other symptoms of PTSD.⁷¹ They are used as a way of “self-medication” to avoid the stressful thoughts after a traumatic event.⁷² Although it can provide a temporary relief⁷³, but the over-use of alcohol or drugs leads to the Substance Use Disorder (SUD).⁷⁴ More than 2 out 10 veterans with PTSD also suffer from SUD.⁷⁵

2.1.3.5 Criminal Conduct

The veterans suffering from PTSD are so affected by it that they sometimes indulge in criminal activities. Sometimes, these activities are conducted in a group to satisfy their need of thrill, when the veterans are suffering from sensation seeking syndrome.

The worst kind of criminal acts are done by the veterans when they experience the flashbacks. The veteran might start acting with violence on the routine issues such as argument

⁷⁰ Matthew Tull, “Alcohol Abuse in Veterans: Links to Post Traumatic Stress Disorder”, taken from http://ptsd.about.com/od/ptsdandthemilitary/a/alcohol_veteran.htm accessed on 24-03-2012 at 09:31 pm PST.

⁷¹ Ibid.

⁷² Ibid.

⁷³ “PTSD and Problems with Alcohol Use”, USA: Department of Veterans Affairs, National Center for Post-Traumatic Stress Disorder, 2, taken from <http://www.samhsa.gov/csatsdisasterrecovery/outreach/ptsdandproblemswithalcohol.pdf> accessed on 24-03-2012 at 09:21 pm PST.

⁷⁴ “Understanding PTSD and Substance Abuse”, USA: Department of Veterans Affairs, 1, taken from <http://www.ptsd.va.gov/about/print-materials/sudptsdflyer.pdf> accessed on 24-03-2012 at 09:27 pm PST.

⁷⁵ Ibid.

with a co-worker or a dispute with wife.⁷⁶ The veterans also act according to their military training. If faced with a threatening situation (or a situation which only appears to the veteran to be threatening), the veteran gets into the survivor mode and react with violence.

In *State v. Heads* the veteran shot and killed his sister-in-law's husband. His condition of PTSD lead him in a dissociative state when he found that his wife was leaving him and he reacted with violence while in dissociative state.⁷⁷

In another case, *State v. Wood*, the veteran shot his foreman while experiencing a flashback. The workplace in factory reminded the veteran of his artillery base in Vietnam and he experienced a flashback due to that and reacted with violence.⁷⁸

It is when the veteran acts with violence and commits a crime, such as shooting a person, that the question of his criminal liability comes under question, which will be discussed in detail in the next chapter.

2.2 PTSD IN DRONE ATTACK VICTIMS IN PAKISTAN

The issue of PTSD is especially important with respect to the drone attack victims in Pakistan. The drone attacks in different parts of Pakistan have created a "war-like situation" in those

⁷⁶ Peter Erlinder, "Post Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to effective Representation", 33.

⁷⁷ *State v. Heads*, No.106,126 (First Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981).

⁷⁸ *State v. Wood*, no.80-7410 (Ill. 1982).

areas.⁷⁹ The attacks on the Pak-Afghan border have become a routine now.⁸⁰ The civilians living in those areas not only have to suffer from exposure to combat and risk of being targeted and killed, but also they are displaced from their homes and most of the times they have to live in unhygienic places.⁸¹ The displacement adds to their suffering and it is not a surprise that many of them develop psychological disorders.

Although, the target of drone attacks is supposed to be militants, the drone attacks are carried on places which are "suspected"⁸² of enemy hide-outs. Since, it is not confirmed in all cases that the targeted place is occupied by militants; there is risk of striking out of innocent civilians. In one case, two missiles were fired at a house in a drone attack. The house was suspected of a militant hide out. After the strike, the villagers pulled out 9 bodies from the demolished building. According to them, the bodies were burned beyond recognition.⁸³ It means that there is no certainty whether or not the killed men were militants or innocent civilians.

⁷⁹ Zahid Shahab Ahmed, "Pakistan: Challenges of Conflict-Induced Displacement", *Peace Direct*, March. 23, 2012. taken from <<http://www.insightsonconflict.org/2012/03/pakistan-the-challenges-of-conflict-induced-displacement-of-people/>> accessed on 27-03-2012 at 01:45 pm PST.

⁸⁰ Sami ur Rehman, "This Senseless War", *The Nations Newspaper*, on March. 27, 2012, taken from <<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/columns/27-Mar-2012/this-senseless-war>> accessed on 27-03-2012 at 02:15 pm PST.

⁸¹ Zahid Shahab Ahmed, "Pakistan: Challenges of Conflict-Induced Displacement".

⁸² Abdur Rauf, "Escalation of Drone Terrorism in Pakistan", taken from <http://www.liveleak.com/view?i=b12_1329227677> accessed on 27-03-2012 at 02:20 pm PST. The words used by the author were "suspected militants".

⁸³ Ibid.

The civilians who have to see such incidents happening around them are not so much different from the soldiers who see dead bodies during combat. The trauma that these civilians suffer is enough to create complicated psychological disorders, which it indeed does.

"About 80 per cent residents of South and North Waziristan agencies have been affected mentally while 60 per cent people of Peshawar are nearing to become psychological patients if these problems are not addressed immediately."⁸⁴ The percentage of the people affected psychologically by the drone attacks is alarming and this problem needs proper solution.

The people living in the areas of drone attacks are terrorized and according to psychologists, many of them develop Post Traumatic Stress Disorder.⁸⁵

UNHCR and its partner are working for providing psychological support to the victims of drone attacks and there are 15 welfare centers in Swat and Lower Dir where 30,000 traumatized people have been helped by the psychologists.⁸⁶

One of the effects of the drone attacks on its victims is that the survivors develop the revenge seeking behavior. Since the civilians who are innocent become the targets of drone

⁸⁴ "80 pc People Suffer from Mental Illness in Waziristan, published on 21-06-2011, taken from <<http://www.dawn.com/2011/06/21/80pc-people-suffer-from-mental-illness-in-waziristan-2.html>> online publication on June. 21, 2011, accessed on 27-03-2012 at 02:17 pm PST.

⁸⁵ "US Drones causing Mental Trauma in Pakistan: Escalating Drone Strikes Targeting Armed Groups Injure Many Ordinary People in the Country", *Aljazeera Network*, on Dec. 14, 2011), taken from <<http://www.aljazeera.com/video/asia/2011/12/201112136012364220.html>> accessed on 27-03-2012 at 01:55 pm PST.

⁸⁶ Zahid Shahab Ahmed, "Pakistan: Challenges of Conflict-Induced Displacement".

attacks and experience the deaths of loved ones, they want to take revenge for what has happened to them.⁸⁷

It has been observed that the veterans too, who suffer from PTSD develop revenge seeking behavior⁸⁸ because they feel like they were used by the governments.

Therefore, it is clear that soldiers are not the only ones who develop Post Traumatic Stress Disorder, but the civilians who are exposed to the combat like situations also develop this disorder. Therefore, when these drone attack victims with the desire to take revenge and this desire is made irresistible due to their PTSD, commit crimes, then their criminal responsibility comes under question which will be discussed in the next chapter.

CONCLUSION

It has been discussed that persons who have been exposed to war do not suffer from only one, but three different kinds of PTSD; therefore the effects are also different. However, the effect of PTSD that has legal bearings is the criminal conduct of the sufferers, which brings about the question of their criminal liability. This issue has been discussed in detail in the next chapter.

⁸⁷ Mirza Hassan, "Pakistan's Tribesmen Seek Revenge for Drone Attacks: Imran Khan", online publication on Oct. 28 2011, taken from <<http://www.thenewstribes.com/2011/10/28/pakistan%E2%80%99s-tribesmen-seek-revenge-for-drone-attacks-imran-khan/#.PhKhxnqY01U>> accessed on 02-04-2012 at 08:15 pm PST.

⁸⁸ Leo Sher et al, "Posttraumatic Stress Disorder, Depression and Suicide in Veterans", 95.

Chapter Three

POST TRAUMATIC STRESS DISORDER AS A DEFENSE

INTRODUCTION

As it has been discussed in the previous chapter, the persons suffering from PTSD might indulge in criminal activities owing to their disorder. The criminal culpability of such persons comes under question. Before discussing the nature of defense to be used in such a case, it has to be established that defendants with PTSD have right to fair trial which entitles them to a right to raise defenses in criminal proceedings.

A right to fair trial means that the accused person must be given the chance to defend himself.¹ In this regard he should be allowed to elicit all the relevant evidence to prove his innocence and also to raise any defense provided by the criminal law. In the case of a person who suffers from PTSD, he has the right to invoke those defenses which can be applied to his situation and these defenses include:

- 1- The insanity defense
- 2- the diminished capacity defense
- 3- Automatism
- 4- Self-defense

¹ "Criminal Law and Your Rights", *Redress: Seeking Reparation for Torture Survivors*, (2008), 2, taken from <<http://www.redress.org/downloads/country-reports/LEAFLET%20FINAL%20English%20Version%20March08.pdf>> accessed on 17-04-2012 at 03:15 pm PST.

In this chapter these defenses have been discussed in detail and it has been observed whether or not these defenses are sufficient for a case of PTSD.

3.1 INSANITY DEFENSE

The concept of insanity defense has progressed throughout history. At first it was recognized as the "wild beast test" and the defense council had to prove that the defendant was so deprived of his mental faculties that he was nothing more than a wild beast.² This was the very crude form of the Insanity defense and as such did not provide the defendant with a proper defense. The law of criminal responsibility holds a man responsible for his actions as a general rule. A person is supposed to be sane and in control of his actions, therefore he is responsible for his criminal conduct and liable to punishment.

However, Insanity Defense elicits a situation where a person's criminal acts resulted from his insanity. In such a case, a person must not be held responsible for his criminal acts and therefore, not liable to be punished. It is said by some jurists that extreme cases of sanity and insanity do not exist; instead there are shades of sanity and insanity.³ However, if the insanity has affected the conduct of man and led him to commit a crime or an offense, the degree of insanity comes under question. It has to be checked whether the man was only a little affected by insanity and could have done otherwise than committing the crime or was so intensely

² Shahid Hussain Qadri, *Commentary on Pakistan Penal Code 1860* (Lahore: Mansoor Book House, 2000), 88.

³ C.M.V. Clarkson and H.M. Keating, *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 1984), 271. It means that on a vertical scale of sanity (on top) and Insanity (on bottom) a man lies somewhere in between the two extremes. It is not possible that a person is either extremely sane or extremely insane.

affected by insanity that he could not have done otherwise. According to Goldstein, insane people should not be liable to punishment because they can not understand deterrence.⁴

There are Defenses which were formed to bring about a successful insanity defense and they will be discussed as follows:

- i- M'Naughten Test
- ii- Irresistible Impulse Test
- iii- Durham Rule
- iv- American Law Institute (ALI)'s Model Penal code Test
- v- Post Hinckley case: Insanity Defense Reform Act

Now these tests will be discussed in detail and it will be discussed whether or not PTSD suffering defendants can plead successfully under these standards.

3.1.1 The M'Naughten Test

The M'Naughten Test was formed in 1843, when Daniel M'Naughten, with the intention of killing Sir Robert Peel, mistakenly killed his secretary Edward Drummond. M'Naughten was suffering from the delusion that Sir Robert was going to have him executed and therefore, proceeded to kill him rather than being killed himself, whereas in reality he was in no such danger of execution.⁵ The defendant was acquitted on the ground of Insanity which lead to a

⁴ Abraham Goldstein, *The Insanity Defence* (London: Yale University Press, 1967), 19-20. Since the insane can not understand deterrence they will not know that they're punished for doing a wrong. Instead, in Goldstein's views he should be helped because he is a person who is lacking mental health.

⁵ Clarkson and Keating, 274.

debate in House of Lords⁶ and questions about insanity defense criteria were posed.⁷ Out of these questions, question number two and three are mostly concerned with a person's state of mind when he committed the crime.⁸ The reference to the "state of mind" of the defendant is clearly made to find out how the judges came to the conclusion that the defendant was suffering from insanity. Lord Chief Justice Tindal replied to those questions and formed the M'Naughten rule that sets a standard to test the state of mind of the accused. If a person fulfills the standard's criteria then he is acquitted under the M'Naughten Test.⁹

The second part of the answer by Justice Tindal describes the standard against which insanity must be proved. A person has to prove that at the time of committing the act he was suffering from such a defect of reason from the disease of mind so that he did not know what he was doing, or if he knew it, he did not know that it was wrong. There are, therefore, five elements in the M'Naughten Test that need to be fulfilled for a person to plead successfully under the M'Naughten Test. These elements will be discussed one by one.

⁶ Richard Card, *Cross and Jones' Cases and Statutes on Criminal Law* (London: Butterworths & Co., 1977), 74-75. The House of Lords asked the judges five questions about the unsoundness of mind which would excuse a person from punishment for his offense.⁶

⁷ For details see *M'Naughten Case* [1843], 10 C1. & Fin.200.

⁸ *M'Naughten Case* [1843], 10 C1. & Fin.200 Question number two asked the judges, "what are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" and the third question was "in what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" These questions show that the House of Lords was not satisfied with the acquittal of Daniel M'Naughten and that's why they asked the judges, who had given the verdict of acquittal, on what grounds they had considered a person who had committed a crime to be free from criminal liability.

⁹ *Ibid* "...as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

- a) **At the time of committing of the act:** When the question of insanity is brought before the court it must be proved by the defense council that the defendant was suffering from the disease of mind which caused a defect of reason "at the time of the committing of the act." The mere existence of insanity does not exempt the defendant from the crime he committed. The link between crime and insanity has to be proved. The mental state of the defendant at the time of the crime is under question.¹⁰ Therefore, evidence must be brought to prove that the criminal act was a result of the mental disorder.
- b) **Disease of mind:** For a defendant to successfully plead insanity under the M'Naughten rules, he has to prove that he was suffering from "disease of mind" that lead to his defect of reason and resulted in his criminal conduct. Whether there must be disorder in the functioning of brain for a condition to qualify as disease of mind or not, was discussed by Judge Devlin J. in Kemp.¹¹ Judge Devlin J. has clarified that the law is concerned with the mind and not the brain. The external factors that cause a person's defect of reason do not come under the 'disease of mind' element of the M'Naughten

¹⁰ Curt R. Bartol and Anne M. Bartol, *Psychology and Law: Theory, Research, and Application* (Australia: Thomson Wadsworth, 2004), 120.

