

**PAPER ON PREVENTIVE  
DETENTION IN PAKISTAN**

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*We are in a state of war and in these extraordinary times, we must take exceptional measures*

- Prime Minister of Pakistan, Nawaz Sharif, addressing the Chairman of the Senate on December 31, 2014

## I. INTRODUCTION

Preventative detention is a controversial method of confinement that allows a state to curtail the liberty of a person, often under the auspices of national security and the maintenance of public order. Particularly during times of war, the doctrine of preventative detention operates as a legal go-between of sorts. It borrows elements from both humanitarian and criminal law, but strictly adheres to neither.

Though controversial, preventative detention is fast becoming common practice in combating terrorist groups. This is of course based on the assumption that its application does not lead to torture or other cruel and unusual punishment. In such circumstances, persons believed to pose a security threat may be detained for days, months and even years under cover of law. Thus, it follows, that each state that maintains such provisions within its laws constructs a preventative detention regime in accordance with its own needs.

Guantanamo Bay, operated by the United States, is the most prominent example of a modern day preventative detention program. Though perhaps it is the most infamous, Guantanamo is far from being the only preventative detention program in the world. Similar detention regimes are maintained by states that include, but are not limited to, the United Kingdom, Israel, Australia, India and Sri Lanka.

The world in which uniformed soldiers engaged one another on discernable battlefields is fast losing its relevance and warfare as it is now, is becoming chaotic and increasingly difficult to address. Laws related to conflict, as they apply in the domestic context, must be reevaluated in light of the threat posed by modern warfare in the form of terrorism to ensure that they provide a framework that addresses situations where an combatant and a civilian cannot be readily distinguished and where the targets of hostilities are just as, if not more likely to be civilian.

It is in this climate that a balancing test naturally occurs. The state must weigh the suspension of the rights of a few against the wellbeing of the many. The results of this dubious equation determine the lengths to which a state is willing to go to preserve national security, both in times of conflict and in times of peace, as terrorism is rooted in both. Within such calculations, the necessity of a preventative detention regime is determined, including its parameters, if such parameters are desired at all.

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The following paper seeks to examine specifically the current status of Pakistan's preventative detention legal framework with the aim of identifying improvements that may be made to the existing law. Taking into account the current nature of hostilities, the improvements suggested will reflect both advancing the preventative detention regime under a humanitarian law narrative, as well as a criminal justice narrative, with the ultimate goal of preserving national security. The

recommendations contained herein are meant to be flexible rather than unitary, providing varied options for enhancing preventative detention laws. The remainder of this paper shall be structured as follows:

Section II provides a background on how preventative detention may be defined and how it is interpreted for the proceeding discussion. This section also examines the international law provisions that guide the scope of preventative detention under human rights and particularly humanitarian law. To initiate a country-specific discussion, the history of preventative detention in Pakistan is also provided.

Section III specifically examines the current laws that make up Pakistan's preventative detention framework. The laws are initially presented on their own and then reexamined in light of the elements they contain, particularly in relation to one another. This section seeks to sift through the fundamental structure of these laws by identifying the varying grounds that allow and the procedures that govern preventative detention in the state.

Section IV addresses the intersection between the law of armed conflict and human rights law as applied through a criminal justice framework. Where the two legal regimes converge, a hybrid method of approaching the laws related to preventative detention may be employed. This section then applies the hybrid approach to the various elements of preventative detention laws and attempts to determine areas of the law that may be further improved.

## **II. UNDERSTANDING PREVENTATIVE DETENTION**

### DEFINING PREVENTATIVE DETENTION

While there is no singular definition of preventative detention available,<sup>1</sup> it may be understood as imprisonment without criminal charges. It is a precursor to arrest in which detention is based on the prevention of a future harm, rather than on the commission of a crime. Preventative detention may also be understood as a “precautionary measure” against the frustration or obstruction of justice by persons that may be formally subject to the criminal justice system in the future.<sup>2</sup>

Preventative detention and internment are often used interchangeably with the term “administrative detention.”<sup>3</sup> The use of the word “administrative” to describe detention is a reference to the power of the executive to make almost unilateral decisions in detaining

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<sup>1</sup> Though accepted definitions of preventative detention incorporate a broad understanding of why such detention may occur as documented by the International Commission of Jurists, the scope of this paper will be limited to an understanding of preventative detention in the context of national security or the maintenance of public order. See page 3 <http://www.mafhoum.com/press9/278S25.pdf>.

