

Journal of Peace, Development and Communication



Volume 07, Issue 04, October-December 2023
 pISSN: 2663-7898, eISSN: 2663-7901
 Article DOI: <https://doi.org/10.36968/JPDC-V07-I04-01>
 Homepage: <https://pdfpk.net/pdf/>
 Email: se.jpdc@pdfpk.net

Article:	Reconciling Military Justice: Assessing Pakistan's Compliance with International Norms
Author(s):	Muhammad Usman Lecturer, Department of Law University of Sialkot, Pakistan.
	Nagina Riaz PhD Law Scholar at International Islamic University Malaysia
	*Asif Khan Assistant Professor at Department of Law University of Sialkot, Pakistan.
Published:	3 rd December 2023
Publisher Information:	Journal of Peace, Development and Communication (JPDC)
To Cite this Article:	Usman, M., Riaz, N., & Khan, A. (2023). Reconciling Military Justice: Assessing Pakistan's Compliance with International Norms. <i>Journal of Peace, Development and Communication</i> , 7(4), 1–15. https://doi.org/10.36968/JPDC-V07-I04-01
Author(s) Note:	Muhammad Usman is serving as a Lecturer at Department of Law University of Sialkot, Pakistan. Email: Usmanmuhammad127@hotmail.com
	Nagina Riaz is a PhD Law Scholar at International Islamic University Malaysia Email: nagina.riaz09@yahoo.com
	*Asif Khan is serving as an Assistant Professor at Department of Law University of Sialkot, Pakistan. Corresponding Author's Email: Khan.asiff@yahoo.com

ABSTRACT

This study critically examines the inherent flaws within Pakistan's military justice system and evaluates its alignment with the country's international obligations. The analysis encompasses a comprehensive review of the procedural and substantive aspects of military justice, highlighting discrepancies between national practices and established international standards. Through a meticulous examination of case studies and legislative frameworks, this research identifies areas where Pakistan's military justice system diverges from universally recognized norms and elucidates the implications of such discrepancies on human rights, due process, and the fulfillment of international commitments. By contextualizing these disparities within Pakistan's legal landscape, this article aims to stimulate discourse on reformative measures necessary to ensure congruence between the nation's military justice practices and its international obligations.

Keywords: Military Justice, Pakistan, International Obligations, Human Rights, Legal Reform

Introduction:

In this Article, the procedural flaws in military court proceedings will be discussed. Furthermore, the international obligations of Pakistan will be analyzed, as can military courts be justified based on International Human Rights Law and International Humanitarian Laws and what is the position of the Constitutional fundamental rights over the matter. The attack on the Army Public School in Peshawar jolted the Pakistani nation and it raised a wave of anger throughout the country. After this attack, military courts were established in Pakistan to try civilians involved in terrorism-related offenses. These courts were established through the 21st Amendment in the Constitution and the Pakistan Army Act, of 1952. Military courts were empowered, through this amendment, to try civilians who are involved in terrorism-related offenses or who are members of terrorist organizations, or anyone who is using the religion or any sect for terrorist activities (Degenhardt, 2015).

Fundamental Violations in the Military Court System

While the entire system of Military Courts/Justice is involved in gross violations of judicial standards and guarantees we will discuss a few of them below.

Right to Fair Trial: Right to Fair trial is a very vast concept. The right to a fair trial is the fundamental right provided and protected by the Constitution. The Code of Criminal Procedure, which is the basic procedural law, also provides for the procedure to be followed in any criminal case from filing of F.I.R. to trial, and at every single step it ensures the protection of judicial guarantees. The Anti-Terrorism Act being a special to deal with terrorism also safeguards judicial guarantees.

Equality Before Law: The Constitution of Pakistan under Article 25 provides equality before law to its subjects. This notion implies that all citizens of Pakistan shall be treated equally and without any discrimination. It cannot be afforded that different laws and procedures will apply to citizens. That's why the law requires to try all criminals in the same manner (Faisal, S. M., Usman, M., & Khan, A. 2023).