¹¹ *R v. Kemp* [1956] 2 All E.R. 249. Judge Devlin J. discussed the "disease of mind" and "disease of brain" and said: "I should think that it would probably be recognized by medical men that there are mental diseases which have an organic cause..... It would probably be recognized that there are diseases functional in origin about which it is not possible to point to any physical cause but simply to say that there has been a mental derangement of the functioning of the mind... [The law] is not in anyway concerned with the brain but with the mind, in the sense that the term is ordinarily used when speaking of the mental faculties of reasoning, memory and understanding..." He regarded the condition of the brain as "irrelevant" to the issue of disease of mind.

rules. For example, if a person forgot to take his medication which resulted in his defect of reason, it would not amount to disease of mind.¹²

c) **Defect of reason:** "Unless a man has the capacity and a fair opportunity or chance to adjust his behavior to the law its penalties ought not to be applied to him."¹³ The law of criminal responsibility is based upon the concepts of autonomy and reasoning.¹⁴ Therefore, where there is a defect of reason which obliterates the reasoning capability of the defendant, he should not be punished.¹⁵ The mere fact that the defendant failed to use the power of reasoning does not come under the defect of reason.¹⁶ Therefore, in a case where a person is suffering from PTSD and he proves that he lacked the capacity to reason, he would be exempt from criminal responsibility.

d) **Nature and Quality of the act:** The third element that must be fulfilled in order to raise a successful insanity defense under the M'Naughten Rules is that the defendant did not know "the nature and quality of the act". It means the physical nature of the act.¹⁷ A person who is hammering on his wife's head but thinks that he is hammering a nail, does not know the nature of the act he is carrying out. The defendant did not "realize

¹² Richard Card, *Cross and Jones Introduction to Criminal Law* (London: Butterworths, 1984), 92. The writer describes the external factors which are not disease of mind. "A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease' and does not constitute a disease of mind." Originally taken from Bailey [1983] 2 All E.R. 503.

¹³ Alan Norrie, *Practical Reasoning and Criminal Responsibility: A Jurisprudential Approach*, taken from *The Reasoning Criminal: Rational choice Perspectives on Offending* (New York: Springer-Verlag, 1986), 219.

¹⁴ Ibid.

¹⁵ Therefore, second element that must be there to fulfill the criteria of the M'Naughten test is that the defendant must have suffered from a defect of reason that lead to his criminal conduct. It means that the power of reasoning was so impaired that the defendant could not have used it.

¹⁶ J.C. Smith and Brian Hogan, *Criminal Law* (London: Butterworths, 1983), 173.

¹⁷ Ibid.

the material circumstances in which he was acting.”¹⁸ There is a misperception of reality which causes the defendant to not know the nature and quality of his act.

e) Accused did not know he was doing what was wrong: This element brings under question the legality of the act and its knowledge in the defendant’s mind. This question that whether or not the defendant knew he was doing what was wrong is a *mens rea* question.¹⁹ In *New Jersey v. Cocuzza* the defendant had attacked a police officer with a log, believing the latter to be an enemy soldier, therefore he lacked the criminal intent. He was acquitted on the ground of insanity under the M’Naughten Test.²⁰

A person who fulfills all these elements is declared not guilty by reason of Insanity under the M’Naughten Test.

3.1.2 The Irresistible Impulse Test

One of the criticisms on M’Naughten Test was that it does not take into account the emotional and volitional factors into consideration while determining the insanity of the defendant. In 1887, The Alabama Supreme Court devised the rule of “Irresistible Impulse”.²¹ The court held that “a person could utilize the insanity defense if he or she could prove that by reason of

¹⁸ Cross and Jones, *Introduction to Criminal Law*, 93.

¹⁹ Glanville Williams, *Textbook of Criminal Law*, (London: Stevens & Sons, 1983), 644. In this case, the person knows the nature and quality of the act but is unable to realize that it is wrong and in some cases, unable to appreciate its results. Therefore, he lacks the required *mens rea* for the crime. For example, a person suffering from PTSD knows it’s wrong to kill people, he also knows that he’s killing another person, but he does not know that he’s killing an innocent man, therefore he does not know he’s doing something wrong. In his perception he’s killing an enemy in war, therefore, he thinks he is justified in doing so.

²⁰ *New Jersey v. Cocuzza*, No. 1484-79 (N.J. Super. Ct. 1981).

²¹ Joseph Devine, “A Brief History of the Insanity Plea, taken from <<http://ezinearticles.com/?A-Brief-History-of-the-Insanity-Plea&id=1508974>>, accessed on 26-11-2011 at 07:30 pm PST.

duress of mental disease he had so far lost the power to choose between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.”²² The idea behind the new test was that the law should not only acquit those who did not know right from wrong, but also acquit those who are aware of right and wrong, but owing to their mental defect, are unable to control their actions.

The Irresistible Impulse was an addition to the M’Naughten rule that extended the scope of the test to those who could not control their actions.²³ Therefore, the volitional factor was added to the M’Naughten test that it had previously ignored. The psychiatrists agree that a person might know that the act he is committing is wrong, but is unable to stop himself.²⁴ In other word, even though he knew the act was wrong, he did not have “sufficient power to prevent himself from committing it.”²⁵ The test is also called “Control Test” and “Police at the

²² *Parsons v. State* (81 AL 577, So 854 1887 AL) . Judge Somerville described the state of mind as one “in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former, nor abstain from the latter?” It means that although the defendant had the ability to reason, but he could not control his impulse and acted in a way he knew was illegal. Judge Stone, giving the dissenting opinion, also discussed the impulse which causes the person to act in a way he knows is wrong. He said: “Impulse is emotional rather than intellectual. It is a sudden emotional influence brought to bear on the will as an intellectual faculty... It differs from the cognitive or the knowing faculty, and not infrequently so dominates the latter as to acquire, for the time, mastery of will.... The will retains all its power, but, for the time, ceases to act in harmony with the knowledge possessing faculty.

²³ Under this rule, if the accused was incapable of controlling his actions and bringing them in conformity with the laws, he can raise the defense of insanity on the ground of his inability to control himself. See Clarkson and Keating, 284.

²⁴ “A Crime of Insanity: From Daniel M’Naughten to John Hinckley: A Brief History of the Insanity Defense”(hereinafter mentioned as *A Crime of Insanity*), taken from <<http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html>>, accessed on 26-11-2011 at 08:15 pm PST.

²⁵ Barbara Wootton, *Social Science and Social Pathology* (Connecticut: Greenwood Press, 1978), 232.

Elbow Test”.²⁶ According to Nyazee, this Impulse does not come upon the defendant suddenly.²⁷ The defendant might be experiencing the impulse for a while before he acts.

3.1.3 The Durham Rule

The Durham rule was established in the case *Durham v. United States*, where the asserted defense was that the defendant was at the time of the commission of the crime, was of unsound mind. In this case, it was stated by Judge Bazelon that M’Naughten Test is “an inadequate guide to mental responsibility for criminal behavior”.²⁸ It was decided by the court that a new test was needed for the defense of insanity. The new rule states that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.²⁹ Therefore, if the person was suffering from a disease which “produced” the criminal act, the accused will be acquitted on the basis of insanity.³⁰

²⁶ “A Crime of Insanity”, The last name is to check whether the defendant would’ve done the same act in the presence of the police.

²⁷ Imran Ahsan Nyazee, *General Principles of Criminal Law*, 137. It even suggests that he may even have planned to act according to his impulse. Irresistible Impulse Test is considered to have filled the lacuna of the M’Naughten test. The M’Naughten test only took into account the cognitive factors, and the Irresistible Impulse added the volitional factor to it. Thus the “control prong” makes the M’Naughten test provide the defendants, who may have known an act to be illegal, but due to their mental impairment, could not control their actions, a successful plea of insanity.

²⁸ *Durham v. United States* 214 F.2d 862 (1954). The defense council argued that even the addition of the Irresistible Impulse to the M’Naughten test is not sufficient criteria to determine the insanity. The M’Naughten standard was considered to be insufficient because it did not take into account the “psychic realities and the scientific knowledge” and the irresistible Impulse Test was discarded because it does not recognize the circumstances where a person does not react immediately or suddenly.

²⁹ Ibid, “The judgment also discussed the meaning of the “disease” and the “defect”. The disease means a condition which is considered capable of either improving or deteriorating. The word defect denotes a condition which is not considered capable of either improving or deteriorating, but is a result of an injury or a physical or mental disease.”

³⁰ Ibid, In concluding the judgment, Judge Bazelon said: “The legal and moral traditions of the western world require that those who, of their own free will and with evil intent..., commit acts which violate the law, shall be

The Test was considered to have reduced the role of medical experts.³¹ In reality the test ended up giving the psychiatrists more authority to testify about the mental condition of the defendant.³² Therefore the act would have to be caused by the mental disease or defect, whether the disease or defect was the main cause or one of the several causes.

In terms of testing the insanity of the defendant, the Durham Rule focuses on mental disorders rather than on the cognitive element of knowing right from wrong.³³ Thus, it was a much broader test in scope, than the M'Naughten and the Irresistible Impulse Test. Under this Rule the disorders such as sociopathy and different personality disorders can be considered the mental disease or defect.³⁴

3.1.4 American Law Institute's Model Penal Code Test

The Durham rule was far too broad to be taken as a standard insanity defense and therefore, it was discarded and declared to be a failure. In 1962, the American Law Institute presented the Official draft of the Model Penal Code. Article 4.01 of the MPC discussed the criminal responsibility of the defendant who used insanity as a defense. According to this article a

criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility."

³¹ Clarkson and Keating, 282.

³² Imran Ahsan Nyazee, *General Principles of Criminal Law*, 137. Since, the test uses the words "product of a mental disease", it gives more authority to psychiatrists to give detailed analysis about the mental state of the defendant. However, according to some analyst, Judge Bazelon meant to give psychiatrists more authority to testify about the mental condition of the defendant, to make the assertion of insanity more scientific. See Curt R. Bartol and Anne M. Bartol, *Psychology and Law*, 122.

³³ Curt R. Bartol and Anne M. Bartol, *Psychology and Law*, 121.

³⁴ Sayeed Akhtar, "Plea of Insanity as a Defense in Criminal Cases: An Update", *Indian J. Psychiatry*, 36:1 (1994), 26, taken from < <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2972450/pdf/IJPsy-36-25.pdf>> accessed on 14-12-2011 at 03:14 pm PST.

person is not criminally responsible for his acts if at the time of the committing of the act he was, due to a mental disease or defect, unable to “appreciate the criminality” of his conduct, or was unable to bring his acts in conformity with the law.³⁵ This seems like a huge improvement of law since the Durham rule was far too vague and too broad.

There are two main elements of the standard: the defendant was due to mental disease or defect, (i) unable to appreciate the criminality of his conduct, and (ii) unable to conform his actions to the requirement of law. The first element resembles the M’Naughten standard, as a person who does not know what he is doing is wrong i.e. criminal, can find acquittal under the test. Second element includes the volition prong by adding that the person who cannot control his actions and bring them in conformity with the law will be able to plead a successful insanity defense under this rule.

The standard was considered to be more flexible than the previous standards as it did not emphasize on the knowledge of right and wrong.³⁶ Instead of a clear knowledge of right and wrong, only the substantial capacity to appreciate the wrongfulness of the conduct was required.³⁷ It was considered as a breakthrough and was adopted by a majority of states in

³⁵ Article 4.01, Model Penal Code (Official Draft), American Law Institute, “1- A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to either appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

2- As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.”

³⁶ Charles Montlado, “ Insanity Defense: Standard for legal Insanity has shifted”, taken from <http://crimes.about.com/od/issues/a/insanity.html>, accessed on 26-22-2011 at 07:25 pm PST.

³⁷ Kimberly Collins et al, “John Hinckley Trial and Its Effects on Insanity Defense: Evolution of the Insanity Plea”, taken from <<http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyinsanity.htm>> , accessed on 26-11-2011 at 07:50 pm PST.

USA.³⁸ The reason for its popularity was that it was considered to be in the middle of the harsh M'Naughten Test and the lenient Durham Rule.³⁹ The rule was further strengthened when in 1972, the Court of the District of Columbia adopted the MPC standard in *Browner* case.⁴⁰ Following elements of the ALI rule for adopted by the Court in the *Browner* case:

- a) **Intermesh of Components:** The first element combines the volition and the cognitive prong.
- b) **The result of mental disease:** The second element describes that such lack of capacity or lack of control was a result of the mental disease or defect.
- c) **At the time of the conduct:** The third element requires that the mental disease affected the defendant at the time of his criminal conduct
- d) **Capacity to appreciate the wrongfulness of his conduct:** The fourth element that was adopted by the court in the *Browner* case was that the standard requires that due to the mental disease or defect he was unable to appreciate the wrongfulness of his conduct, rather than the criminality of his conduct

³⁸ Ibid.

³⁹ Angela Jarvis, "The Insanity Defense- A Constitutional Right?", taken from http://www.forensic-evidence.com/site/Behv_Evid/Finger_insanity.html accessed on 26-11-2011 at 07:52 pm PST. Unlike, M'Naughten it does not require that a person is so mentally impaired to not know right from wrong and provides a softer test for defendants suffering from mental diseases or defect. And Unlike Durham, it excludes the persons who repeatedly commit crimes and thus they cannot find acquittals under the Test.

⁴⁰ *United States v. Browner*, 471 F.2d 969 (1972) (en banc) Judge Leventhal discussed the ALI's MPC standard at length and used it in their verdict. According to the judgment of the case, the language of ALI test was not stilled towards one side, instead it brought the experts of legal and medical professions together. It means that the ALI brings the medical and legal experts together and thus they're able to help out the jury in understanding the facts of the case and the mental condition of the defendant so that the jury is better informed while making a decision.

- e) **Caveat paragraph:** The fifth element was considered the caveat paragraph which describes the exception to the mental disease or defect and excludes the repeated criminal behavior from mental disease or defect.

3.1.5 Post Hinckley Case: Insanity defense Reform Act

The ALI test was popular and in force in many states in USA, until the verdict of the Hinckley case.⁴¹ The trial, that included the testimony of psychiatrists stating that Hinckley was suffering from insanity, was followed by a verdict of not guilty by reason of insanity (NGRI).⁴² This verdict resulted in immediate uproar from the public.⁴³ The public was enraged at the idea of acquitting a person who should have been punished for his acts. The public outcry also showed that they believed the insanity defense to be too lenient and felt as if anyone could use it to find acquittals.⁴⁴ Following the public outrage the Congress held debates on the legislation to devise a rigid insanity defense that would be adopted by all states. There were some members who wanted to completely abolish the insanity defense.⁴⁵ Some states adopted the *mens rea* approach that anyone who pleads insanity has to bring evidence to negate *mens*

⁴¹ *United States v. Hinckley* 33 US DC 356 (1989). In 1981, John Hinckley tried to kill President Reagan to impress the actress Jodie Foster. His acts resulted caused the President several wound and serious injuries to his Press Secretary James Brady.

⁴³ Kimberly Collins et al, "John Hinckley Trial and Its Effects on Insanity Defense: Evolution of the Insanity Plea", taken from <<http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyinsanity.htm>> , accessed on 26-11-2011 at 07:50 pm PST.

⁴⁴ "A Crime of Insanity."