<sup>2</sup> Macken, Preventative Detention and the Rights of Personal Liberty pg 2

<sup>3</sup> Stella Elias Rethinking Preventative Detention pg 110 “Although there are exceptions, the term “administrative detention” is more frequently employed in civil law countries, and the term “preventive” or “preventative” detention is used more often in common law countries. This apparently innocuous distinction is nonetheless important, as the differing terms “administrative” and “preventive” are intrinsically value-laden, suggesting, in the case of the former, that detention is a tool of the administration or bureaucracy, and, in the case of the latter, that detention is necessary to “prevent” a potential threat or danger from occurring.”

individuals without charge.<sup>4</sup> The primary authority of the executive relative to administrative detention is illustrated in the limited role of the court, restricted to considering only the lawfulness of the detention order and related treatment,<sup>5</sup> not for the “taking the decision [on whether to detain or not] itself.”<sup>6</sup> For the purposes of this paper, the term “preventative detention” will be primarily employed.

To fully understand the nature of preventative detention, interpretations developed by several international bodies may prove useful. The United Nations most commonly interprets preventative detention as the process by which persons are “arrested or imprisoned without charge.”<sup>7</sup> Regarding “administrative detention,” the International Commission of Jurists provides the definition:

[T]he deprivation of a person’s liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial.<sup>8</sup>

The International Committee of the Red Cross (ICRC) identifies this process as internment, rather than as preventative detention, which is an “exceptional measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting State security or public order in non-conflict situations provided the requisite criteria have been met.”<sup>9</sup> The ICRC defines internment as the “deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned.”<sup>10</sup>

An operational definition of preventative detention must then include certain components. It requires, first and foremost, a restraint on physical liberty, akin to formal imprisonment. Preventative detention, differentiating it from formal criminal justice processes, must also be devoid of the filing of criminal charges. For the purposes of this definition, the absence of any criminal charges at the time of the detention may indicate either a criminal charge for a specific offence is soon to be filed or that there is no specific criminal charge against the individual, but that their detention is nonetheless a necessity. Preventative detention further requires that the executive play the primary role with respect to whether or not to detain a person, relegating the courts to deciding only upon the lawfulness of the detention, the ability of the executive to detain. Finally, the detention must be conducted for the specific purpose of ensuring national security and public order.

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<sup>4</sup> Macken note 2 Preventative Detention and the Rights of Personal Liberty pg 2

<sup>5</sup> *Id.*

<sup>6</sup> Craig Forcese Catch and release pg 5

<sup>7</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>

<sup>8</sup> Macken note 2 Preventative Detention and the Rights of Personal Liberty pg 3

<sup>9</sup> [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0892.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf) pg 376

<sup>10</sup> Note 1 pg 4 <http://www.mafhoum.com/press9/278S25.pdf>

## PREVENTATIVE DETENTION & INTERNATIONAL LAW

Preventative detention is not prohibited outright under international law.<sup>11</sup> To an extent, international law provides some latitude with regards to this mechanism. However, the circumstances under which preventative detention is conducted make a substantial difference in determining whether or not the detention is lawful under international law.

### *Preventative Detention under International Human Rights Law*

Several international legal instruments, both binding and non-binding, address what constitute the standards arrest and detention. The Universal Declaration of Human Rights (UDHR), which may be construed as customary international law, states, “no one shall be subjected to arbitrary arrest, detention or exile.”<sup>12</sup> The drafting history of the UDHR indicates that the original intention of the drafters was to prohibit arrest and detention that was “unlawful.”<sup>13</sup> This is evident in the Drafting Committee’s original provision which prohibited arrest and detention “except in cases prescribed by law and after due process.”<sup>14</sup> The concept of “unlawful” was replaced with “arbitrary” after deliberations that suggested that arbitrariness was a broader means of providing protection to individuals subject to arrest or detention.<sup>15</sup>

The International Covenant on Civil and Political Rights (ICCPR) is a binding extension of the UDHR. Article 9(1) of the ICCPR conveys the same principle:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.<sup>16</sup>

The phrase “arbitrary arrest or detention” is employed once again, but this time in conjunction with the statement that the deprivation of liberty may only occur in a manner that is prescribed by law. Perhaps the most impactful portion of Article 9(1) is the word “arbitrary,” which may be interpreted in several ways. This interpretation has a direct impact on how much latitude is provided to the practice of preventative detention in international law.