Right to Life: The right to life is the fundamental right provided by the Constitution and it is also an integral part of the Natural Law. But it would be quite insane to consider it protected once the right to fair trial and equality before the law is grossly violated. If military courts do not afford the accused the right to a fair trial, then how his/her right to life is safeguarded?

Minimum Judicial Guarantees: Military Courts established in Pakistan, not only violate fundamental rights but more importantly, violate the minimum judicial guarantees provided by the common article III of the Geneva Conventions which Pakistan ratified, thus it becomes binding for Pakistan. Moreover, it is also the international obligation of Pakistan to ensure respect for international humanitarian law coupled with its application (Das, S., & Nargas, A. 2017).

Procedural Flaws in Military Courts

Besides many other objections to the legality of military courts, the procedure adopted by the military courts creates more doubts in the minds of the people. The method of referral cases, lack of transparency, inadequate information regarding cases, in-camera hearings and the secrecy in hearings are such problems that make it hard for the public to have any faith in these courts. It seems that military courts were not made on legal grounds rather it was a political matter.

Here again, we need to recall the dissenting note penned down by minority judges in the 21st Amendment case. The view held by minority judges was that establishing a military court would violate the guarantee of fair trial, which is the state's responsibility through its constitution, and it is also part of its international obligation because of the Geneva Conventions and many other human rights conventions. Justice Faiz Isa pointed out the flaws that existed in Anti-terrorism Courts and maintained that by removing those flaws, the combatants can be tried lawfully.

Referral Cases: So far, no proper or specific criteria have been provided to people through which the cases are being transferred or referred to military courts. Apex committees were formed at the provincial level, comprising military and civilian personnel to select cases for military trial and then they send a list of such cases to the interior minister. After checking out the list the interior minister referred the cases to the military courts for trial (Hussain, N., Khan, A., & Chandio, L. A. 2023).

Composition of Military Courts: Under the Army Act, a military court consists of up to five serving officers of the armed forces, and their legal training or education is not necessarily required to discharge judicial functions. While performing judicial functions military officers remained subject to obey the military chain of command. The Judge Advocate General branch provides a law officer to assist the military court, but his opinion is only of recommendary scope.

Secret Hearings: Under the Army Act, it is not necessary to hold a public trial. On February 25, 2015, further amendment was brought in the Army Act, which allows the judges to hold in camera and the identity of the persons involved in proceedings to be kept secret (Vashakmadze, M. 2018).

Location: Under the Army Act, an accused person can be accused anywhere, and no question will be entertained regarding the jurisdiction. To start with proceedings eleven military courts were established in Pakistan.

Appeal: A person convicted through military courts whether capital punishment or imprisonment for life or imprisonment exceeding three months or whatever holds the right to appeal against the decision to a military appellate tribunal.

A military appellate tribunal is presided over by an officer, not below the rank of Brigadier. Any other officer, appointed by him, can also hear the appeals. The problematic thing is that the presiding officer is not required to have any legal education or training.

The law also provides that every appellate court hearing may be attended by a judge advocate from the Judge Advocate General's branch of Pakistan Army, in case, no such person is available then any person appointed by the Army Chief. The appellate tribunal has the power to reduce or enhance the punishment awarded by the military courts before (Khan, A., Hussain, N., & Oad, S. 2023).

The verdict of a military court that is upheld by a military appellant tribunal cannot be further appealed before any civil court, but only the high court has the power to review the judgment (Kimura, E. 2015).

In October 2018, the Peshawar High Court set aside the military court judgments convicting more than seventy persons. The Court held that the trials were conducted based on bad faith and the standards of fair trial provided in the Constitution and the international standard of fair trial were greatly compromised and ignored. The Court further stated that there

was no standard evidence produced in the military courts based on which accused could be convicted. The Court raised the concern that only one person was hired by all the accused person to represent them in the Court whereas private councils was also engaged by the families of the accused person. Furthermore, the Court raised her concern regarding the question of evidence. It was shockingly surprising for the Court that all convictions were based upon the Confession of the accused persons. All confessional statements were in the same handwriting and there was no contradiction found in the tone and style of the writing. Many statements were written years after the arrest of the accused (Hussain, N., Khan, A., Chandio, L. A., & Oad, S. 2023).