⁴⁵ *Ibid*, According to Sen. Strom Thurmond, the insanity defense absolved a person who had planned to commit the crime and Sen. Dan Quayle said that the insanity defense "pampered criminals".

rea.⁴⁶ This approach was very rigid as anyone who could not bring evidence to deny that he had *mens rea*, would be convicted even if they deserve to be acquitted.

In 1984, the Insanity Defense Reform Act was passed which changed the previous insanity defense standard in four ways:

- 1- A shift in burden of proof
- 2- Elimination of the volition prong
- 3- The departure from NGRI verdict
- 4- Limitation on the role of experts

These four changes will be discussed hereon:

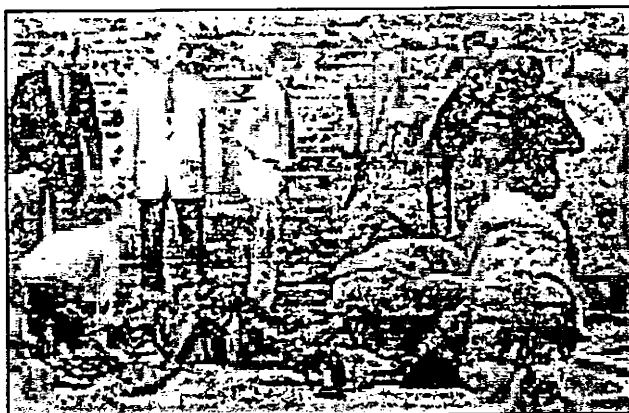
3.1.5.1 Shift in Burden of Proof

The Insanity Defense Reform Act, 1984 required that the burden of proof was on defendant.⁴⁷ The burden of proof was shifted from the prosecution to the defendant.⁴⁸ In previous insanity defense standards, it was the prosecution's responsibility to prove that the defendant was not insane, and now it was defendant's responsibility to prove that he was insane. The defendant had to bring about enough evidence to prove that he actually suffered from a disease of mind that resulted in the committing of the crime.

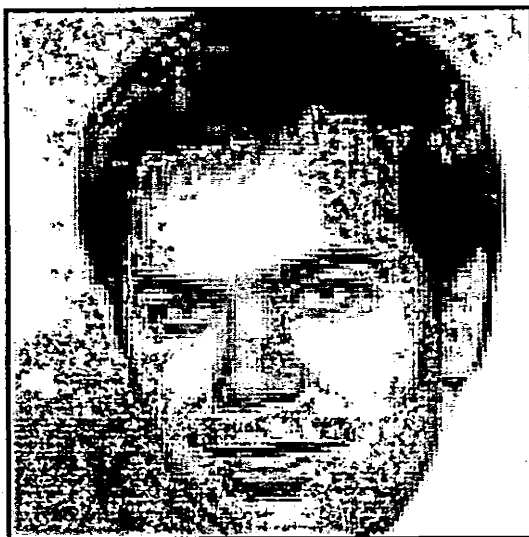
⁴⁶ Julie E. Grachek, "The Insanity defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System", *Indiana Law Journal*, 81:1479(2006), 1485, taken from http://www.law.indiana.edu/ilj/volumes/v81/no4/14_Grachek.pdf accessed on 26-11-2011 at 08:20 pm PST.

⁴⁷ Curt R. Bartol and Anne M. Bartol, *Psychology and Law*, 124.

⁴⁸ Ibid.



Agents hold down Hinckley⁴⁹



John Hinckley⁵⁰

⁴⁹ <http://www.trutv.com/library/crime/criminal_mind/psychology/insanity.html>

⁵⁰ *ibid*

3.1.5.2 Elimination of the Volition Prong

The Act also adopted harsher rule like M’Naughten and eliminated the volition prong from the insanity defense.⁵¹ The terms used are “unable to appreciate” instead of the words “lacks substantial capacity” which were used in the ALI standard.⁵² This shows a shift in the application of the insanity defense as the Insanity defense Reform Act meant the insanity defense standard to be stricter than the ALI.⁵³

3.1.5.3 Departure from NGRI Verdict

The most significant change in the insanity defense was the alteration of the verdict of NGRI. The public felt that a person who committed the crime should not be acquitted, let alone set free in the society. Therefore the new version of the verdict was adopted which stands “guilty but mentally ill” (GBMI). The result of the GBMI verdict was that the defendant was not set free in the society; instead he had to be institutionalized.⁵⁴ The purpose of GBMI verdict is to enable the jury to make a clear statement about the “factual guilt, mental condition and moral

⁵¹ “The Federal Insanity Defense Reform Act”, taken from <http://criminallaw.uslegal.com/defense-of-insanity/current-application-of-the-insanity-defense/the-federal-insanity-defense-reform-act/> accessed on 31-12-2011 at 09:30 m PST. The wordings of the new defense are:

It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.⁵¹

⁵² Kimberly Collins et al, “John Hinckley Trial and Its Effects on Insanity Defense: Evolution of the Insanity Plea.”

⁵³ Unable to appreciate denote a total lack of ability to understand the nature of an act, whereas the lack of substantial capacity refers to a state of mind that can understand the nature of an act to some extent. The inability to control was completely eliminated.

⁵⁴ “A Crime of Insanity.”

responsibility of the defendant".⁵⁵ The NGRI verdict did not declare the actual state of responsibility of the defendant and the GBMI defines that a person is guilty of the offense, but is mentally ill. The major difference between NGRI and GBMI is that in the latter form of verdict, the defendant who has recovered from the mental disease or mental disorder now has to complete the time of his conviction in the prison.⁵⁶

3.1.5.4 Limitation on the Role of Experts

The Insanity Defense Reform Act also limited the role of experts from giving testimony in the court. It was felt that the expert testimony played a significant role in the verdict of NGRI in *Hinckley case*.⁵⁷ It was declared by the Congress that no expert testimony will be allowed that states whether or not the defendant possessed a specific state of mind at the time when the crime was committed.⁵⁸ It is the jury or the judge's responsibility to decide the case on the facts and evidence and not the psychiatrist's privilege to make such statements. Thus, these four changes were made in insanity defense after the verdict of NGRI in *Hinckley case* was condemned by the public.

3.1.6 Criticism on Insanity Defense Standards

a) **M'Naughten:** The first problem with the M'Naughten test is that the test uses the word "right" and "wrong" which are ambiguous terms as there is no clarification about whether they

⁵⁵ Ira Mickenberg, "A Pleasant Surprise: The Guilty But Mentally Ill Verdict has both Succeeded in Its Own Rights and successfully Preserved the Traditional Role of Insanity Defense", *University of Cincinnati Law Review*, 55 (1987), 943-996.

⁵⁶ Ibid.

⁵⁷ Kimberly Collins et al, "John Hinckley Trial and Its Effects on Insanity Defense: Evolution of the Insanity Plea."

⁵⁸ Ibid.

mean “morally” right or wrong or “legally” right or wrong.⁵⁹ Although these words have been interpreted to mean “legally” wrong, still there should be clarity about the meaning of the terms right and wrong. Secondly, The M’Naughten rules are based on outdated concept of insanity.⁶⁰ The latest developments in the field of psychiatry that are better in defining insanity are not included in the test. For example, the test can only be successfully used by a “mad” person and not a “feeble minded person”.⁶¹ A person, who is otherwise sane, but suffers from partial insanity, would not be able to plead successfully under the strict rules of M’Naughten.⁶² The third criticism on M’Naughten is that it does not provide a defense for those, who are so affected by their insanity that even though they know that they are doing something wrong, but they are unable to control their actions.⁶³ The test does not take into account the emotional and volitional factors that affected the behavior of the defendant.⁶⁴ There are so many cases of insanity defense that are not covered by the M’Naughten test, and the rules are stretched “to

⁵⁹ Barbara Wootton, *Social Science and Social Pathology* (Connecticut: Greenwood Press, 1978), 230.

⁶⁰ *Cross and Jones Introduction to Criminal Law*, 97.

⁶¹ Barbara Wootton, 230.

⁶² *Cross and Jones Introduction to Criminal Law*, 97.

⁶³ Clarkson and Keating, 280 “there should be a defense for a person who establishes that although he knew he was doing what was wrong, owing to his insanity it was impossible for him to stop himself from committing the act. For example a person, kills a person whom he believes to be putting thoughts into his mind, or kills him and gives reason that the victim was spying on him, or simply kills him because he has an overpowering urge to do so, the M’Naughten rules, strictly interpreted, will not give him a defense if he admits that he knew that he was killing a man and that murder was a crime.” Originally taken from Report of the Committee on Mentally Abnormal Offenders (Butler Committee), Cmnd.6244 (1975), 217-219. Therefore, the M’Naughten rules are so strict that a person who suffers from an insane delusion that a person is putting thought into his mind or is spying on him,, will not be able to successfully plead an insanity defense. Also a person who kills another man and due to his mental condition he wasn’t unable to stop himself from killing, although he was aware of the act he was carrying out and also was able to appreciate the results of his actions, would not be able to raise a successful insanity defense under the M’Naughten Test.

⁶⁴ Imran Ahsan Nyazee, *General Principles of Criminal Law: Islamic and Western* (Islamabad: Shari’ah Academy International Islamic University, 2007), 137.

make them fit particular cases.”⁶⁵ Therefore, a new test must be devised instead of trying to make the cases fit into the M’Naughten Test.

b) Irresistible Impulse: The first criticism on Irresistible Impulse Test is that the irresistible impulse cannot be proved.⁶⁶ In *State v. Crane*, the Irresistible Impulse Test was discussed and it was held that “legal and medical professions have rejected that standard (Irresistible Impulse), essentially because both recognized that it is scientifically suspect and unworkable as a practical matter.”⁶⁷ The second problem with the Test is that there is no standard which distinguishes the irresistible impulse from an impulse that is not resisted.⁶⁸ How can it be proved that it was an impulse which could not be resisted, and not the one which was not resisted at one’s own will? The third problem with the Test emanates from the above mentioned problem, that if there is no way of identifying between the irresistible impulse and an impulse which was not resisted by choice, then it would open the doors of faking and manipulation for the criminals to find acquittals.⁶⁹ Criminals would just pretend that they were stricken by an impulse which they could not resist and find acquittals, and this would result in misuse of the Test.

⁶⁵ Clarkson and Keating, 280.

⁶⁶ Glanville Williams, *Textbook of Criminal Law*, 658. The technology and science can prove the existence of a mental disorder, but the existence of an impulse that could not be resisted cannot, yet, be proved. Therefore, it is absurd to base a test on something which cannot be proved.

⁶⁷ *State v. Crane*, Supreme Court of The United States, No.00-957, taken from <http://www.appellate.net/briefs/Crane.pdf>, on 14-12-2011 at 03:11 pm PST There is no scientific standard which can prove that an irresistible impulse existed at the time when the defendant committed the crime, therefore, according to the critics of the test, the Irresistible Impulse Test must be abolished.

⁶⁸ “Responsibility for Murder”, *British Medical Journal*, (1953), 768 taken from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2029561/pdf/brmedj03410-0046.pdf> accessed on 14-12-2011 at 03:13 pm PST. Glanville Williams, *Textbook of Criminal Law*, 659.

⁶⁹ Mark Gado, The Insanity Defense, taken from http://www.trutv.com/library/crime/criminal_mind/psychology/insanity.html accessed on 26-11-2011 at 7:45 pm PST.

c) **Durham Rule:** Although it was supposed to be a better standard than M'Naughten and the Irresistible Impulse Test, still it has faced a lot of criticism. Judge Burger was the person who was always dissatisfied by the rule and criticized it in the judgment of many cases.⁷⁰ He stated that the Durham Test "tend[ed] to treat unsupported and dubious psychiatric theory as scientific knowledge."⁷¹ It means that the test presented the psychiatric theories which were not authentic as scientific knowledge to be believed by the jury. Second, he stated that the concepts of "mental disease" and "mental defect" were not defined by the judgment of *Durham Case* and also the test assumes that the criminal conduct was the product of the mental disease.⁷² This created confusion among legal and medical experts as the medical and legal experts tried to explain the meaning of these terms along with the struggle to determine which acts could be the products of such disease or defect.⁷³ Due to the expansive nature of the definition of insanity under the Durham rule, the alcoholics, compulsive gamblers and drug addicts could find defense because their acts could be considered as product of mental diseases by the psychiatrists.⁷⁴ Another problem with Durham rule is that it places burden on the prosecution to prove that the act was not the product of the mental disease.⁷⁵

⁷⁰ Charles M. Lamb, "Warren Burger and the Insanity Defense- Judicial Philosophy and voting Behavior on a U.S Court of Appeals", *American University Law Review*, 24:91 (1974), 99-126, taken from <<http://www.wcl.american.edu/journal/lawrev/24/lamb.pdf?rd=1>> accessed on 20-12-2011 at 02:35 pm PST.

⁷¹ *Blocker v. United States*, 288 F.2d 853 (D.C. Cir.1961).

⁷² *Ibid.*

⁷³ Curt R. Bartol and Anne M. Bartol, *Psychology and Law*, 122.

⁷⁴ "Insanity Defense", taken from <http://www.law.cornell.edu/wex/insanity_defense> accessed on 26-11-2011 at 08:00 pm PST.

⁷⁵ Charles M. Lamb, Warren Burger and the Insanity Defense- Judicial Philosophy and voting Behavior on a U.S Court of Appeal. Generally, in cases of insanity the defendant has to prove that he suffered from a mental incapacity, but Durham rule placed the burden of proving that the defendant did not have the mental incapacity on the prosecution, which usually resulted in failure on the prosecution's part.

d) ALI Standard: The Model Penal Code Test as formulated by the American Law Institute appears to be a new rule, however, its application seems nothing more than M'Naughten standard combined with Irresistible Impulse. In Fact, according to Platt, it is "M'Naughten in new clothes".⁷⁶ The ALI standard does not use the same terms used by the M'Naughten test, but their meaning and application are almost the same. The M'Naughten Test uses the words unable to know "the nature and quality of the act" whereas the ALI test uses the word "lacks substantial capacity to appreciate the criminality of the conduct".⁷⁷ This is merely the twist of terms and presenting them as a new standard. Similarly, the volition prong is the same as the one in Irresistible Impulse Test, except that the heavily criticized words "irresistible impulse" have been avoided in the rule. The terms mental disease and defect haven't been defined instead, the definition of these terms as defined in the McDonald case was applied in the *Browner case*.

e) Insanity Defense Reform Act: the problems with IDRA is that the verdict of GBMI is a façade. It appears to be upholding the insanity defense but in fact it is nothing more than the outright abolition of insanity defense.⁷⁸ The fact, that a defendant is declared to be guilty, shows the unwillingness of the law to provide a defense to those who are not accountable for their actions. Also, the GBMI verdict must be followed by the institutionalization, but the truth is that

⁷⁶ George M. Platt, "Choosing A Test for Criminal Insanity", taken from *Concepts of Criminal Law* (Minnesota: West Publishing company, 1975), 554.