In her discussion of preventative detention and personal liberty, Claire Macken demonstrated that there are two possible interpretations of “arbitrary” as follows:

1. An arrest or detention is “arbitrary” if it is purely unlawful and not in accordance with procedure as laid down by law;
2. An arrest or detention is “arbitrary” if it is unlawful or unjust, which means that in addition to violating the letter of the law, it also violates the principles of justice in spirit.<sup>17</sup>

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<sup>11</sup> Macken note 2 Preventative Detention and the Rights of Personal Liberty pg 4

<sup>12</sup> UDHR

<sup>13</sup> <http://pgil.pk/wp-content/uploads/2014/04/Protection-from-Arbitrary-Arrest-and-Detention-Under-Internationa.pdf> pg 352

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 353-55.

<sup>16</sup> ICCPR 9(1)

If “arbitrary” is to be interpreted as per the first, more narrow, provision, the conclusion to be drawn is that “[p]reventative detention, even as a result of despotic, tyrannical, objectively unreasonable legislation, would therefore be acceptable under this Article of the ICCPR.”<sup>18</sup> The second, wider and more favored interpretation of “arbitrary” not only requires that the arrest or detention be in accordance with law, but that the law itself must “conform to the principles of justice or with dignity of the human person, and must not be inappropriate or unjust.”<sup>19</sup> The later interpretation is also favored in General Comment 35 of the ICCPR on liberty and the security of persons.<sup>20</sup>

An examination of the remainder of Article 9 of the ICCPR provides further understanding of what may be considered in accordance with the principles of justice in matters of preventative detention. First and foremost, arrest and detention are both used in Article 9, which indicates that they are not considered to be the same.<sup>21</sup> This is an important distinction to make when examining Article 9(2), which states specifically that someone who is *arrested* is to have the rights contained in that sub-section.<sup>22</sup> Further, Article 9(3) uses the phrase “arrested or detained on a criminal charge.”<sup>23</sup> The discussion above on the working definition of preventative detention clearly demonstrated that it consists of the deprivation of liberty without criminal charges. Thus, Article 9(3) is not directly applicable to principles of justice associated with preventative detention. Article 9(4), however, is applicable and reads as follows:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>24</sup>

This section provides a right akin to *habeas corpus* and the original draft of Article 9(4) specifically included this right, but it was later removed to allow states to provide similar mechanisms specific to their legal systems.<sup>25</sup> It is the only right of access to the courts provided to those individuals subject to preventative detention and so adherence to Article 9(4) is essential in upholding principles of justice under Article 9(1).

ICCPR General Comment 35 (a replacement for General Comment 8)<sup>26</sup> details additional parameters of preventative detention as authorized under international human rights law. The

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<sup>17</sup> Macken note 2 Preventative Detention and the Rights of Personal Liberty pg 5

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> GC 35 para. 12 “The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”

<sup>21</sup> ICCPR 9

<sup>22</sup> ICCPR 9(2)

<sup>23</sup> ICCPR 9(3)

<sup>24</sup> ICCPR 9(4)

<sup>25</sup> Macken note 2 Preventative Detention and the Rights of Personal Liberty pg 24

<sup>26</sup> General Comment 8 originally stated: “Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach”

right under Article 9(4) applies to “all detention by official action or pursuant to official authorization.”<sup>27</sup> The General Comment states that detention becomes arbitrary if it does not involve periodic reevaluation of its justifications.<sup>28</sup> This periodic evaluation must be conducted by a court<sup>29</sup> or “tribunal possessing the same attributes of independence and impartiality as the judiciary”<sup>30</sup> and this court must have the ability to order release from unlawful detention.<sup>31</sup> The detainee must also be allowed access to both “independent legal advice”<sup>32</sup> and disclosure regarding the grounds upon which the decision is to be made.<sup>33</sup> The grounds that justify the detention must be prescribed by law, but must not be overly broad so as to be arbitrary.<sup>34</sup> The General Comment makes it clear that the evaluation need not take place immediately after an individual is detained, but that no individual may be denied the right to review of their status. The right to appeal a decision on the lawfulness of detention, however, is not required.<sup>35</sup>

### *Preventative Detention under International Humanitarian Law*

The four Geneva Conventions and their two Additional Protocols govern the law of armed conflict. Article 2, common to the four Geneva Conventions mandates the application of these conventions to “cases of declared war or of any other armed conflict” and this is applicable even if all parties do not accept that a state of war exists or if the opposing state is not a party to these instruments.<sup>36</sup> The Geneva Conventions also apply during the occupation of a territory, even without the presence of armed conflict.<sup>37</sup> Additional Protocol I and the four Geneva Conventions are applicable in situations of international armed conflict (IAC). Similarly, Common Article 3<sup>38</sup> of the Geneva Conventions and Additional Protocol II<sup>39</sup> govern a non-international armed conflict (NIAC).