In 2016 a petition was filed by the convicts of the military courts before the Supreme Court. The conviction was challenged before the Court because the trial in military courts violated their fundamental right to a fair trial. The right to fair trial was violated as the right to appoint counsel was denied, the right to be informed regarding the charges against them, and the right to have a public trial were not granted in military courts. In some other cases, the matter of forced disappearance, inhumane treatment, and torture was pointed out while in certain cases it was also alleged that the children under eighteen years of age were also tried and convicted by the military courts. In August 2018, the Supreme Court dismissed all the petitions and repeated its position once again that the military courts had jurisdiction to try the accused in all cases and the question of bad faith was irrelevant as no evidence supported this concern.

Evidence: The Army Act provides that the standard of evidence in Military Courts is the same as practiced and observed by regular military courts (Bunglawala, S., Durward, R., & Schulte, P. 2016).

The amendments to the Army Act allow the federal government to transfer proceedings pending in any other criminal court, provided that the accused is being tried for the offenses that could be tried by military courts. The military courts can also give a verdict based on the previously recorded statement.

Retrospective: The military courts, after the amendment to the Army Act 1952, also have a retrospective effect. Meaning that they became competent to try persons for the conduct that occurred before the amendment of 2015.

Incompetence of Military Courts: The basic issue with the military courts is that military courts are presided over by military officers who are a part of the executive branch of the state, and legal training is also not necessary for them. Moreover, their tenure is also not very much certain. Members of the JAG department may supervise the hearings, but they do not sit on the bench. The place of hearing and finality of punishments are left in the hands of Military officers, not judges (Khan, A. S., Bibi, A., Khan, A., & Ahmad, I. 2023).

Absence of public hearing: Fairness requires that the trial must be public, keeping in mind the exception in which good cause must exist for conducting in camera hearing. Also, the reason for conducting in-camera hearings must be consistent with international standards.

Bar on Civil Courts to Entertain Appeals: The Pakistan Army Act places a bar on civil courts from exercising their appellate jurisdiction over military courts' decisions.

Civilian courts in Pakistan have held that writ jurisdiction may be invoked over cases decided by military courts, where "any action or order of any authority relating to the armed forces of Pakistan is either "coram nonjuice, mala fide, or without jurisdiction". The Supreme

Court also maintained in the petitions relating 21st Amendment that the power of judicial review is still with the Supreme Court over decisions of Military courts.

It should be kept in mind that under Pakistani law, the scope of judicial review is not very vast. Courts have also held that *“the High Court in its Constitutional jurisdiction is not a court of appeal and hence not empowered to analyze every piece of evidence to return a verdict”* and *“controversial questions of facts.... cannot be looked into this limited extraordinary writ jurisdiction”*.

As far as international standards are concerned, where military courts exist, their authority should be ruled in the first instance. Consequently, appeals should be brought before civilian courts.

The opaqueness of Judgement: A duly reasoned, written judgment including findings, evidence, and legal reasoning is also an integral part of a fair trial. Even if the hearing is held on camera, the findings of the court must be made public. Military courts usually do not produce detailed and reasoned judgments.

Although the Supreme Court of Pakistan has directed the government of Pakistan to make necessary amendments to the Pakistan Army Act, unfortunately the directions have not been implemented so far (Kingsbury, B. 2017).

Test of Military Justice

The capability of the military justice system can be examined through a three-fold test. Military courts and their functioning are observed based on equality before the law, independence of tribunals/ courts, and competence to try civilians. This assessment is based upon international law as well as domestic law of Pakistan.

International Human Rights Law: As far as International Human Rights are concerned, the two most important instruments are UDHR and ICCPR. This is because both instruments are accepted by Pakistan., The Supreme Court of Pakistan recognized the binding nature of UDHR.

The right to fair trial was recognized in Article 10 of the UDHR which says that *“everyone is entitled in full equality to a fair and public hearing by an independent tribunal”* Pakistan has acceded to ICCPR and Pakistan must ensure all the rights to its citizens. Article 14 of the Convention acknowledges the right to a fair trial and also provides its constituent elements. These elements are the right to fair and public hearings, equality before the law, and independence of tribunals or courts.