⁷⁷ Ibid.

⁷⁸ Ira Mickenberg, "A Pleasant Surprise: The Guilty But Mentally Ill Verdict has both Succeeded in Its Own Rights and successfully Preserved the Traditional Role of Insanity Defense". The word 'But' in "Guilty But Mentally Ill" gives the jury impression that the blames on the defendant has been mitigated by such verdict. But the fact is that the words Guilty But Mentally Ill are deceiving as the judge or jury believes that the defendant who is found GBMI will not receive punishment, whereas in reality he does.

most of the defendants who are found GBMI serve their time in prisons.⁷⁹ And once they are imprisoned, they are treated the same way as other convicted criminals.⁸⁰

This is merely to satisfy the public that the law is not being misused, when in fact the law was never misused in the first place. The public believes that by giving NGRI acquittals, the doors will be open to all criminals to find acquittals, but the fact is that the plea of insanity defense is rarely used.⁸¹ Therefore, those who do not deserve punishment cannot be sentenced due to the false perception of the public. The human rights of such defendants have to be preserved and the GBMI verdict does not achieve that.

3.1.7 Insanity Defense and PTSD

Whether the standards of insanity defense can be a standard for a PTSD defense or not has been discussed next:

- a) **M’Naughten:** The condition of PTSD would have to be tested against the five elements of the M’Naughten Test. Firstly, it has to be established whether PTSD is a disease of mind under the M’Naughten standard or not. Whether or not PTSD is a disease of mind under the M’Naughten rules, has to be checked. The term “disease of mind” as used in the M’Naughten standard is such which causes a defect of reason due to which the person does not know right from wrong, or if he does know it, he does not know that he

⁷⁹ Curt R. Bartol and Anne M. Bartol, *Psychology and Law*, 124.

⁸⁰ *Ibid.* The purpose of Insanity Defense is to absolve from punishment those who do not deserve it. Therefore, the GBMI verdict fails the purposes of an insanity defense by all means as the defendants are liable to serve punishments.

⁸¹ *Ibid.*, 125.

is doing something wrong. If strictly construed, the M'Naughten Test provides a successful defense only for those who are completely insane. Therefore, going by the strict and actual interpretation of M'Naughten Test, PTSD is not a disease of mind.

The term defect of reason has already been discussed and it is clear that it means the impairment of mental faculties so that the person was not able to use reasoning powers instead of mere failure to use them. The problem arises because the M'Naughten standard does not use the word misperception of circumstances.⁸² Therefore, the M'Naughten Test must include the word "perceiving him to be in a situation where he believes his act is justified." If these words were added to the M'Naughten Test, it would read as follows, "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong, perceiving himself to be in a situation where he believes his act is justified."⁸³

Another M'Naughten element is that the person does not know the nature and quality of his act. This is not true for all of the PTSD cases. In case where a person suffers from PTSD, he is aware of his acts. A war veteran is aware that he is using a gun to shoot a fellow human

⁸² The use of this terminology is crucial for a PTSD Defense because it specifically deals with a case where a war veteran or a drone attack victim defendant suffering from dissociative state of PTSD kills a man, perceiving him to be an enemy soldier and perceiving himself to be in war situation. Here, it is clear that the defendant is aware of his act i.e. killing another human being. What he lacks, however, is the correct perception of reality which leads him to commit the act of violence.

⁸³ Here the word "justified" is used instead of "right" or "not wrong", because the act of killing in self-defense against an enemy is an exception to the general rule that killing is a crime and thus it tells in what situations, killing another human being is justified, not "right" or "not wrong". Also the word "believes" is of utmost importance because owing to PTSD, the sufferer is convinced that the innocent person is actually an enemy who wants to attack him, and it excludes cases where a mere notion would result in killing of an innocent man.

being. He even knows that it will result in the latter's death. Therefore, PTSD does not fulfill this element. The last element is that the defendant does not know what he is doing is wrong. This element is fulfilled by PTSD in the dissociative state only, as the person believes that he is justified in killing the other person because he perceives himself to be in a situation of war where he can kill enemy soldiers.

b) Irresistible Impulse: Since, the Irresistible Impulse Test is an addition to M'Naughten Test, it is safe to say that as the M'Naughten Test does not suffice to be a standard test for PTSD, and so neither does the Irresistible Impulse Test. The test is not based on any scientific approved method of identifying an impulse. It is very hard on the onset, to prove the existence of PTSD. It would be even harder for the defense attorney to prove the existence of an impulse for which there is no method. Second problem is that, not every PTSD sufferer acts on an impulse. In fact, where a person is suffering from the PTSD in its dissociative state, he might experience the flashback for several days, and imagining himself to be in a combat situation, might plan for his act of violence before actually committing it. In such a case, the defendant would not find acquittal under the irresistible Impulse Test. Third, and most important of all, the "unable to control" element is not present in the case of a person suffering from PTSD. The defendant who suffers from PTSD perceives the circumstances to be such that his acts appear to him to be justified. In such a case, he will not even try to control his actions. Therefore, he will not get a successful acquittal under the M'Naughten Test. From all above arguments, it is concluded that, like M'Naughten, Irresistible Impulse Test is not a sufficient standard for a PTSD Defense.

c) **Durham Rule:** The rule has already been declared a failure and has been discarded by the Judge who formulated it because it was too vague and too lenient; therefore, it cannot be a perfect standard defense for any mental disorder, let alone PTSD. If adopted as a standard for PTSD defense, it would raise the chance of false cases where the defendants would fake the mental disorders and thus get acquittals. It is also very hard to prove that the criminal act of the defendant was the product of PTSD. Lastly, the rule does not give a criteria of the mental disease therefore, it cannot be proved whether or not PTSD qualifies as a mental disease or defect under the Durham Rule. Therefore, the Durham Rule is not a sufficient standard for PTSD Defense.

d) **ALI Standard:** Although, it is same as the M'Naughten Test, yet it does have a somewhat less rigid application than M'Naughten. The persons suffering from PTSD might be able to plead a successful insanity defense under ALI standard if they can prove that PTSD caused them to commit the crime and they were unable to control their actions.⁸⁴ In *State v. Wood*, the defendant claimed the similarities between his work place resembled the artillery base he had in Vietnam which resulted in a flashback and he ended up shooting his foreman. The defendant was found not guilty by reason of insanity under the ALI test.⁸⁵

The ALI standard does not create a sufficient standard for those defendants who are suffering from PTSD.⁸⁶ Although it appears to be a good defense for PTSD sufferers, but in reality it only

⁸⁴ Erin M. Gover, "Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans" (hereinafter mentioned as *Iraq as a Psychological Quagmire*), *Pace Law Review*, 28 (2008), 561-587.

⁸⁵ *State v. Wood*, no.80-7410 (Ill. 1982).

⁸⁶ *Iraq as a Psychological Quagmire*.

works for those defendants who suffer from the dissociative state of PTSD. Therefore, there is need for a standard PTSD defense that covers all kinds of PTSD.

e) Insanity Defense Reform Act: One of the basic problems with the defense presented by the Insanity Defense Reform Act, 1984 is its lack of concern with the purposes of having an insanity defense.⁸⁷ The purpose of insanity defense is to save those from punishment who do not deserve it. A war veteran or a drone attack victim suffering from PTSD will not be able to plead successfully as they are not completely deranged as to not know right from wrong.⁸⁸

The next problem with IDRA is that the verdict of GBMI will not save a PTSD sufferer from punishment. The purpose of punishment is to make a person realize what he did was wrong so that he will not do it again. In case of a PTSD sufferer, he committed the crime in state of insanity, therefore (i) he did not intend to commit a crime, though he intended to act, (ii) once he has been institutionalized and recovers completely he will not commit the same crime in absence of insanity. Therefore, there is no point in punishing him for something he did in a different state than he normally is i.e. insanity.

Another crisis for the PTSD suffering war veterans is that once they're found GBMI and sent to prisons, they will develop hostile feelings towards their people and their country. They had served in war to defend their country and developed PTSD as a result of those experiences,

⁸⁷ Like a child is not legally accountable for his actions, a person suffering from insanity is also not responsible for his acts when such acts are the result of his insanity. By applying the strictest possible standard of insanity, the Insanity defense reform Act does not achieve this purpose.

⁸⁸ They would know an act is right and another is wrong, but in dissociative state they would not know that they're doing something wrong by reason of their false perception of circumstances. Thus, on the very face of it the Insanity Defense Reform Act (IDRA) fails as a standard for insanity defense for PTSD sufferers.

and now when they are in need of help, their people want them locked up in prisons, with not even a proper insanity defense available for them to plead in courts. This hostility would develop in the drone attack victims as well, although for a different reason. The drone attack victims would feel betrayed by their country that was unable to protect them from attacks and now as a result of those attacks they have developed PTSD and the country is unwilling to provide them with a standard defense to plead their cases.

From the above arguments it seems necessary to have a standard PTSD Defense other than an insanity defense.

In the next part of chapter the existing law related to insanity in Pakistan has been discussed.

3.1.8 Insanity Defense In Pakistan

Section 84 of the Pakistan Penal Code, 1860 deals with the offenses committed by persons of unsound mind.⁸⁹ To bring a successful case under section 84, three elements must be complied with. These elements are:

- 1- By reason of unsoundness of mind
- 2- At the time of committing the act
- 3- Incapable of knowing

⁸⁹ Pakistan Penal Code, 1860, section 84: Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

a- the nature of act

b- that what he is doing is wrong or contrary to the law

This is a version of the M’Naughten test as applied in Pakistan as the elements bear close resemblance to the elements of the M’Naughten rules. However, they will be discussed one by one as to what extent they cover insanity and whether or not they provide a sufficient standard to plead a successful case of PTSD in Pakistan.

3.1.8.1 By Reason of Unsoundness of Mind

The unsoundness of mind is a vague term as it does not explain the range of mental disabilities covered by the law. However, by referring to the case laws, one can understand how the section is to be interpreted. It was stated in the judgment of the case *Muhammad Nawaz v. The State* that legal insanity is different from medical insanity.⁹⁰ It was said that if a person’s cognitive faculties are intact and the person has the capability of knowing that his acts are wrong, then he is legally responsible for his acts. The judgment excluded “uncontrollable impulses” from the unsoundness of mind. Thus, it was made clear that irresistible impulses are not covered by unsoundness of mind under section 84.

Similarly in *Ata Muhammad v. the State* it was said:

On the legal concept of insanity no amount of queerness in habit, morbidity of temper, peculiarities of character or eccentricities of behavior, or even aberrations of mind

⁹⁰ *Muhammad Nawaz v. The State*, PLD 1976 Lahore 805.

resulting in abnormality will constitute insanity for the purpose of section 84. P.P.C. although they may be relevant factor for determining whether or not the accused was insane.⁹¹

In *Aurengzeb v. The State* it was held that “benefit of insanity under section 84, P.P.C. can be availed of only if legal insanity is established and mere queer behavior does not establish insanity.”⁹²

The case law in Pakistan is clear about one fact that legal insanity is not same as medical insanity. A person, who might be medically insane, will be punishable for his acts because his legal capacity is quite intact. Whereas a person, who is not medically declared to be insane, could be exempt from punishment because his legal capacities would be impaired.

However, it has to be seen that what range of mental disabilities are covered by the term “unsoundness” of mind. It was said in *Muhammad Shafi v. The State* that:

unfortunately the law in this country does not recognize such lesser forms of abnormality and, apart from unsoundness of mind which renders a person incapable of knowing either the nature of the act or that what he is doing is wrong or contrary to law... Under the existing law even in a case of impulsive insanity or melancholic homicidal mania it is necessary to establish that the maniac was incapable of knowing what he was doing at this point of time.⁹³

⁹¹ *Ata Muhammad v. The State*, PLD 1960 Lahore 111.

⁹² *Aurengzeb v. The State*, 1971 P Cr. LJ 1285.

⁹³ *Muhammad Shafi v. The State*, PLD 1962 SC 472.

Therefore, it is clear that for a person to plead insanity he must be totally impaired in his cognitive faculties. A person who has the understanding of right and wrong and cannot control his actions according to law will not be able to plead a successful insanity defense under section 84.

The section 84 also cannot be applied to the cases where a person suffers from insane delusions. If a person suffers from insane delusions but his cognitive faculty is intact, in such case he knows the nature of his act and its legal consequences and he is responsible for his acts.⁹⁴ The case of delusions is different than hallucinations. In hallucination a person hears a sound or sees an object that is not there in reality. Such hallucinations are caused by a person's "most intimate experience, fear wishes etc."⁹⁵ However, the law's standing is the same that if a person knows he's doing something wrong, he is criminally responsible.

What is noticeable here is the lack of incorporation of the latest psychological advancements into our law. The false perception has never been discussed anywhere. The phenomenon of false perception is of utmost importance as this is where a person suffering from dissociative state of PTSD will find his defense. A person who experiences a flashback of the combat will act with violence. He knows the nature of his act and the results of his act. He is also aware that "killing is illegal". What makes his case different from the strictly interpreted unsoundness of mind is his false perception of circumstances and the situation. He will think that he is justified in killing an innocent civilian because he perceives the latter to be an enemy. In such a case, the law is insufficient to provide a defense of insanity for PTSD sufferers.

⁹⁴ Sh. Shaukat Mehmood, *Pakistan Penal Code, 1860* (Lahore: Legal Research Centre, 1981), 1, 155.

⁹⁵ *Ibid*, 156.

3.1.8.2 At the Time of Committing the Act

This element is the same as all of the other insanity defense standards. The mere existence of insanity does not absolve defendant from punishment. It has to be proved that the insanity or the impaired mental condition caused the committing of the crime. Similarly under section 84, it has to be proved that the unsoundness of mind affected the defendant at the time of the act and became the cause of it.

It was discussed in *Muhammad Ishaque v. The State* that “the mere fact that on one earlier occasion, the appellant had been subject to delusions and had suffered from derangement of the mind would not be sufficient to bring his case within the exemption.”⁹⁶

In *Muhammad Ibrahim v. The State*, it was noted through evidence that the appellant had bouts of insanity occasionally and used to become temporarily deranged in mind. The witnesses also testified that at the time of the act, they found the appellant in the same condition of abnormality as his usual bouts of insanity. The judgment also stated that the appellant “did suffer from bouts of insanity... at the time of the incident he was mentally deranged and killed the deceased while he was, by reason of his unsoundness of mind, incapable of knowing the nature of his act.”⁹⁷

There are several cases where the existence of insanity was established, but it was not proved whether or not the defendant suffered from it at the time of the act. One such case is *Muhammad Nawaz v. The State* where the judge said, “On the evidence on record and in the

⁹⁶ *Muhammad Ishaque v. The State*, 1977 P Cr. L J 977.