The “minimum” requirements regarding preventative detention under international humanitarian law (IHL) are found in Article 75 of Additional Protocol I, governing IACs.<sup>40</sup> Article 75 is also regarded as customary international law, applicable to even those states that are not a party to the

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<sup>27</sup> Para 40 GC 35 note 20 This includes, “detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests. It also applies to detention for vagrancy or drug addiction, detention for educational purposes of children in conflict with the law and other forms of administrative detention. Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement.”

<sup>28</sup> *Id.* para. 12

<sup>29</sup> *Id.* para 45 “Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature”

<sup>30</sup> *Id.* para. 15

<sup>31</sup> *Id.* para. 41

<sup>32</sup> It is suggested, although not explicitly required, that detainees be afforded prompt and regular access to counsel. *Id.* para 46

<sup>33</sup> *Id.* para. 15

<sup>34</sup> *Id.* para. 22

<sup>35</sup> *Id.* para 48.

<sup>36</sup> Common Article 2

<sup>37</sup> *Id.*

<sup>38</sup> Common Article 3

<sup>39</sup> See generally AP II

<sup>40</sup> Cassel pg 820 <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7296&context=jclc>

Additional Protocol.<sup>41</sup> It prohibits torture and other forms of inhumane treatment and provides safeguards to those detained in relation to an international armed conflict. Article 75 guarantees certain fair trial rights to detainees that include the right to be tried publicly by a “regularly constituted court,” the right to hear the charges without delay, the right to prepare a defense and the right to be presumed innocent until proven guilty.<sup>42</sup>

In NIACs, preventative detention is recognized as a permissible exercise under Additional Protocol II, but there are no grounds or procedures further specified in either Articles 5 or 6 of Additional Protocol II or in Common Article 3.<sup>43</sup> That international humanitarian law contemplates, but does not provide the legal basis for preventative detention in a non-international armed conflict is reaffirmed in a recent decision from the United Kingdom, *Serdar Mohammed v. Ministry of Defence*.<sup>44</sup> In *Serdar Mohammed*, the High Court held that with no legal basis to be derived from IHL, “the only potential sources of a power to detain are considered to be the host state’s own domestic law [...] and UNSCRs.”

The absence of IHL provisions governing preventative detention during an NIAC requires that the applicable law be determined through customary international law, the law of IACs and/or the law established through the interplay of humanitarian and human rights law in these situations. Customary international law, for example, contemplates that persons deprived of their liberty during a non-international armed conflict must be permitted to challenge the legality of their detention.<sup>45</sup> Additional Protocol I provides that those detained during an IAC should be promptly informed of the grounds for their internment and they must be released as soon as possible and not beyond the cessation of the circumstances that gave rise to the detention.

While states are bound to follow customary international law and the rules it provides regarding preventative detention during an armed conflict, it is not required that states apply humanitarian law related to IACs to NIACs where Common Article 3 or Additional Protocol II are silent. It is a matter of debate regarding if and how exactly this application should occur. Accordingly, if the remaining body of IHL were applied to NIACs, under the harmonization doctrine,<sup>46</sup> human rights law would be displaced in those areas where IHL operates, because IHL is deemed *lex specialis*. As a result, the protections provided by human rights law, *lex generalis*, would be lowered, particularly in relation to preventative detention during an NIAC. Moreover, provisions of IHL that provide legal status to parties to IACs would do the same for parties to NIACs, giving non-state actors increased legitimacy.