Equality before Law: Equality before law refers to equal access and non-discriminatory treatment. It is further supplemented by the equality of arms (Khan, A., Iqbal, N., & Ahmad, I. 2022).

Access to the administration of justice means that one should be deprived of claiming justice and procedure should become a hurdle in his/her access to justice. It also manifests that no distinction should be made regarding access to courts, the trial must be conducted through regular courts not through the special courts.

Equality before the courts also means that similar cases are dealt with in similar proceedings and no categorization is allowed under any circumstances. In *Dudko v. Australia*, the Human Rights Committee observed:

“When a defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of

fairness and equality are engaged. It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the [defendant]”. (Kreps, S. E., & Wallace, G. P. 2016)

Equality of arms ensures that procedural rights are afforded to all parties indiscriminately and no distinction to be made except based on law. Such a distinction should also be justified on reasonable grounds and in terms of objectives provided that no harm is inflicted upon defendants.

Independence of Tribunal: Impartiality and independence of courts can be determined on two basis. First, the judges must remain out of the influence of their biases, and they should refrain from drawing their perceptions over the dispute. Second, their proceedings must be observed by an impartial and reasonable observer’. ‘The right to be tried by an independent and impartial tribunal is a universally recognized right. The ingredients to this very concept are qualification and appointment of judges, guarantee in terms of their tenure, and most importantly the distinction from the executive organ of the State.

Trial of Civilians by Military Tribunals: Military courts can try civilians for military offences keeping in view Article 14 of ICCPR. The ICCPR does not prohibit the military courts from trying civilians, but it certainly lays down such conditions which are necessary to consider for the sake of fair trial. It is the prime duty to take all necessary measures so that the conditions stipulated in Article 14 can be fulfilled. In *Madani v Algeria*, the Human Rights Committee held:

“The State party must demonstrate, concerning the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials that other alternative forms of special or high-security civilian courts are inadequate to the task, and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused according to Article 14”. (Khan, A., Javed, K., Khan, A. S., & Rizwi, A. 2022)

International Humanitarian Law: The protection of the right to fair trial and to secure the minimum judicial guarantees, during non-international armed conflict, has not attained the much attention as it should have. During non-international armed conflict, IHL and IHRL are applied simultaneously and both legal regimes are applied to complementary and to achieve the same goal.

In IHL, the most provision related to minimum judicial guarantees is the common article 3 of the Geneva Conventions. The said article particularly talks about judicial guarantees during the armed conflicts of a non-international character. Common Article 3 does not talk specifically about what judicial guarantees are to be afforded to the accused. Other provisions of Conventions further elaborate the judicial guarantees which are being afforded in Common Article 3. The provisions applied to armed conflicts, all provisions ensure that an accused must be presumed innocent, charges against him must be disclosed before him, he must be allowed to engage counsel of his own choice, his rights against self-incrimination remain available and he must be notified about the remedies available to him (Schlueter, D. A. 2015).

The following guarantees are afforded to the accused under the umbrella of Common Article 3 and these guarantees are mentioned in different provisions of the treaty.

- A fair and regular trial (GC IV Article 5)

- Safeguards of proper trial and defense, which shall not be less favorable than those provided under GC III Article 105, GC I Article 49, GC II Article 50
- Trial by regular courts AP I, Article 75
- The courts must afford fundamental guarantees to the accused Common Article 3
- A court offering the essential guarantees of independence and impartiality. AP II, Article 6
- Trial must be conducted by regular courts, not special courts such as military courts GC IV, Article 66
- Competence of court GC IV, Article 71

Two important dimensions are to be considered here regarding the general scheme of fair trial. The first dimension is related to the mechanism of trial to ensure the right of fair trial and it contains the matter related to the court. It describes that the court must be competent, a regularly constituted court, and a non-political military court. The second dimension is related to the procedural requirement of fair trial, proper, regular, guarantees, etc. (Maurer, D. 2020).

Case Law

Hamdan v. Rumsfeld: In the Hamdan v. Rumsfeld case, Hamdan was captured and detained by the US military in Guantanamo Bay. Hamdan filed a writ petition of Habeas Corpus in federal district court and he challenged his detention. Before the pronouncement of the federal district court, he had already been convicted by a military commission which held him as an enemy of the State. The basic question before the tribunal was whether the rights given to Geneva Conventions could be enforced through court or not?