⁹⁷ *Muhammad Ibrahim v. The State*, 1975 P Cr. L J 910.

circumstances of the case I am satisfied that the appellant was not insane at the time of the committing the crime.”⁹⁸ Therefore, it is vital to establish through evidence the existence and effect of insanity at the time when the act was committed.

3.1.8.3 Incapable of Knowing

- a) **the Nature of the Act:** The third element of section 84 is that the person must be, by reason of unsoundness of mind, incapable of knowing the nature of the act. This is the same as the M’Naughten Test specifies. In fact, section 84 was interpreted in *Muhammad Ishaque v. The State* in the exact words of the M’Naughten rule. The defendant’s cognitive faculties must be completely impaired so that he does not know the nature of his act.
- b) **The act is wrong or contrary to the law:** If defendant is aware that his acts are wrong or contrary to the law, then he is responsible for his act as the irresistible impulses are not considered to be covered by the unsoundness of mind.

The analysis of section 84 of P. P. C. makes it clear that there is an enormous need of development of the law on the matter of insanity defense. For a PTSD case to be successful a broader interpretation is needed. The psychological advancements must be used while making laws and there should be a defense available for those who deserve it. In Pakistan the issue of drone attacks is a widely discussed matter. One aspect of these drone attacks is the

⁹⁸ *Muhammad Nawaz v. The State*, PLD 1976 Lahore 805.

development of PTSD among the survivors. The danger of these survivors harming innocent public also subsists. While their human rights have already been violated by drone attacks, it would add to their suffering if they do not have a defense to use in the courts in case they commit crimes due to their mental disorder.

The current law on insanity is not sufficient to cater the needs of the drone attack survivor defendants; therefore, it needs to develop. The forensic psychology must be used by courts to understand the issues of criminal insanity.⁹⁹ If it was considered as “unfortunate” that the law in our country does not recognize the lesser forms of mental abnormalities in *Muhammad Shafi v. The State*, then it was clear from the words that there is a need for these developments in our legal system.

It is definitely regrettable that the law does not take into account the advancements in science and psychology, as with the growing dread of PTSD development among the drone attack surviving masses, these “lesser forms of mental abnormalities” could lead to huge problems. Therefore, the laws should be made in accordance with the needs of the country and the issue of PTSD should not be ignored in any case. If once their rights have been violated by being subjected to drone attacks, it must be made sure that they’re not violated again, by providing them with a perfect defense system to use in courts.

⁹⁹ Hammad Altaf, “Forensic Psychology and Our Legal System”, taken from < <http://www.qic.edu.pk/publications/pdf/Hammad%20Altaf.pdf>> accessed on 01-01-2012 at 09:14 pm PST.

3.2 DIMINISHED RESPONSIBILITY DEFENSE

The second defense that has been used in the cases of PTSD is the Diminished Responsibility defense. The fact that a defense was formulated other than insanity defense shows that the insanity defense had not quite achieved its goal to be a standard defense to be used in court. The reason is that a person who was not completely insane would not find a defense under the Insanity defense standards. A person can be partially insane and this creates the problem where a person has to be defined as legally sane or insane. These persons are "not quite mad but a borderline case".¹⁰⁰ The responsibility of such a person is lesser than a legally sane defendant and greater than a legally insane defendant.¹⁰¹ Thus there was a need to have another standard of defense for those who have diminished capacity to commit crimes and thus have diminished criminal responsibility.

The defense of diminished responsibility has always been a part of Scottish common law.¹⁰² In UK, however this concept was adopted in section 2(1) of the Homicide Act 1957 which describes that people suffering from abnormality of mind that sufficiently impairs their mental responsibility will not be convicted of murder.¹⁰³ The second clause of the section also describes that such a person will be convicted of manslaughter. It is to be noted that this section was only meant for the murder cases.

¹⁰⁰Smith and Hogan, 186.

¹⁰¹ William M. Roberts, "Criminal Law: Abnormal Mental condition and Diminished Criminal Responsibility", taken from *Concepts of Criminal Law*, (Minnesota: west Publishing Company, 1975), 499.

¹⁰² Glanville Williams, *Textbook of Criminal Law*, 685.

¹⁰³ Homicide Act, 1957, section 2(1), "where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

3.2.1 Elements of the Diminished Responsibility Defense:

There are three elements in the section 2(1) of the Homicide Act and these will be discussed as follows:

- 1- Abnormality of mind
- 2- Substantial impairment
- 3- Mental responsibility

3.2.1.1 Abnormality of Mind

The phrase “abnormality of mind” is very ambiguous and does not clearly define what is to be considered an abnormality of mind. This confusion was somewhat resolved in the *Byrne* case, where the judge said that the abnormality of mind is

...a state of mind so different from that of ordinary human beings that the reasonable man... would term it abnormal. It appears to us to wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether the act was right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.¹⁰⁴

¹⁰⁴ *R v Byrne* [1960] 2 QB 396 at 403.

Thus, not only the inability to understand and distinguish right from wrong, but also the inability to choose to act in accordance with law is covered by the abnormality of mind under the Homicide Act, 1957. It is such a state of mind that is clearly different from the state of mind of a normal human being. The range of mental condition which can be stated as abnormality of mind includes PTSD. However the term has been criticized to be too broad and it is neither a legal term nor a medical one.¹⁰⁵ It is true that the term needs some explanation and clarification as to the extent to which it includes certain psychological disorders.

The psychological injuries are also covered by the term abnormality of mind.¹⁰⁶

3.2.1.2 Substantial Impairment

The second element of the defense of diminished responsibility is the substantial impairment of mental responsibility. This term has also been criticized for being too vague. The question that whether there was a substantial impairment in a case is a question of degree.¹⁰⁷ It refers to the person's inability to control his actions and not the difficulty to control his actions, for the latter is the degree of difficulty and is not covered by the term substantial impairment.¹⁰⁸ The problem with this is that the degree of inability to exercise will-power cannot be measured by any scientific methods and thus it is left to the jury to decide by the facts of the case if there was a substantial impairment or not. The question that whether there was a substantial

¹⁰⁵ "Provocation, Diminished Responsibility and Infanticide", Discussion paper, taken from <http://www.ipc.nsw.gov.au/lrc.nsf/pages/DP31CHP4> accessed on 03-01-2012 at 09:38 pm PST.

¹⁰⁶ *Ibid.*

¹⁰⁷ Richard Card, *Introduction to Criminal Law*, 101.

¹⁰⁸ *Ibid.*

impairment cannot be answered by any medical sciences as it is a question of a subjective estimation.¹⁰⁹ The common law does not help by distinguishing the substantial impairment either; rather it places it somewhere in the middle of the total impairment and trivial impairment.¹¹⁰ Thus the second element of the diminished responsibility defense also remains vague.

3.2.1.3 Mental Responsibility

The third element of the diminished responsibility defense is mental responsibility and it has also created problem for lawyers and judges as its meaning is not clear. The critics call it an “ill chosen expression” as it is not a clinical fact relating to the defendant.¹¹¹ The concept of responsibility cannot be proven through any medical sciences. It is either a legal or a moral concept.¹¹² According to Smith and Hogan this concept is of moral responsibility, for a person who experiences an irresistible impulse has no moral responsibility as he had no control over his actions.¹¹³ On the other hand, Clarkson and Keating do not regard the mental responsibility to be a moral concept as moral questions do not enter in the definition of a crime.¹¹⁴ However, the latter opinion seems to be more plausible as moral devaluation does not lead to punishment for a crime.

¹⁰⁹ Glanville Williams, *Textbook of Criminal Law*, 686.

¹¹⁰ “Diminished Responsibility in Queensland: Rationale, Advantages, Disadvantages”, *Queensland Law Student Review*, 3 (2010), 149, taken from <http://www.law.uq.edu.au/documents/qlsr/recent-issues/vol3/issue2/Martin_2010_3-2_QLSR.pdf> accessed on 03-01-2012 at 10:06 pm PST.

¹¹¹ Glanville Williams, 686.

¹¹² Clarkson and Keating, 295.

¹¹³ Smith and Hogan, 186.

¹¹⁴ Clarkson and Keating, 295.

If it is not a moral concept, then it entails that it is a legal one. The problem here is that the legal responsibility either exists or it does not.¹¹⁵ Either a person is legally responsible for his actions or he is not. There is no middle ground in legal responsibility.

Thus even the third element of the diminished responsibility is a disputed one and is not clear in its meaning.

3.2.2 Function of the Diminished Responsibility Defense

The diminished responsibility defense works by negating the mens rea of the defendant.¹¹⁶ Thus a person, who has diminished capacity, does not have the mental state required for committing a crime. The defense negates the specific intent of the defendant to commit a crime and the defendant asserts that due to his mental disorder he did not have the capacity to form the required mens rea of the crime.¹¹⁷

The defense also allows the psychiatrist testimony on a broader level than the insanity defense as the psychiatrist does not only give the testimony of the mental defect, but goes beyond and denies the mens rea of the crime.¹¹⁸ This has been subjected to a lot of criticism as this is not in the province of psychiatrists to give testimony on the legal issues. And as Judge

¹¹⁵ Glanville Williams, 686.

¹¹⁶ William M. Roberts, "Criminal Law: Abnormal Mental condition and Diminished Criminal Responsibility", 500.

¹¹⁷ Iraq as a Psychological Quagmire.

¹¹⁸ Ibid.

Lawton put it "the cases are tried by courts and not by psychiatrists."¹¹⁹ It is the job of the judge to decide whether the defendant had the required mental state for the crime or not.

However, the defendant must be allowed to bring out evidence to prove that he did not have mens rea.¹²⁰ This does not mean that the psychiatrists can give conclusive evidence of absence of mens rea. They are only allowed to comment on the mental disorder of the defendant and the judge can decide on the merits of the case whether the defendant had the mens rea or not. The evidence can be about the mental disorders or disease of the defendant and under Model Penal Code such evidence is admissible in cases where a defendant denies that he had the mens rea for the crime.¹²¹

In some jurisdictions of USA, the defense has been used as a partial defense.¹²² It means that the defendant is responsible for his acts, but only partially. As a partial defense, it does not completely exonerate the defendant from punishment, but only works as a mitigating factor to reduce punishment.¹²³ It was said in *Commonwealth v. Paolello* that "the diminished capacity defense may only be used when the defendant admits criminal liability but contests the degree of guilt."¹²⁴ Thus a defendant who admits to being guilty will have a reduced sentence by pleading the defense of diminished responsibility. Therefore, the defense is not a complete defense.

¹¹⁹ *Dix* (1982) 74 Cr App Rep 306, CA.

¹²⁰ William M. Roberts, "Criminal Law: Abnormal Mental condition and Diminished Criminal Responsibility", 500.

¹²¹ Model Penal Code, section 4.02(1) (2001).

¹²² *Iraq as a Psychological Quagmire*.

¹²³ *Ibid.*

¹²⁴ *Commonwealth v. Paolello*, 665 A.2d 439 (Pa. 1995).

3.2.3 The Defense of Diminished Responsibility and PTSD

The defense of diminished responsibility has been used in cases of PTSD. In *Fishman*, the defendant brought about the diminished responsibility defense once his insanity defense plea was unsuccessful. The US District Court allowed expert testimony to explain the defendant's behavior.¹²⁵ This gives the experts the authority to comment on the life of the defendant pre-war and their combat experiences that caused PTSD.¹²⁶ And thus help the judge understand the mental condition of the defendant which could result in successful diminished responsibility defense and result in complete acquittal. In a Washington case, the court stated that if there was a link between PTSD and the diminished culpability of the defendant then it is inappropriate to exclude expert testimony in this regard. The Court said that "...PTSD would have impaired the defendant's ability to act with the intent required for a conviction and this evidence would have helped the jury determine whether the defendant was capable of forming the "requisite specific intent to murder" the victim".¹²⁷ Similarly in another case the Vietnam War veteran was accused of murdering his wife. He asserted that he did not have the mens rea for the crime. The court ruled that the evidence regarding his mental responsibility weighed "quite heavily" in his favor.¹²⁸

However, as explained before in some jurisdictions of US, the defense is only acceptable as a partial defense and does not lead to complete acquittal. In *Brink*, the court declared that diminished capacity defense is only a partial defense and works to reduce the degree and

¹²⁵ *United States v. Fishman*, 743 F. Supp. 713, 721 (N.D. Cal. 1990).

¹²⁶ Iraq as a Psychological Quagmire.

¹²⁷ *State v. Bottrell*, 14 P.3d 164, 165-66 (Wash. Ct. App. 2000).

¹²⁸ *Kemp v. State*, 211 N.W.2d 793, 794-95 (Wis. 1973).

nature of crime, but does not completely absolve the defendant from responsibility.¹²⁹ Thus the defense can only mitigate the sentence but does not completely acquit the defendant.

The major flaw of the defense is its lack of basis on properly explained concepts. The fact that even the basic elements of the defense are disputed upon, leads to the failure of defense as a standard defense for PTSD suffering defendants. The concepts abnormality of mind, substantial impairment and mental responsibility need to be defined clearly. Although PTSD is covered by the term abnormality of mind, nevertheless this concept has been subject to criticism for being too broad and would lead to lack of adaptation by courts for being too vague and too vast. The term mental responsibility must also be clarified that whether it means moral or legal responsibility. In any case, the defendant suffering from PTSD must be acquitted completely if his abnormality of mind has been proved by evidence. It makes no sense to still punish the person who bears no responsibility for his actions. A person is either responsible for his acts, or he is not. There is no middle ground. To say that a person is responsible and punishable, but only partially just shows lack of proper legislation in this regard.

3.2.4 Diminished Responsibility Defense in Pakistan

The defense of Diminished Responsibility is not available under the laws of Pakistan. It was stated in the judgment of *Muhammad Shafi v. The State* that "Unfortunately the law in this country does not recognize such lesser forms of mental abnormality and, apart from unsoundness of mind..., the plea of diminished responsibility is not available as a defense in

¹²⁹ *State v. Brink*, 500 N.W.2d 799, 806 (Minn. Ct. App. 1993).

criminal prosecution as in England now under English Homicide Act of 1957.”¹³⁰ Therefore, it is clear that the law does not provide a defense of diminished responsibility.

However, it is interesting to note that the verdict of the case did uphold the concept of diminished responsibility in awarding the sentence. The appellant in the case was given transportation for life instead of death sentence.

Similarly in another case, *Baloo v. the State* the court held that “...taking all these facts and circumstances into consideration; we are definitely of the opinion that the appellant committed the offence while he was completely sick of his life and, therefore, award him a lesser punishment.”¹³¹ In this case too, the appellant was given transportation for life instead of death sentence.

Therefore, it shows that even though there is no law providing a defense of diminished responsibility, the judges have on the merits of the case awarded lesser punishments to defendants who had committed crimes under the state of mental abnormality.