Where there is an absence of any direct provision that covers a matter during an armed conflict, as is the case with the grounds and procedures for preventative detention in a non-international armed conflict, what role, if any, does human rights law play? In the International Court of Justice Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court held as follows:

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<sup>41</sup> *Id.*

<sup>42</sup> Article 75 AP I

<sup>43</sup> Cassel note 40 at 820

<sup>44</sup> SM v. MOD para 242-43

<sup>45</sup> Rule 99 ICRC Customary Rules

<sup>46</sup> harmonization project Columbia law school

<http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/011012summary.pdf>

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, Save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>47</sup>

Thus, preventative detention, particularly during NIACs, is governed by primarily by IHL, but not exclusively.

#### THE HISTORY OF PREVENTATIVE DETENTION IN PAKISTAN

It is important to understand the history of preventative detention in Pakistan before the current status of such laws can be discussed. The law as it exists now is a remnant of the British Colonial era, particularly the East India Company Act, 1793 and the subsequent 1915 and 1939 Defence of India Act.<sup>48</sup> Following independence, Pakistan included preventative detention provisions in its law as a permanent fixture, even beyond the existence of any particular emergency.<sup>49</sup>

Pakistan's first Constitution authorized further lawmaking with regards to preventative detention that related to the "defence," "external affairs," "security of the State" and "maintenance of public order."<sup>50</sup> This first provisional Constitution was replaced three times subsequently, and each version of the Constitution contained similar provisions.<sup>51</sup> Dr. Fakir Hussain found that from the first Constitution to the present version, codified in 1973, the preventative detention statute only suffered minor alterations.<sup>52</sup>

Initially, a Review Board was established which comprised of persons appointed in federal cases by the Chief Justice of the Supreme Court and by the respective Chief Justices of the High Courts.<sup>53</sup> However, in 1962 the Constitution mandated that the Board contain two persons, a Supreme Court or High Court Judge and a senior civil servant appointed by the President or a Governor for federal and provincial cases respectively.<sup>54</sup>

In 1972, the interim Constitution curtailed the width of the preventative detention program's provisions. Pre-review detention of a person was limited from three months to one month before the matter was to be taken before the Review Board.<sup>55</sup> Persons that were detained were required to be informed of the grounds for their detention within one week (this was the first time a time

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<sup>47</sup> para 106 <http://www.icj-cij.org/docket/files/131/1671.pdf>

<sup>48</sup> F. Hussain Book pg 173

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 174.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 175.

<sup>55</sup> *Id.*

limit was placed on this requirement).<sup>56</sup> Finally, a maximum period of detention was fixed and within twenty-four months, no person was to be detained for more than twelve months.<sup>57</sup>

Once again, in 1973, a new Constitution made slight adjustments to the existing preventative detention regime. The improvements included a restriction on extensions of detention without formal review and removed civil servants from the Board itself, opting instead for current or former members of the judiciary.<sup>58</sup> The Review Board was also empowered to determine the location of the detention and fix an allowance for the detainee's family, if necessary.<sup>59</sup>

Political instability in 1975 provoked further changes in the preventative detention provisions.<sup>60</sup> The period for pre-review detention was increased to three months, as it was prior to 1972 and the time frame for conveying the grounds of detention was increased from one week to fifteen days.<sup>61</sup> Also, the maximum period of detention was done away with for those detainees that were acting on behalf of the enemy, those that were jeopardizing the security or integrity of Pakistan and those engaged in "anti-social activities."<sup>62</sup>

The Constitution (4<sup>th</sup> Amendment) Act, 1975 and Constitution (5<sup>th</sup> Amendment) Act, 1976 significantly reduced the ability of the High Courts to intervene in detention cases.<sup>63</sup> The Courts were no longer able to prevent the executive from making a detention order, granting bail or providing "any other interim order" with respect to detainees.<sup>64</sup> The imposition of martial law in 1977 also restricted the Courts to only the power of judicial review in matters related to military justice.<sup>65</sup> By 1985, however, the restrictions place by martial law and the Constitution (5<sup>th</sup> Amendment) Act were repealed.<sup>66</sup>

The law regarding preventative detention in Pakistan was developed not only through the Constitution, but also through various public safety laws, including the Public Safety Ordinances of 1949 and 1952.<sup>67</sup> These were followed by the Security of Pakistan Act, 1952<sup>68</sup> and the Maintenance of Public Order Ordinance 1960,<sup>69</sup> both of which will be discussed further on in this paper. Conflict with India in 1965 and 1971 gave rise to the Defense of Pakistan Ordinances.<sup>70</sup> With martial law in 1977 came Martial Law Order No. 12, which further permitted

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 176.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 176-77.