The court held in its judgment that neither the executive nor the Congress can issue a military tribunal of such sort. Moreover, the military commission had to comply with the ordinary law of the country. Also, the Geneva Conventions being the ordinary law of war is applicable and must be enforced by the court. As the military commission violated both laws, the Geneva Conventions and the Uniform Code of Military Justice, consequently, the trial held by the military commission is void and illegal.

Customary International Humanitarian Law: In Customary International Humanitarian Law certain rules have been provided concerning International Humanitarian Law which not only customarily remain applied during armed conflicts but also supplement the humanitarian treaties. Rules 100 and 101 are of such worth that these must be discussed here (Margulies, P. 2015).

I. Rule 100

“No one may be convicted or sentenced, except according to a fair trial affording all essential judicial guarantees”.

The trial by an independent and impartial court is always been of paramount importance to afford a fair trial to the accused. Common Article III of the Geneva Conventions also speaks for this. The impartiality and independence can be achieved only when the trial must be conducted by regularly constituted courts. The third Geneva Convention says that the courts trying prisoners of war should be impartial and independent.

To ascertain the meaning of independence and impartiality, the case law can be referred to. To examine the independence of the court, it must be ensured that the judiciary performs its functions independently from all branches of the government. To further ensure impartiality, the judges should never promote the interests of one side and should not have any perceptions

in mind. Finally, enough guarantees should be provided to remove doubts regarding the impartiality of the court (Vashakmadze, M. 2018).

II. Rule 101

“No one may be accused or convicted of a criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offense was committed”.

The Geneva Conventions also provide that no retrospective should be allowed. This means that no civilians and military personnel will be tried for actions or omissions that were not considered criminal before committing such acts. This principle further reaffirms in additional protocols that no heavy punishment shall be awarded but only such offense will be tried and only such punishment will be awarded which was provided by the law.

Pakistani Law: Since Pakistan is a dualist State and ICCPR cannot be applied directly in the domestic judiciary of Pakistan it can serve as a supplementary source to fill the vacuum in national laws. Pakistan also acknowledges the right to a fair trial, and it has been incorporated into the national law of Pakistan with all its elements. In 2010 the right to have a fair trial was brought into the Constitution through the Eighteenth Amendment and Article 10A was made a distinct article in the Constitution. Article 10A states that:

“For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”

In Memon, the Supreme Court said that:

“the right of access to justice is an internationally well-recognized human right and is now being implemented and executed by granting relief under the Constitutional provisions. Article 10 of the Universal Declaration of Human Rights and Article 14 of the United Nations Convention on Civil and Political Rights recognize the right of fair trial by an independent and impartial Tribunal established by law”.

Equality before courts: There is no separate provision in the Constitution that establishes the right to equality before courts but Article 4 and 9 refers to this very right as interpreted by the superior courts of the country. Article 4 states:

“To enjoy the protection of the law and to be treated following the law is the inalienable right of every citizen”

Further Article 9 provides us that:

“no person shall be deprived of life or liberty save following law”

The Supreme Court has used the phrase “following the law” quite openhandedly and has placed many ingredients of the right of fair trial in it. On the other hand, the phrase “*due process of law*” refers to, that the notice of the proceedings will be given to the accused and he will be afforded reasonable time to defend himself. Also, the court before which he is being tried is impartial and holds no bias against him. In Sarfraz, the Supreme Court called fair trial an inalienable right. Article 10(1) provides for elements falling under the “*equality of arms*” category, e.g. that an arrested person “shall not be denied the right to consult and be defended by a legal practitioner of his choice” (Kastenber, J. E., Fidell, E. R., Hillman, E. L., Rosenblatt, F. D., Sullivan, D. H., & VanLandingham, R. E. 2020).