However, as already has been stated the defense of diminished responsibility does not prove to be a standard defense for PTSD, as (i) it is not accepted universally, (ii) it is not well defined, and (iii) it does not completely exonerate the defendant of the responsibility. Therefore, it is not the proper defense to be used for PTSD.

¹³⁰ *Muhammad Shafi v. The State*, PLD 1962 SC 472.

¹³¹ *Baloo v. The State*, PLD 1956 Karachi 579.

3.3 AUTOMATISM

One of the defenses that have been used in cases of PTSD is the defense of Automatism. This defense is based on the voluntary element of a crime. It is an established principle of criminal law that a crime has to be committed by a person voluntarily, for him to be liable to punishment. In simple words, where an act is outside the control of a person's mind, the act is an involuntary act and the person acted in a situation of automatism.¹³²

The legal definition of automatism is "any abnormal state of consciousness (whether confusion, delusion or dissociation) that is regarded as incompatible with the existence of *mens rea*, while not amounting to insanity."¹³³ Thus if a person has acted without planning his acts, in a sudden act of his reflexes, his act is involuntary.

A defense of automatism negates the *mens rea* of the crime by establishing that there was no voluntary control on the act by the defendant.¹³⁴ Since the act was not voluntary, the defendant did not have the required mental state to commit the crime.

In *Bratty*, it was stated that no act which is involuntary is punishable. The automatic acts were described to be those acts that are done 1) by the muscles without any control by the mind such as spasm, a reflex action or convulsion, 2) acts done by persons who are not aware of what they are doing, such as in the state of somnambulism (sleepwalking).¹³⁵ Therefore if a person acts without planning his act in the act of reflexes, his acts are done in the state of

¹³² Richard Card, *Introduction to Criminal Law*, 104.

¹³³ Paul H. Robinson, *Fundamentals of Criminal Law* (Boston: Little, Brown & Company, 1988), 907.

¹³⁴ Julio Arboleda-Florez, "On Automatism", *Lippincott Williams & Wilkins*, 15(2002), 574 taken from http://post.queensu.ca/~ja9/My_Homepage_Files/Download/On%20Automatism.pdf, accessed on 09-01-2012 at 09:15 pm PST.

¹³⁵ *Bratty v. Attorney General for Northern Ireland*, [1961] 3 All E.R. 523.

automatism and thus he is not responsible for the consequences. The MPC further describes the involuntary movements and adds the acts done under hypnosis and the acts that are not otherwise a result of the effort of the actor.¹³⁶

There are two opinions about the way an automatism defense works. The first view states that the defense of automatism denies the *actus rea* of the crime.¹³⁷ When there was no willed body movement, therefore there was no act committed by the defendant. According to Williams, this notion of denying the *actus rea* is unnecessary except in the cases of strict liability.¹³⁸ It is because in cases of strict liability *mens rea* is not taken into account, therefore in such cases denying the *actus rea* plays a crucial role in ascertaining the liability of the defendant, whereas in other case denying *mens rea* is sufficient.

The other view, however, does not negate the *actus rea*, but focuses on the negation on *mens rea* of the crime. The act was committed, but not voluntarily, therefore the absence of required mental state exonerates the defendant from punishment. The acquittal of defendant cannot be based "upon the absence of an "act." Clearly defendant has killed or wounded..."¹³⁹ We cannot say that there was no act done, just because it was not voluntary. It is clear that the

¹³⁶ Model Penal Code, "(1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

(a) a reflex or convulsion;

[*578] (b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual ..."

¹³⁷ Adam Caine, "Fallen from Grace: Why Treatment should be Considered for Convicted Combat Veterans Suffering from POST Traumatic Stress Disorder", *UMKC Law Review*, 78 (2009), 215- 239.

¹³⁸ Glanville Williams, *Textbook of Criminal Law*, 663.

¹³⁹ *Ibid*, 665.

act was committed. The fact to be considered for acquittal is the lack of *mens rea* by the defendant.

3.3.1 Kinds of Automatism

The two kinds of automatism are: sane automatism and, insane automatism.

In the sane automatism, the state of automatism is not caused by any disease of the defendant. Instead it is caused by external factors such as hypoglycemia, concussion after getting a blow on the head, use of alcohol or drugs.¹⁴⁰ When a person is suffering from hypoglycemia, for example, which is a state of low blood sugar, and commits a crime in the state of automatism caused by such condition, such a person's automatism is not founded in any mental disease and thus it is non-insane automatism. In *R v. Quick*, P. Gresson was quoted to describe that automatism can be due to a mind's disease or it can be caused by external factors. It was said that "Automatism, that is action without conscious volition, may or may not be due to or associated with the "disease of the mind."¹⁴¹ Therefore, the acts which are caused by external factors leading to automatism fall under non-insane automatism

The insane automatism is the state of unconsciousness caused by a disease of mind. The acts committed in the state of somnambulism come under the insane automatism¹⁴² as somnambulism is a defect due to a disease of mind. A person who commits an offense in a

¹⁴⁰ "Actus Reus: Automatism", *University of London*, 29, taken from < http://www.londoninternational.ac.uk/current_students/programme_resources/laws/subject_guides/crim_law/criminal_ch3.pdf> accessed on 09-01-2012 at 08:45 pm PST.

¹⁴¹ *R v. Quick and Paddison*, [1973] 3 All E.R. 347.

¹⁴² Actus Reus: Automatism, *University of London*, 27-28.

dissociative state will also be dealt under the insane automatism because the dissociative states are caused by the disease of mind. A case of a defendant suffering from PTSD also comes under the insane automatism, as the defendant's dissociative state was caused by PTSD which is a disease of mind.

3.3.2 PTSD and Defense of Automatism

The Defense of Automatism has been used in the cases of PTSD where the defendant suffers from the dissociative state of PTSD. The training of the war veterans makes them do certain acts automatically. The soldiers are trained to act whenever they experience a certain situation. In case of any loss suffered by their unit, their reaction is attack on the enemy.¹⁴³ When these soldiers return from war or are off duty, they start reacting with violence if they suffer a loss or even apprehend a future loss. In such situations they do not premeditate their acts, but act instinctively in a state of autopilot according to their well trained habits. In *Lisnow*, the defendant had struck the maitre d' twice in a restaurant. The court overturned his conviction on the defense of automatism as it was testified that his service in Vietnam had caused PTSD due to which he often experienced flashbacks and his acts in the restaurants were also done in one of those "blackouts".¹⁴⁴ In another case of Post Traumatic Automatism, the court stated that the defendant had experienced suffered from automatism caused by the blow on head during the fight with the victim and thus acquitted him on a charge of non-capital murder.¹⁴⁵

¹⁴³ Iraq as a Psychological Quagmire.

¹⁴⁴ *People v. Lisnow*, 88 Cal. App. 32d1 [1978].

¹⁴⁵ *Bleta v. The Queen*, [1964] S.C.R. 561.

It appears to be a very good defense for the defendants suffering from PTSD, as whether it negates the *actus rea* or *mens rea*, it would result in complete acquittal if it is established through evidence that the defendant was in a state of automatism and acted like an automaton at the time of the committing of the crime. Since, the act was not voluntary and was a result of the defendant's instincts to act with violence, therefore no liability attaches. Similarly in the case of a drone attack survivor, if the defendant apprehends the danger and ends up attacking another person he perceived to be threatened by, in a state of automatism and by acting through reflexes, he would find complete acquittal and will not be liable to punishment. The problem with the defense of automatism however lies in the fact that it is only available to those who suffer from the dissociative state of PTSD.¹⁴⁶ The defendants suffering from the sensation seeking syndrome and the depression-suicide syndrome will not be able to find use of this defense.

3.3.3 Automatism under the Law of Pakistan

Section 39 in the second chapter of Pakistan Penal Code 1960 gives the definition of voluntary acts. The definition given in section 39 only describes that an act is voluntary when a person intends to cause it.¹⁴⁷ The section does not give any exceptions through which involuntary acts could be described. The definition also fails to describe the difference between "intention" and

¹⁴⁶ Iraq as a Psychological Quagmire.

¹⁴⁷ Pakistan Penal Code, 1860, section 39, "Voluntarily: A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it."

“knowledge of likelihood.”¹⁴⁸ The real problem with the section, however, is not in its lack of explanation of the voluntary act. The problem is in not defining the involuntary acts. The acts which a person does not premeditate or plan and are committed by a person without any intention, and the acts done in the reaction of a situation by means of reflex must be defined in the Pakistan Penal Code.

The lack of definition of involuntary acts is not the only flaw in the legalization of Penal Code. The fact that there is no defense of automatism whatsoever in the law, is also very noteworthy and unfortunate. Even the crime of murder, Qatl e amd in section 300 of PPC does not give include involuntary acts in its exception. The exceptions include such acts of murder that are done in sudden and grave provocation but the acts done in a state of automatism are not included. In section 318, however, we find a case where a murder takes place without any intention.¹⁴⁹ Although not specifically related to a case where a person acts with violence thereby causing death or serious harm to others in a state of automatism, this section does refer to the act where a person does those act without any intention. Since there is no *mens rea*, the person cannot be convicted of qatl-e-amd. However, he is not completely free from liability. In fact section 319 describes the punishment for qatl-i-khata (murder by mistake) to be diyat.¹⁵⁰ Although, there is no mention of acts done in a state of automatism, the section 318 can be a basis for legislation on automatism. As our law has already recognized “unintentional”

¹⁴⁸ Shahid Hussain Qadri, *Commentary on Pakistan Penal Code 1860* (Lahore: Mansoor Book House, 2000), 59.

¹⁴⁹ Pakistan Penal Code, 1860, section 318, “Whoever, without any intention to cause death of, or cause harm to, a person causes death of such person, either by mistake of act or by mistake of fact, is said to commit qatl-i-khata.”

¹⁵⁰ Pakistan Penal Code, 1860, section 319, “Whoever commits qatl-i-khata shall be liable to diyat.

Provided that, where qatl-i-khata is committed by rash or negligent act, other than rash or negligent driving, the offender may, in addition to diyat, also be punished with imprisonment of either description for a term which may extend to five years as ta’zir.”

killing in section 318, There is no question why it should not recognize and formulate a defense of automatism for those who suffer from such diseases of mind so that they commit certain acts without realizing what they are doing and without any intentions.

3.4 SELF-DEFENSE

Another defense that has been used in cases of PTSD is self-defense. Here the defendant alleges that he acted to protect himself against a perceived use of force, when in reality there might have been no such threat present.

The self-defense has been defined in Model Penal Code as “the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”¹⁵¹ A situation where a person suffering from PTSD perceives that another person is about to attack him and reacts with violence, comes under the self-defense because the defendant had acted believing himself to be under attack or about to be attacked. This type of defense in PTSD has been compared to the Battered Spouse Syndrome where a wife attacks her husband when she feels she is provoked in a way that she feels attacked and responds with a manner as if defending herself.¹⁵²

¹⁵¹ Model Penal Code, 1962, section 3.04 (1).

¹⁵² The Warrior Returns.

When war veterans perceive that they are going to be attacked, they get into their survivor mode and react with violence in self-defense.¹⁵³ In reality there might be no such threat of use of force against them. In self-defense the judge has to be satisfied that there was a reasonable apprehension of use of force against the defendant that lead to his reaction of violence.¹⁵⁴ “Although the requirement of a reasonable belief might serve as a qualifier in the use of this defense, the veteran could argue that the PTSD had a substantial effect of what he viewed as reasonable under the circumstances.”¹⁵⁵ This reasonable apprehension can be based on PTSD in such a way that because of this mental disorder the defendant considered a normal event to be suspicious enough to have believed that he was about to be attacked.

3.4.1 Self-defense as a standard for PTSD

Self-defense is a suitable defense standard for PTSD for those who suffer from the dissociative of PTSD. A PTSD sufferer in dissociative state, when experiences flashback, can take a police officer for an enemy soldier who is about to attack him and thus would react with violence to avoid being attacked by the police officer. When in reality, there was no danger of attack. The flashbacks are not the only factor that can awake the sense of attack in the PTSD sufferers. A PTSD sufferer is hyper vigilant. He might act with violence to defend himself in the most ordinary situation as well. For example, he sees a person reaching in his pocket for money and because of hyper vigilance fears that the person is taking out a gun to shoot him, and ends up

¹⁵³ Iraq as a Psychological Quagmire.

¹⁵⁴ The Warrior Returns.

¹⁵⁵ “PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System”, *Marquette Law Review*, 68:647, 24, taken from < http://www.newlearner.com/courses/hts/cln4u/pdf/defences_case_law.pdf> accessed on 27-01-2012 at 12:30 am PST.

attacking that person. In such a case, the PTSD sufferer feels justified in using force because he believes he is acting in self-defense.

However, the self-defense is only suitable for those PTSD sufferers who fear attack and it is not a usable standard for PTSD sufferers in their sensation seeking syndrome and depression suicide syndrome states.

3.4.2 Self-defense in Pakistan

Section 96 of PPC gives the right of self-defense.¹⁵⁶ The right of self-defense is recognized as one of the most necessary rights as the “bad men” will not be restrained unless they fear individual resistance.¹⁵⁷ Under section 96, nothing is an offence which is done in self-defense. The use of self-defense however cannot exceed the threat of use of force that is used against the person. The section justifies a crime which is committed in self-defense against an attack.¹⁵⁸ Reasonable apprehension was discussed and it was said that the reasonable apprehension of danger to the body must be taken into account and not the amount of actual injuries while dealing with a case where a person acted in self-defense.¹⁵⁹ It was also declared that reasonableness of apprehension depends on the weapon which was used to attack.¹⁶⁰ It means that if person is attacked by a piece of log, his apprehension would be unreasonable if he

¹⁵⁶ Section 96, Pakistan Penal Code 1860, “Nothing is an offence which is done in the exercise of the right of private defense.”

¹⁵⁷ Shahid Hussain Qadri, *Commentary on Pakistan Penal Code 1860*, 99.

¹⁵⁸ *Ibid*, 100.

¹⁵⁹ 1975 P Cr. LJ 772.

¹⁶⁰ *Ibid*.

thought his attacker was going to kill him. However, if he saw his attacker pull out a gun, his apprehension of getting killed would be reasonable.

The section 96 only gives the right of self-defense when a person is attacked. There is no mention of perceived attack in the defense. Therefore, if a drone attack survivor perceives another person to about to attack him and acts in self-defense, he would not find acquittal under section 96. Although, in his own mind he would be justified for using force to defend himself, he would find not acquittal because the law does not recognized perceived danger as sufficient for the use of force in self-defense. The law, therefore, needs to be extended for cases of persons suffering from PTSD.

3.5 PROBLEMS IN CREATING A PTSD DEFENSE

Following are the problems that occur with a PTSD Defense:

- a) Causation
- b) Jury Bias
- c) Malingering
- d) Recidivism
- e) Stigma

These problems will be discussed one by one.