<sup>62</sup> *Id.* at 177.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 178.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 180- Public Safety Ordinance, 1949 (contained no requirement to communicate grounds for detention or opportunities to make representations against the order); and the Public Safety Ordinance, 1952 (also contained no safeguards and detention could be ordered if authority was satisfied it was necessary for "maintenance of public safety").

<sup>68</sup> See *Id.* at 181.

<sup>69</sup> See *Id.* at 183.

<sup>70</sup> *Id.* at 183-84.

preventative detention in defense of Pakistan and pursuant to the aims of martial law.<sup>71</sup> Such laws were supplemented by various judgments that clarified issues related to detention including the extent of the power of the executive and the standards of reasonableness applicable to detention cases, which will also be discussed in the proceeding sections.<sup>72</sup>

### III. PAKISTAN'S PREVENTATIVE DETENTION LEGAL FRAMEWORK

This paper operates under two base assumptions, one that Pakistan is in a state of armed conflict and, two that the armed conflict is non-international in character. Extensive evaluation of either of these assumptions is beyond the scope of this paper. Nevertheless, to understand how the law of preventative detention may be further developed, it is important to navigate the discussion within this paper in accordance with what may be likely future events.

#### TERRORISM IN PAKISTAN

Pakistan may be engaged in a non-international armed conflict with Tehreek-i-Taliban Pakistan (TTP) and its associates, as both the Government of Pakistan<sup>73</sup> and the TTP<sup>74</sup> have acknowledged in their respective statements over the past several years. Counter-terrorism operations to mitigate this threat have taken the form of law enforcement operations and, as is currently the case, military operations, pursuant to Article 245 of the Constitution.

In 2014, Operation Zarb-e-Azb was launched to counter terrorist forces operating and seeking sanctuary in North Waziristan.<sup>75</sup> Zarb-e-Azb was initiated partially in response to an attack on Jinnah International Airport in Karachi on June 8, 2014 that resulted in the deaths of several airline employees and security personnel, along with injury to many others.<sup>76</sup> TTP claimed responsibility for the attack despite purportedly engaging in peace talks with the government at the time.<sup>77</sup> The airport attack was not the only indicator of the hollow nature of TTP's desire for peace. Several months before the airport attack, the Taliban executed twenty-three Frontier Corps soldiers only days prior to a scheduled negotiation session.<sup>78</sup>

After Zarb-e-Azb began, the Taliban retaliation culminated in an attack on the Army Public School in Peshawar on the 16<sup>th</sup> of December 2014, which resulted in the deaths of more than 140 people, including 132 children.<sup>79</sup> These attacks are only some of the most recent acts of violence perpetrated by the TTP and its associated forces. They are also responsible for countless other attacks over the last several years,<sup>80</sup> many of which have resulted in significant harm to

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<sup>71</sup> *Id.* at 184.

<sup>72</sup> See *Id.* at 186-191.

<sup>73</sup> See for example <http://arynews.tv/en/pakistan-is-in-a-state-of-war-chaudhry-nisar/>

<sup>74</sup> <http://www.dawn.com/news/1043692/war-continues-against-govt-troops-ttp>

<sup>75</sup> [https://www.ispr.gov.pk/front/main.asp?o=t-press\\_release&id=2574#pr\\_link2574](https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=2574#pr_link2574)

<sup>76</sup> <http://www.dawn.com/news/1111397>

<sup>77</sup> *Id.*

<sup>78</sup> find media citation

<sup>79</sup> <http://www.theguardian.com/world/live/2014/dec/16/over-100-people-killed-in-pakistan-taliban-school-siege-says-provincial-chief-minister-live-updates>

<sup>80</sup> malala

civilians.<sup>81</sup> Such acts are not limited to any one province, region or manner of target, nor does there exist any single specific reason for their commission.

From its inception, Pakistan has faced continuous threats to its security and integrity. Terrorism is perhaps the most current manifestation of this dilemma. Over time, measures ranging from the use of drones, to negotiations and military operations were employed to counteract this threat and laws allowing detention supplemented these measures. Though terrorism is not the sole basis for the existence of preventative detention in Pakistan's laws, the current nature of the threat is such that the preventative detention regime is maintained for addressing such concerns.