In case, an accused is unable to afford a lawyer then the State must afford him a lawyer and that lawyer must be given the proper opportunity to defend his client. Article 25 of the

Constitution provides the equality before law and equal protection of the law. Similarly, the Code of Criminal Procedure also gives certain rights such supply of documents to the accused and the assistance of an interpreter. On discrimination, in Memon, the Supreme Court said:

“Although class legislation has been forbidden, it permits reasonable classification for the legislation. Permissible classification is allowed provided the classification is founded on intelligible differentia which distinguishes persons or things that are grouped from others who are left out of the group and such classification and differentia must be on rational relation to the objects sought to be achieved by the Act. There should be a nexus between the classification and the objects of the Act. Independence and impartiality of tribunals ‘The independence of the judiciary is one of the salient features of [... the Pakistani] Constitution. The preamble to the Constitution provides that ... the independence of the judiciary shall be fully secured. The Objectives Resolution ... also commands that independence of the judiciary has to be fully secured”.

Independence of Judiciary: The higher judiciary has interpreted the terms “fully” and “secured” in a very broad sense to highlight the concept of Independence of Judiciary. In Pakistan, it is a prerequisite for the judiciary to be independent and free from all sorts of influences ranging from financial to administrative. Most importantly, it should maintain a reasonable distance from the executive. In Faridi, the Supreme Court said that the independence of the judiciary means:

- “(a) that every Judge is free to decide matters before him following his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and
(b) that the judiciary is independent of the Executive and Legislature and has jurisdiction, directly or by way of review, over all issues of a judicial nature”.*

The procedure for the appointment of judges and the security of their tenures are very closely linked with the independence of the judiciary . The constitution provides for the “separation of judiciary from the executive” qualifications for the appointment of judges, the procedure of appointment, service conditions, salary, and pension. Another important factor in the judicial system of Pakistan is the accountability of judges. The Constitution mentions the ground on which a judge can be removed and prescribes the procedure to be adopted for the removal of a judge. No other ground or procedure can be followed to remove a judge from his office except provided by the law (Morales, E. T., & Brooker, J. W. 2022).

Application of the Tests

Independence of military courts: Military courts can never be assumed as independent of the ordinary judiciary in the country. As the armed forces come under the direct control of the Federal Government and Federal Government can exercise its direct influence over the military courts. Similarly, judges appointed to preside over the case are from the executive branch and they have no link to the Judge Advocate General branch more importantly, the judge advocate has no link with the Ministry of Law or the Attorney General’s office. The Judge Advocate General has never been an independent officer in the armed forces as he is appointed by the Defence Ministry and he acts under the supervision of the Army Chief, that is why to consider him as an independent personal is impossible.

Impartiality of military courts: As a matter of fact, judges' advocates also come under the military chain of command which is why their impartiality always comes under doubt.

Certain precautionary measures are provided in Army Rule to ensure impartiality by disallowing certain individuals to sit in the court the courtroom room such as the the convening officer, any officer who has conducted an an inquiry or investigation, commanding officer of the accused. But still, it is not sufficient because no guarantees are offered to the other officers involved in the military justice system in terms of their pay, promotion, transfer, and suspension. Consequently, all officers involved in the military justice system are bound to follow the military chain of command.

Equality before the court: The Army Act and Army Rules mention several elements of equality before the court. The accused can have access to the court, engage counsel out of his free will, and the evidence produced against him/her, etc but evidence suggests that there exists a huge gulf in what is being written and what is being manifested:

“A former military legal adviser said the military sometimes prevented suspects from having lawyers, making convictions easier. He said he knew of more than 100 cases where the military used the charges to bypass civilian courts and try a defendant suspected of a different crime”.

Trial of civilians by military courts: International law primarily emerges from the conventions and treaties, the international community agreed upon and of course, Pakistan also ratified many of those conventions and treaties. The Convention on Civil and Political Rights to which Pakistan is a party and it is thus necessary for Pakistan to comply with those directions provided by the convention. Article 14 of the said convention states “Everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by the law”. The UN Human Rights Committee has made it crystal clear that the notion of fair trial refers to all courts whether general, special, or even military.

The UN Human Rights Committee has made clear that *“the trial of civilians by military courts has raised serious problems as far as the equitable, impartial, and independent administration of justice is concerned”*. It has also repeatedly called on countries to prohibit the trials of civilians by military courts (Maggs, G. E., & Schenck, L. 2015).