- a) **Causation:** The problem of causation comes where it has to be proved that the mental disorder caused the commission of crime. It is not enough to establish the existence of

PTSD, but the defendant also has to prove that there is a link between PTSD and his conduct.¹⁶¹ "The illness maybe completely unrelated to the conduct."¹⁶² It means that the first obstacle that has to be crossed after establishing the existence of PTSD is to prove that PTSD became the cause of the criminal conduct of the defendant. The rule of causation becomes a problem while creating a PTSD defense when the judge is skeptic and not ready to accept the mental condition of defendant, i.e. having PTSD.¹⁶³ Although they may accept that the person suffers from PTSD, they will not be so ready to accept that their crime was due to their mental condition.

b) Jury Bias/ Judge Bias: The second problem in creating a PTSD defense is jury bias. The judges and the juries are skeptic towards the fact that the defendant suffers from PTSD in the first place. The reason is that the psychological diagnosis is made on the defendant's self account of events.¹⁶⁴ The jurors are less likely to accept such account of events as true. Secondly, the jurors have the misconception that once acquitted; the defendant will be released in the society where he will endanger all.¹⁶⁵ The jury must be instructed of the outcomes of their verdict and it should be clarified that the acquitted defendant will be institutionalized for his disorder. In one case, the district judge refused to instruct the jury on the outcome of their verdict¹⁶⁶, and this is the biased attitude of the judge toward a defendant who pleads insanity defense.

¹⁶¹ The Warrior Returns .

¹⁶² Clarkson and Keating, 297.

¹⁶³ The Warrior Returns.

¹⁶⁴ Ibid.

¹⁶⁵ Curt R. Bartol and Anne M. Bartol, *Psychology and Law*, 127.

¹⁶⁶ Ibid.

c) **Malingering:** The third problem that contributes even to the jury bias is the fear of malingering. The problem is that, as more and more war veterans are informed about PTSD, its symptoms and effects, they are likely to raise false claims and defenses.¹⁶⁷ In *Lockett*, the defendant's plea of non responsibility was accepted by the court for psychiatrists gave testimony that he suffered from PTSD which he had developed as a result to his Vietnam experiences. Later, the court found through evidence that Lockett had never served in Vietnam.¹⁶⁸ This is a great example of how PTSD can be faked by defendants to avoid acquittals. Although, this problem can be avoided by careful medical and psychological examinations, it still contributes to the fear of jury to acquit a person claiming to be suffering from PTSD.

d) **Recidivism:** Recidivism is the fear of repeating one's criminal conduct. This factor also contributes greatly to the jury's reluctance to acquit a defendant suffering from PTSD. They fear that the acquitted person will be released in the society where he would commit crimes of the same nature. The jury will be uncomfortable with the idea of releasing a person who would "recreate" his crime and they will be least likely to acquit such defendant when there's a lack of curative relief.¹⁶⁹ This problem can be avoided by making a verdict of institutionalization of the defendant suffering from PTSD as necessary for every acquittal. In this way, the jury will not feel reluctant to acquit a defendant suffering from PTSD when it will be aware that the person will be treated for his mental disorder.

¹⁶⁷ Iraq as a Psychological Quagmire.

¹⁶⁸ *State v. Lockett*, [1983] 468 N.Y.S. 2d 802.

¹⁶⁹ The Warrior Returns.

e) **Stigma:** "Stigma may be particularly pronounced among military service members with a psychological problem."¹⁷⁰ Stigma is a factor that does not affect the judge decision, but affects the defendant's decision of whether or not to raise a PTSD Defense. In fact, the fear of stigma prevents the war veterans from even taking the health care benefits and treatment.¹⁷¹ They fear that they will be labeled as "crazy" in the society and this prevents them from raising a PTSD defense. Thus, the defendants who deserve to be acquitted and treated have to suffer when they are reluctant to raise PTSD Defense for the fear of stigma.

This problem can be avoided when the awareness programs are arranged in society to realize that PTSD is a disorder like any other disease and the person suffering from it is not crazy. The media can be of great help in creating such awareness. This way the defendants suffering from PTSD will not fear the labeling that they would have to endure otherwise.

As it has been observed that each defense separately taken is not a sufficient standard defense for the PTSD suffering defendants. There is need for the legislation of such a defense as would satisfy the needs of the persons suffering from all kinds of PTSD. It must include a clause which should provide suitable defense for the persons suffering from dissociative state PTSD. There should also be a clause that should suffice as a defense for the defendants suffering from depression suicide syndrome and the sensation seeking syndrome; and in case of drone attack victims, the revenge seeking behavior caused by PTSD.

¹⁷⁰ Matthew Tull, "PTSD and Stigma", taken from <<http://ptsd.about.com/od/treatment/a/Stigma.htm> > accessed on 14-02-2012 at 08:24 pm PST.

¹⁷¹ Melissa Daoud, "Stigmatization of Iraq Veterans with PTSD, depression or chronic back pain", *Sans Jose State University*, 3651 (2009), 2 taken from <http://scholarworks.sjsu.edu/cgi/viewcontent.cgi> accessed on 14-02-2012 at 08:31 pm PST.

However, the defense should not be provided without any clause referring to the treatment of such people. Whether these defendants should be provided with treatment or not, has been discussed in the next chapter.

CONCLUSION

It has been observed that a person suffering from PTSD is entitled to the right of fair trial and can raise a defense in criminal proceedings. Whether this defense be of insanity or diminished responsibility; automatism or self defense; it was noted that none of these defenses cater to all kinds of PTSD. Therefore, a standard PTSD defense is needed, which if successfully pleaded, will result in complete acquittal. The question of how to deal with acquittees is the subject of discussion in next chapter.

Chapter Four

THE RIGHT TO TREATMENT AND COMPENSATION

INTRODUCTION

Once the war veteran or drone attack victim defendant has been acquitted by the law, the question arises as to what should be done about him. Surely, a person who has PTSD of such severity that he ended up in criminal proceedings, cannot be let free in the society. This chapter discusses whether or not such persons should be imprisoned. The second part of the chapter discusses their entitlement to compensation under the existing laws.

4.1 THE RIGHT TO TREATMENT

The war veterans and the drone attack victims who suffer from PTSD and commit crimes not only have the right to PTSD defense but also the right to be treated for their disorder. If they are acquitted and let free in the society without having being treated for their disorder, then they pose a threat to society. Since, they must not be punished; there is need for another solution to deal with recidivism. Recidivism is the "failure to maintain a crime-free life after having once been convicted of an offence."¹ So basically, the person will not be able to live his/her life without indulging in criminal activities.

¹ Paul F. Cromwell and Rolando V. del Carmen, *Community-Based Corrections* (USA: Wadsworth, 1999), 313.

The purpose of punishment is to reduce recidivism, and it has already been discussed that the defendants suffering from PTSD do not deserve to be punished. Since, they do not deserve to be punished; they cannot be imprisoned like normal criminals.

In UK, when a person is found GBMI, a hospital order is made to send the offender to a special hospital, and two doctors have to certify that the offender suffers from serious mental illness.² The hospital where the offender must be sent is selected by Home Secretary.³

In USA Constitution eighth amendment the right to treatment is available to all prisoners.⁴ The right to treatment however is not given without limitations; the right is only available to the extent to "alleviate acute symptoms of mental illness."⁵ It means that the treatment would not be provided any further as soon as the patient recovers from the most severe symptoms of his disease, mental or physical. This right however is for the prisoners who go to regular jails. The persons who suffer from severe mental disorders such as PTSD and commit crimes due to their disorders have the right to treatment up to full recovery because until they are cured, they continue to be a threat to general public.

Therefore they have two kinds of rights:

- 1- The right to be institutionalized in Correction Institutions
- 2- The right to be treated for their disorder

² Glanville Williams, *Textbook of Criminal Law*, 650.

³ Ibid.

⁴ See for details "USA Bill of Rights".

⁵ "A Guide to Mental Illness and the Criminal Justice System: A System Guide for Families and Consumers", (Department of Policy and Legal Affairs: National Alliance on Mental Illness) taken from < <http://www.nami.org/Content/NavigationMenu/NAMILand/CJguidetomentalillnessandcjsystem.pdf> > accessed on 02-04-2012 at 02:30 pm PST.

These two rights are interlinked. In fact the right to be institutionalized is the base for the right to treatment. This issue will be discussed further.

4.1.1 The Right to be institutionalized in Corrections Institutions

The defendants suffering from PTSD must be institutionalized in facilities that work specifically for the correction of criminals. They must not be imprisoned with other normal criminals. There are two questions that can be posed with regards to institutionalization of persons with PTSD.

- 1) Why should not they be imprisoned?
- 2) If imprisonment is not a solution then why should they not be sent to regular mental hospitals?

The answer to first question is this: The conditions of prisons are not suitable for the persons who are suffering from mental disorders. The prisoners, who do not have high levels of mental illness, when they are imprisoned, start suffering from temporary mental illnesses.⁶ When the normal prisoners can develop mental illnesses due to the conditions of prison, it is not suitable to send a person who is already suffering from mental disorder to prisons.

Second, the purpose of imprisonment is to punish the criminal. In case of the person suffering from PTSD, the purpose is not punishment because his crime was a result of mental disorder. Therefore, sending him to prison is not a suitable solution.

⁶ Lee H. Bowker, *Corrections: The Science and the Art* (New York: Macmillan Publishing Co., Inc., 1982), 130.

The person with PTSD has many medical needs that must be dealt by "competent medical personnel."⁷ These needs cannot be met in normal prisons. Only 60 % of the mentally ill prisoners reported that they had received mental health treatment since imprisonment in the federal prisons of USA.⁸

According to Bowker, this question is a lot complicated than it seems. "Transfer between prisons and mental hospitals are limited by policies of state agencies, court decisions, enacted laws and the attitudes of institutional administrators."⁹

However, a simple way to approach the answer is that the person who suffers from PTSD and commits a crime is not like an ordinary person suffering from mental illness. It can not be ignored that he has committed a crime. Therefore, he should not be sent to a regular mental hospital, but a correction institution which has qualified staff members to deal with the criminals who suffer from mental disorders. Corrections institution means that there are special programs available in the institutions that work to improve the condition of the person who is institutionalized.¹⁰

The Correctional Institutions use different kind of therapies to reduce recidivism in the committed persons. They use methods such as psychotherapy, psychodrama, transactional

⁷ Henry Burns Jr., *Corrections: Organization and Administration* (Minnesota: West Publishing Co., 1975), 391.

⁸ "A Crime of Insanity: The Jailed and Imprisoned Mentally Ill", taken from <http://www.pbs.org/wgbh/pages/frontline/shows/crime/jailed/> accessed on 02-04-2012 at 02:20 pm PST.

⁹ Lee H. Bowker, *Corrections: The Science and the Art*, 129.

¹⁰ Patrick R. Anderson and Donald J. Newman, *Introduction to Criminal Justice* (New York: McGraw-Hill Inc., 1993), 352.

analysis, reality therapy, behavior modification.¹¹ These methods aim at modifying the behavior of criminals so that they will not commit crimes once they leave the institutions.

Sending the persons with PTSD who commit crimes to corrections is not just for their advantage but also for the society's benefit.¹² The crime is not the problem of an individual but for the whole society.¹³ Therefore, when the person with PTSD is sent to a correction, it is not only to his benefit, but to the benefit of whole society because once he leaves the correction completely treated, he will not be a danger to the society anymore.

Therefore, the defendants who suffer from PTSD must be sent to correctional institutions.

4.1.2 The Right to receive treatment

The judgment of a case in PTSD case must be made according to the "offender's needs rather than for the purpose of punishment."¹⁴ Therefore, where a person suffering from PTSD is institutionalized, his needs must be fulfilled and the right to treatment is one of them.

The type of treatment that a person suffering from PTSD may need is not a specific one. In fact, the relation between types of treatment and the type of offender is not really clear

¹¹ For full details see Clemens Bartollas, *Correctional Treatment: Theory and Practice* (New Jersey: Prentice-Hall Inc., 1985) 121-138.

¹² Howard Jones, *Penal Theory Now: Society Against Crime* (New York: Penguin Books, 1981), 37.

¹³ Ibid.

¹⁴ Martin Iller and George Goodwin, *Criminal Litigation* (London: Butterworths, 1985)284. The authors explain the different kinds of sentences and emphasize that the purpose of individual sentences is to keep in mind the needs of the offender rather than to punish him for his conduct.

yet.¹⁵ It would be effective if it is specified that what kind of treatment is best suited for those persons who are suffering from one kind of mental disorders, but the fact is that it is not possible to do so. For each type of offender has the need for a different type of treatment.¹⁶ It is possible that one kind of treatment that is effective in reducing recidivism in one offender with PTSD may have no effect whatsoever on another offender with PTSD.¹⁷ The reason behind this is that the offenders not only differ from each other in the form but also in the meaning and reasons for their offence.¹⁸ In PTSD, the problem is also that the experiences of trauma is different for every person, therefore, they all need different type of treatment for their disorders.

Thus, it is necessary that the person suffering from Post Traumatic Stress Disorder receives sufficient treatment by having regular sessions with their psychiatrists in order to recover from their trauma experiences. Only if they are treated properly, the recidivism can be reduced.

Whether or not the treatment is compulsory is another issue. Some scholars are against involuntary commitment in the correctional institutions. According to Norval Morris all treatment programs must be voluntary.¹⁹ According to the National Advisory Commission "No offender should be required or coerced to participate in programs of rehabilitation or

¹⁵ Roger Hood and Richard Sparks, *Key Issues in Criminology* (London: Weidenfeld and Nicolson, 1970) 193.

¹⁶ Ibid.

¹⁷ Ibid, 195.

¹⁸ Gordon E. Misner, *Criminal Justice Studies: Their Transdisciplinary Nature* (London: The C.V. Mosby Co., 1981) 307.

¹⁹ Patrick R. Anderson and Donald J. Newman, "Introduction to Criminal Justice."

treatment nor should the failure or refusal to participate be used to penalized an inmate in any way.”²⁰

However, this cannot be applied in the case of offenders who are suffering from mental disorders, and if they are not treated, then since they are not imprisoned either, they would most likely continue to be a danger to the public.

In *Washington v. Harper*, the court held that “forcing such treatment is acceptable when an inmate is dangerous either to self or others, or when the treatment is in the best medical interests of the inmate.”²¹ The treatment must be mandatory for the persons who suffer from PTSD because unless they are fully recovered, they will continue to be a threat to the public.

The critics of treatment programs hold the belief that “violation must be punished.”²² Although, it can be held true for normal offenders, this is not applicable in offenders with mental disorders. The purpose of punishment is reducing recidivism, and the treatment is the only solution to reduce it in the mentally ill offenders.