#### DOMESTIC LAWS THAT GOVERN PREVENTATIVE DETENTION

Pakistan's current preventative detention framework comprises of laws that span from 1952 to 2014. The laws that precede these, laws promulgated by the British, operated in times of emergency, but their adoption by Pakistan was a permanent one.<sup>82</sup> Pakistan's short history reflects the preservation of preventative detention laws that culminated in the regime documented below. These laws that also comprise part of Pakistan's counter-terrorism framework are in continuous operation and apply generally throughout the state.

#### *The Constitution of Pakistan (1973)*<sup>83</sup>

The Constitution of Pakistan, as it exists today, was promulgated in 1973. Article 10 of the Constitution directly addresses preventative detention and, by and large, the language has remained unchanged over time.

#### Article 10: Safeguards as to Arrest and Detention<sup>84</sup>

- (4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorize the detention of a person for a period exceeding three months unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of three months, unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.
- (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, within fifteen days from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order
- (7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of

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<sup>81</sup> see generally <http://www.satp.org/satporgtp/countries/pakistan/terroristoutfits/ttp.htm>

<sup>82</sup> F. Hussain note 46 pg 173

<sup>83</sup> Constitution general citation

<sup>84</sup> Const. Article 10

any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case

*Provided* that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy or who is acting or attempting to act in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity

- (8) The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family
- (9) Nothing in this Article shall apply to any person who for the time being is an enemy alien

Changes made to Article 10 that remain in tact today, were enacted through the Constitution (Third Amendment) Act, 1975.<sup>85</sup> The Act extended pre-review detention from one month to three months, along with the period for communicating the grounds for detention from one week to fifteen days.<sup>86</sup> The limitation on the extent of time for which a person may be detained was removed for persons referenced in the “Provided” clause above.

#### *Protection of Pakistan Act (2014)*<sup>87</sup>

The Protection of Pakistan Ordinance, 2013 was issued in October 2013 as a temporary measure intended to “provide protection against waging of war against Pakistan, prevention of acts threatening the security of Pakistan and for speedy trial of certain offences.”<sup>88</sup> The Ordinance was amended in January 2014 and its application was extended for an additional 120 days not long after.<sup>89</sup> In July 2014, the Ordinance was converted into the full-fledged Protection of Pakistan Act, 2014.

The Protection of Pakistan (Amendment) Ordinance, 2014 expanded the preventative detention framework incorporated in the initial Ordinance by redrafting Section 6 and including additional types of persons subject to these provisions.

#### Article 6: Preventive Detention<sup>90</sup>

- (1) The Government may, by an order in writing, authorize the detention of a person for a period specified in the order that shall not exceed ninety days if in the opinion of the Government such person is acting in a manner prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services:

*Provided* that detention of such person shall be in accordance with the provisions of Article 10 of the Constitution:

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<sup>85</sup> Cite Third amendment Act

<sup>86</sup> Id. section 1

<sup>87</sup> Cite PoPA

<sup>88</sup> statement of object and reason (double check)

<sup>89</sup> NACTA timeframe document

<sup>90</sup> PoPA note 85 art. 6

*Provided* further that without prejudice to the above, an enemy alien or a Combatant Enemy may be detained by the Government for such period as may be determined by it from time to time in accordance with Article 10 of the Constitution.

Explanation – A person connected or reasonably believed to be connected with the commission of a Scheduled Offence or a person falling under sub-section (5) of section 5 shall be deemed to be a person acting in the manner stated above.

- (2) In areas where the Federal Government or the Provincial Government has called Armed Forces in aid of civil power under Article 245 of Constitution, 1973 or where any Civil Armed Force has been called by the Federal Government or Provincial Government in aid of civil power under Anti-Terrorism Act 1997, the said requisitioned force may detain any enemy alien, combatant enemy, or any person connected or reasonably believed to be connected with the commission of a Scheduled Offence in designated internment camps after a notification to the effect:

*Provided* that detention of such person shall be in accordance with the provisions of Article 10 of the Constitution:

- (3) At any time during the said notifications or upon their withdrawal, such internee may be handed over to Police or any other investigating agency for formal investigation and prosecution:
- (4) The Federal Government shall make Regulations to regulate the internment orders, internment camps, and appeal mechanism against the internment orders.
- (5) Any person arrested or detained by the Armed Forces or Civil Armed forces and kept under arrest or detention before the coming into force of this Ordinance shall be deemed to have been arrested or detained pursuant to the provisions of this Ordinance.