The Draft Principles Governing the Administration of Justice Through Military Tribunals, which were adopted by the former UN Sub Commission on the Promotion and Protection of Human Rights 2006. The Draft Principle focuses on the military courts and has affirmed that the jurisdiction of the military courts should be confined to the military personnel concerning military offenses. The principle also stresses the right to a fair trial including the right to appeal before civilian courts, and civilians, accused of any offense, shall be tried by civilian courts. The basic document regarding fundamental rights is the Universal Declaration of Human Rights, which mentions the right to equality, freedom from torture, right to equality before the law, and the the right to a fair public hearing.

The 2003 case before the African Commission on Human Rights, Law Office of the Ghazi Suleiman v. Sudan, a case regarding the trial of a civilian before a military Court. The commission stated:

“Civilians appearing before and being tried by the military courts presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial military courts should respect norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offenses which are under the purview of ordinary courts”.

Breaches and Violations

The decision of military courts cannot be appealed before the higher judiciary, the only remedy available is to invoke the writ jurisdiction of the higher judiciary. However, the writ jurisdiction of the apex court can be invoked by the accused and the decisions of military courts can be challenged on the grounds of “*coram nonjudicial, mala fide or without jurisdiction*”. By mid-2015, the military courts awarded six accused persons death sentences. Against these convictions, petitions were filed before the Supreme Court, the honorable Court initially suspended the execution, so the Constitutionality of the military courts could be decided first. After deciding the Constitutional legitimacy of the military courts, the Supreme Court dismissed all petitions. The petitions of 17 convicts who were sentenced to death were challenged before the Supreme Court by their Families on the ground of violation of their right to a fair trial, however, all these petitions were dismissed by the Supreme Court in the case SAID ZAMAN KHAN and others v. FEDERATION OF PAKISTAN through Secretary Ministry of Defence and others.

The violations mentioned in the said petitions were the denial of the right to counsel of free will; failure of charges disclosure to the accused; failure to furnish copies of the decisions and the secrecy behind the trials as the location to conduct the trial was not disclosed and the number of occasions Pakistan Army Act Rules, 1954 were infringed in short no fair trial guarantees were provided. The trials were also inconsistent with Article 4 of the constitution and in this regard, reference was made to Rules 23 and 24 as well as Rules 81 to 87 of the Pakistan Army Act Rules, 1954. Also, not enough time and opportunity were given to make preparations for the defense in terms of Rule 23 of the Pakistan Army Act Rules, 1954, and no pre-trial proceedings were conducted in violation of the Pakistan Army Act, 1952.

The learned counsels for the Petitioners had argued that the trials were conducted, after three years of the alleged occurrence, violated the bar contained in Section 91 of the Pakistan Army Act, 1952, hence, the said trials were ultra vires to their jurisdiction. Furthermore, it was argued that convicts were kept in the Internment centers subject to Actions (in aid of Civil Power) regulation, 2011 which is sub judice before this Court for being and have violated the articles of the constitution namely; 10 and 10A.

There were occasions where the petitioners contended that the convicts were severely tortured and disappeared forcibly along with other ill-treatments (Brady, H. L. 2016).

Conclusion

After discussing the above, it has become clear that the military courts in Pakistan, proving fatal to human rights, and free trial and compromised the judiciary’s independence. Since a proper mechanism was already there in the shape of the special law and courts, the military courts were only deceptive in the name of speedy justice. The military courts were established as a short-term solution and it was intended to make reforms in the criminal justice system and the sunset clause was also incorporated there. But the result is that nothing has been done effectively. The Criminal Justice Amendment Act failed to bring the desired reforms and results. At the same time, the duration of military courts was extended. In 2015, the amendments were made in Military Courts but practically the pattern of proceedings remained the same. The military courts were established in a chaotic atmosphere, after the attack on Army Public School in Peshawar, if not deceptive. Pakistan must understand that there is no overnight solution for the sedition that has been present for so many years. Pakistan, being a

state, cannot escape its international obligations and the principle of fair trial should never be compromised since it is not only an international obligation but also embedded in the Constitution of 1973. It is important to understand that one wrong can never be made right by committing another wrong. If terrorism carries with it atrocities and pain, then violating the right of trial also does the same.