There have been many projects that have been taken by the corrections institutions in different states of USA, and not all of them have been effective. But they can be taken as something to build upon. There was Walter Reed Project that was intended for soldiers who became the violators of law, which aimed at modifying the behavior of soldiers.²³ Another

²⁰ Ibid.

²¹ Ibid.

²² Harry W. More Jr., *Criminal Justice Management: Text and Readings* (Minnesota: West Publishing Co., 1977) 235.

²³ Michael T. Nietzel, *Crime and Its Modification: A Social Learning Perspective* (New York: Pergamon Press, 1979) 121.

project was the Junction City Treatment Center, which was aimed at treatment of those persons who had "special mental health and adjustment needs."²⁴

Therefore, there must be research on the best suited methods for the treatment of the offenders with PTSD so that when they leave their institutions, they are no more a threat to the society.

4.2 THE RIGHT OF VETERANS TO COMPENSATION

The veterans who develop PTSD due to their participation in combat are entitled to disability benefits. This right is available to them even under International Human Rights Law. Article 25 of UDHR gives the right of "security in the event of unemployment, sickness, disability..."²⁵ Therefore, the veterans who develop PTSD due to their service in the combat can not only claim compensation due to the fact that PTSD is a disability, but also in case that PTSD leads to unemployment.

The veterans serve their country and due to their service they develop PTSD. This leads to unemployment in many veterans, as has been discussed before, and they are unable to earn for themselves and their families and struggle financially. It is the government's responsibility to support them in their time of need.

²⁴ Ibid, 138.

²⁵ Article 25, Universal Declaration of Human Rights (1948), "1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

There are however, certain conditions that must be fulfilled in order to receive disability benefits for PTSD.

- 1) It must be proved that PTSD is a result of combat experiences.
- 2) PTSD has impaired the social functioning of the veteran.

In USA, the Department of Veteran Affairs (DVA) has been established to deal with the claims of PTSD and grant compensation to those veterans whose claims are successful. There is also a Board of Veteran Appeals (BVA) that hears the appeals on any rejected claims.

The veterans receive disability benefits according to the severity of impairment they suffer due to PTSD. The benefits can vary from a few dollars a month to a few thousand dollars a month.²⁶ For example, it can range from 115 dollars a month to 2500 dollars a month.²⁷

The degree of impairment is taken into consideration to decide the compensation for the veteran suffering from PTSD.

The VA uses the General Rating Formula (GRF) to determine the compensation for the veterans. The veteran's disability is diagnosed on the Global Assessment of Functioning Scale (GAFS).²⁸ The veterans who have the lower scores on GAF are considered to have severe social functioning impairments, thus they are entitled to higher rates of compensation.²⁹

²⁶ "The PTSD Help Network: VA Compensation", taken from <<http://www.ptsdhelp.net/id9.html>> accessed on 06-04-2012 at 06:07 pm PST.

²⁷ Scott Simonson, "Back from War, A Battle for Benefits: Reforming VA's Disability Ratings System for Veterans with Post-Traumatic Stress Disorder", *Arizona Law Review*, 50 (2008), 1177-1204.

²⁸ "How the VA Evaluates Levels of Disability", taken from <http://www.vva.org/ptsd_levels.html> accessed on 06-04-2012 at 06:10 pm PST.

²⁹ Ibid.

The GRF has the scales starting from 0% to 100%. A veteran whose disability score is 0% is not entitled to any compensation.³⁰ The veterans with a 100% rating receive the highest benefits.

According to Simonson, the GRF is not the appropriate to deal with persons suffering from PTSD. The problem is simple that it is a "general" rating formula and there is need for a rating formula specifically for PTSD.³¹ This problem was highlighted in the *Mauerhan case*. In this case, the Vietnam veteran claimed that his rating of 30% was too low compared to his PTSD. According to the medical results his claim was valid but the VA had used the GRF and accordingly his PTSD symptoms did not match the symptoms of 50% disability.³² The argument of claimant was that the VA should use DSM-IV to check the symptoms of PTSD instead of the GRF. However, Mauerhan was denied relief as it was held that the symptoms given in GRF are not requirements that must be fulfilled.

In another case, the veteran had the same claim that the disability rating from GRF was too low. The veteran went to appeal. The Veteran Court stated that "It is apparent from a review of the Board decision that it focused on whether or not appellant had any of the listed symptoms as opposed to discussing what effect appellant's many documented PTSD symptoms had on his occupational and social impairment."³³ It means that while assessing the level of disability of the veteran the authority must take into account the symptoms the veteran has rather than the symptoms that he does not have.

³⁰ Ibid.

³¹ Ibid.

³² *Mauerhan v. Principi*, 16 Vet. App. 436 [2002].

³³ *Trice*, [2007] WL 3083552, at 1.

Also the symptoms must be looked at to the extent of the impairments that they cause while determining the rating of disability, and not just for their mere existence.³⁴ The presence of a few symptoms should not mean that the veteran is denied a higher rating, instead the effect of the symptoms and the level of impairment must be taken into account for determining a disability rating.

There is need for a specific evaluation standard for PTSD to determine the level of disability in a veteran suffering from PTSD. The new evaluation standard must be based on the recent developments in the field of psychology to cater for the needs of the veterans.

4.3 THE RIGHT OF DRONE ATTACK VICTIMS TO COMPENSATION

Like veterans, the drone attack victims suffering from PTSD are also entitled to compensation. It is, however, unfortunate that the drone attack victims suffering from mental illness in Pakistan have not been taken into consideration as being entitled to any compensation.

The families of the dead drone attack victims are compensated but there has not been any program or authority that deals with compensations for the victims who develop mental illnesses due to being subjected to continuous attacks that threaten their lives.

At one occasion, the government of Pakistan announced that the families of the people who died in USA drone attacks will be compensated with Rs. 300,000 and the injured victims

³⁴ Scott Simonson, "Back from War, A Battle for Benefits: Reforming VA's Disability Ratings System for Veterans with Post-Traumatic Stress Disorder."

will receive Rs. 100,000.³⁵ Similarly, on another occasion it was announced that the families of the dead, due to the USA drone attacks, will receive US \$ 3,530.³⁶

The tribes leaders have also demanded that USA must pay compensation to the drone attack victims.³⁷

However, there is no announcement by the government to compensate the victims who suffer from mental illnesses due to the drone attacks. There are not even any laws regarding compensation for the victims.

The victims of drone attacks are entitled to compensation under Article 8 of UDHR.³⁸ The drone attacks are a violation of the right to peace. Therefore, if the civilians who live in the areas of drone attacks develop mental illnesses due to the violation of their right, it is the duty of the government to make compensations to them.

There is also a view that the victims of drone attacks can demand compensation from the USA and USA itself is liable to pay compensation to the victims.³⁹ Under the Alien Tort

³⁵ "Drone Attack: 'Victims' families to get Rs 0.3 m each", *Express Tribune* on 27-03-2011, taken from <<http://tribune.com.pk/story/138047/pakistan-to-compensate-us-drone-strike-families-official/>> accessed on 11-04-2012 at 09:25 pm PST.

³⁶ "Pakistan to Compensate the Victims of March 17 Drone Attack", online published on 26-03-2011, taken from <<http://dawn.com/2011/03/26/pakistan-to-compensate-victims-of-march-17-drone-attack/>> accessed on 11-04-2012 at 09:29 pm PST.

³⁷ "MQP Demands Compensation for Drone Victims' Families", published online on 20-03-2011, taken from <<http://www.pakistantoday.com.pk/2011/03/20/news/national/mqp-demands-compensation-for-drone-victims-families/?thick=off>> accessed on 11-04-2012 at 09:34 pm PST.

³⁸ Article 8, Universal declaration of Human Rights (1948), "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."

³⁹ Farah Khalid Khan, "Drone Victims' Right to Compensation", published in *The Nation* on 24-09-2011, taken from <<http://nation.com.pk/pakistan-news-newspaper-daily-english-online/Opinions/Columns/24-Sep-2011/Drone-victims-right-to-compensation>> accessed on 08-10-2011 at 09:45 pm PST. <<http://rsilpa>

Claims Act (1789), USA is liable to pay compensation to any alien who has suffered from a tort, at the hands of USA, committed in violation of law.⁴⁰ According to Farah Khan, the victims of drone attacks can demand compensation directly from USA under the ATCA for they have suffered from “destruction of property and land, loss of family members, physical injuries, mental injuries...”⁴¹

Therefore, the victims of drone attacks who suffer not only from physical injuries, but also mental injuries, such as PTSD, are entitled to compensation which USA is liable to pay them under their own laws.

CONCLUSION

It is concluded that acquittal without order of treatment is not in the interests of public, as the acquittees will continue to be a threat to the public. Furthermore, imprisoning an acquittee is contradictory to the verdict of acquittal.

Therefore, the person acquitted of all charges must receive mandatory treatment by the order of court as well as monetary compensation in accordance with the severity of the PTSD.

k.org/files/publications/187843%20-%20Drone%20victims%E2%80%99%20right%20to%20compensation.pdf>
accessed on 1-04-2012 at 09:31 pm PST.

⁴⁰ Alien Tort Claims Act, 1789.

⁴¹ Ibid.

CONCLUSIONS

We started our analysis by examining the issue of Post Traumatic Stress Disorder and the legal issues pertaining to it. Foremost among these issues was whether or not PTSD could be considered as a “disability” under the International Human Rights Law instruments. The term disability, as used in CRPD is not an exhaustive term as disability as an evolving concept. The reason for leaving out a standard definition was to include those kinds of disabilities which are recognized by the medical developments overtime. After examining the term disability, the elements of PTSD were discussed and it was established that PTSD is a disability under IHRL and the people suffering from PTSD are entitled to the rights given by the CRPD.

The second issue was about the relation of PTSD with human rights. It was found that the relation of PTSD with human rights is two-fold; both as a result and a cause of violation of human rights. The person whose rights are violated by acts, such as trafficking, sexual assault, or exposure to combat, develops PTSD. Also, the people who develop PTSD end up violating the human rights of others while experiencing the flashbacks; the worst effect of PTSD. Thus, it is concluded that PTSD is directly related to human rights.

The thesis analyzed the effects of PTSD on persons who have been exposed to combat and it was found that re-experiencing the traumatic event is the most severe effect of PTSD, as it leads to the violation of human rights. A war veteran, who relives the horrors of combat in a flashback, reacts with violence and thus ends up harming innocent civilians.

The third, and the core issue is related to the aforementioned conduct of the person suffering from PTSD. Once, the person with PTSD reacts with violence and, his criminal culpability comes under question.

As a general principle of criminal law, insane people are not liable to punishment as they're not accountable for their actions. The question, then, arises that whether or not the principle of criminal law is applicable to the people with PTSD. There have been cases where the insanity defense was used and one such case is *State v. Heads*. The war veteran acted with violence and ended up committing murder as a result of a flashback. He was acquitted on the ground of insanity.¹ In *Cocuzza*, the defendant was also acquitted on the basis of insanity.² There have also been cases where the defendant did not find acquittal even though they deserved it.³

It has also been noted that most acquittals have been awarded in cases where the defendant was suffering from the dissociative state of PTSD. The standards of insanity defense such as M'Naughten Test, Irresistible Impulse Test, Durham Rule, ALI's MPC Test and the Insanity Defense Reform Act do not meet the requirements for providing a defense for PTSD cases that covers all kinds of PTSD.

Other than Insanity defense, the defenses which have been used in the cases of PTSD, such as diminished responsibility defense, defense of automatism and the self defense, also do

¹ *State v. Heads*, No 106, 126. (First Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981).

² *New Jersey v. Cocuzza* No. 1484-79 [N.J. Super. Ct. 1981]

³ *State v. Felde*, 422 So. 2d 370.

not meet this required criterion. Diminished responsibility defense only provide mitigated punishment, whereas the defense of automatism only covers the dissociative kind of PTSD.

Thus, it is concluded that there is need of a standard defense for PTSD which would cover all kinds of PTSD and would provide complete acquittal to those who deserve it.

Another issue discussed in the thesis is related to the case of acquittal; whether partial or complete. If a person with PTSD has been given partial acquittal as a mitigated sentence, then would he be sent to the prisons or not? Surely, such a person would not be let free, but the conditions of prisons are not suitable for a person who is mentally ill. Sending such a person to prisons would only add to their sufferings. Then, there is the issue of complete acquittal. The persons with PTSD who are completely acquitted cannot be let free in the society for they pose a threat to the public. Plus, it is also their right to receive treatment. It is only just to provide treatment to those who served their country by participating in combat, or were exposed to war as a general civilian population. Thus, it is the best in the interests of the society and also in the interest of the person with PTSD that they must be committed to the treatment facility. Therefore, the verdict of acquittal must be accompanied by the order of commitment in a treatment facility.

The last issue discussed in the thesis is compensation. The war veterans who suffer from physical disabilities due to being exposed to war get compensation from the governments. Therefore, not only the war veterans but also the persons who have been exposed to drone attacks and developed PTSD must be provided with monetary compensation.

RECOMMENDATIONS

Following recommendations have been drawn from the conclusions:

- 1- A defense must be legislated to deal with the cases where defendants suffer from PTSD. The defense must not give an exhaustive definition of PTSD but will rely on DSM- IV, however it must have the clauses that will provide defense to all kinds of PTSD, and provide complete acquittal in case of a successful PTSD Defense. The Standard must not be so strict that it would be practically impossible to find acquittal even when the defendant deserves it. Yet, it must not be so lenient that the persons with minor disorders would be exonerated.
- 2- The consultation of psychiatrists must be compulsory to assist the judge in assessment of mental disorder. Also, it would strike out the chance of cases of malingering.
- 3- The verdict of acquittal must be accompanied by the order of mandatory commitment to a treatment facility. Although, some scholars have argued that the commitment must be voluntary, it is in the interest of the public and of the persons with PTSD that they must be committed to a treatment facility.
- 4- The commitment must be carried out in special facilities established to cope with the problem of PTSD and fulfill the requirements of those who suffer from it. The time period of commitment must not be fixed as in imprisonment. It should be declared to be until recovery.

- 5- Monetary compensations must be provided to the PTSD sufferers who developed PTSD as a result to exposure to war, which is a violation of their right. Due to this violation, they have developed such a mental disorder that it is impossible for them to find employment, thus it is the responsibility of government to provide them with adequate compensation.
- 6- Special Review Boards must be established to examine the applications for compensation. The Board must be assisted by psychiatrists to ascertain the existence of PTSD in a person. Also, the cases must be closely examined to ascertain that the development of PTSD is a result of exposure to combat.
- 7- Finally, the government must take steps to create awareness about PTSD and its effects on war veterans and drone attack victims, so that the public is more aware of the problems the PTSD sufferers are facing. When the public is aware of PTSD and how to deal with the persons with PTSD, they are more comfortable in coping with this new issue. Also, the PTSD sufferers would not feel as alienated from the rest of the society as they feel now.

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