References:

- Brady, H. L. (2016). Justice is no longer blind: How the effort to eradicate sexual assault in the military unbalanced the military justice system. *U. Ill. L. Rev.*, 193.
- Bunglawala, S., Durward, R., & Schulte, P. (2016). Just wars, just outcomes—Reconciling just outcomes in military intervention. In *Just War on Terror?* (pp. 117-132). Routledge.
- Das, S., & Nargas, A. (2017). Mapping the Jadhav dispute at the world court: Evaluating India and Pakistan's arguments. *Cal. W. Int'l LJ*, 48, 35.
- Degenhardt, T. (2015). Crime, justice and the legitimacy of military power in the international sphere. *Punishment & Society*, 17(2), 139-162.
- Faisal, S. M., Usman, M., & Khan, A. (2023). Unraveling the Constitutional Quandary: The Status of FATA Pre-Merger in the 1973 Constitution. *Pakistan Journal of Law, Analysis and Wisdom*, 2(02), 591-599.
- Hussain, N., Khan, A., & Chandio, L. A. (2023). Legal Safeguards against Mob Justice: An Analysis of Blasphemy Laws in Pakistan and International Human Rights Norms. *Al-Qamar*, 13-26.
- Hussain, N., Khan, A., Chandio, L. A., & Oad, S. (2023). Individual Criminal Responsibility for the Crime of Aggression: The Role of the ICC's Leadership Clause. *Pakistan Journal of Humanities and Social Sciences*, 11(1), 223-232.
- Kastenberg, J. E., Fidell, E. R., Hillman, E. L., Rosenblatt, F. D., Sullivan, D. H., & VanLandingham, R. E. (2020). *Military justice: Cases and materials*. Carolina Academic Press.
- Khan, A. S., Bibi, A., Khan, A., & Ahmad, I. (2023). Responsibility of Sexual Violence Under International Law. *Journal of Social Sciences Review*, 3(1), 29-41.
- Khan, A., Hussain, N., & Oad, S. (2023). The Rome Statute: A Critical Review Of The Role Of The Swgca In Defining The Crime Of Aggression. *Pakistan Journal of International Affairs*, 6(1).
- Khan, A., Iqbal, N., & Ahmad, I. (2022). Human Trafficking in Pakistan: A Qualitative Analysis. *Journal of Social Sciences Review*, 2(3), 257-268.
- Khan, A., Javed, K., Khan, A. S., & Rizwi, A. (2022). Aggression and individual criminal responsibility in the perspective of Islamic law. *Competitive Social Science Research Journal*, 3(1), 35-48.
- Kimura, E. (2015). The struggle for justice and reconciliation in post-Suharto Indonesia. *Southeast Asian Studies*, 4(1), 73-93.
- Kingsbury, B. (2017). Reconciling five competing conceptual structures of indigenous peoples' claims in international and comparative law. In *Indigenous Rights* (pp. 185-246). Routledge.
- Kreps, S. E., & Wallace, G. P. (2016). International law, military effectiveness, and public support for drone strikes. *Journal of Peace Research*, 53(6), 830-844.
- Maggs, G. E., & Schenck, L. (2015). Modern military justice: Cases and materials. *Modern Military Justice: Cases and Materials*.
- Margulies, P. (2015). Justice at War: Military Tribunals and Article III. *UCDL Rev.*, 49, 305.
- Maurer, D. (2020). A Logic of Military Justice?. *Tex. Tech L. Rev.*, 53, 669.
- Morales, E. T., & Brooker, J. W. (2022). Restoring Faith in Military Justice. *Conn. L. Rev.*, 55, 77.

Schlueter, D. A. (2015). American military justice: Responding to the siren songs for reform. *AFL Rev.*, 73, 193.

Vashakmadze, M. (2018). Understanding Military Justice: A Practice Note. *DCAF, Geneva*, 1-49.ment in Pakistan: A Post 18th Amendment Assessment. *J. Pol. Stud.*, 26, 97.