Sub-sections (2) through (5) were added by the Amendment to the original Ordinance and they represent expanded legal cover provided to the Armed Forces regarding their counter-terrorism operations.

#### *Actions (in Aid of Civil Power) Regulations, 2011<sup>91</sup>*

The Actions (in Aid of Civil Power) Regulations, 2011 (AACPR) is the primary law governing preventative detention pursuant to actions in aid of civil power. Triggering Article 245 of the Constitution,<sup>92</sup> these military operations are then subject to the law related to armed conflict. The application of AACPR, however, is limited to not only the call for actions in aid of civil power,<sup>93</sup> but also to the territory of the Federally Administered Tribal Areas (FATA).<sup>94</sup>

#### Section 8: Interning authority<sup>95</sup>

- (1) The Governor, or any officer authorized by it in this behalf, may issue an order of internment under this Regulation.

#### Section 9: Power to intern<sup>96</sup>

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<sup>91</sup> Cite AACPR

<sup>92</sup> Const Art. 245

<sup>93</sup> AACPR 3(1)

<sup>94</sup> Id. 1(2)

<sup>95</sup> Section 8

- (1) The Interning Authority shall intern any person who:
  - (a) may obstruct actions in aid of civil power in any manner whatsoever; or
  - (b) if not restrained or incapacitated through internment shall strengthen the miscreants' ability to resist the Armed Forces or any law enforcement agency; or
  - (c) by any action or attempt may cause a threat to the solidarity, integrity or security of Pakistan; or
  - (d) has committed or likely to commit any offence under this Regulation so that the said person shall not be able to commit or plan to commit any offence, during the actions in aid of civil power.
- (2) If, in the opinion of the Interning Authority, the internment of any person is expedient for peace in the defined area, it shall pass an order of internment.
- (3) The Interning Authority may intern any person who may not be in the defined area, but is suspected of having committed acts or has nexus with actions that are referred to in subsections (1) and (2) in the defined area.
- (7) The Governor shall prescribe internment procedure.

#### Section 10: Remedy for release<sup>97</sup>

- (1) The Interning Authority may, either on its own or on the written request of the person interned or his relatives, may withdraw the order of internment.

#### Section 11: Duration of internment<sup>98</sup>

The power to intern shall be valid from the day when this Regulation deemed to have come into force, or the date the order of internment is issued, whichever is earlier, till the continuation of actions in aid of civil power.

#### Section 14: Oversight Board<sup>99</sup>

- (1) The Governor shall notify an Oversight Board for each internment center comprising two civilians and two military officers to review the case of each person interned within a period of time, not exceeding one hundred and twenty days, from the issuance of the Order of Internment, and prepare a report for consideration of the Governor.

#### Section 15: Prohibition on torture<sup>100</sup>

No person interned under this Regulation, shall be subjected to inhuman or degrading treatment or torture.

The aim of AACPR is to facilitate the actions of armed forces during conflicts in FATA. This Regulation provides the legal basis for preventative detention during actions in aid of civil

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<sup>96</sup> Section 9

<sup>97</sup> Section 10

<sup>98</sup> Section 11

<sup>99</sup> Section 14

<sup>100</sup> Section 15

power, which makes AACPR the only domestic law for preventative detention that directly situates itself in an IHL framework.

*Anti-Terrorism Act (1997)*<sup>101</sup>

The Anti-Terrorism Act (ATA) was issued in 1997 to provide a legal solution to acts of terrorism, sectarian violence and other heinous offences.<sup>102</sup> This was the first law designed to provide a more permanent legal basis for addressing terrorism after the 1975 Suppression of Terrorist Activities (Special Courts) Act.<sup>103</sup> The laws promulgated in the interim were considered “special” laws and the ATA was designed to replace the use of these ad hoc legal measures.<sup>104</sup> Originally the ATA contained no specific provision providing for preventative detention. The Anti-Terrorism (Amendment) Ordinance, 2002 inserted Section 11EEE and the Anti-Terrorism (Second Amendment) Act, 2013 inserted Section 11EEEE to provide for preventative detention pursuant to the ATA.<sup>105</sup>

Section 11EEE: Power to arrest and detain suspected persons<sup>106</sup>

- (1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to section 11EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be specified, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months.
- (2) The provisions of Article 10 of the Constitution of the Islamic Republic of Pakistan shall mutatis mutandis apply to the arrest and detention of a person ordered under sub-section (1)

Section 11EEEE: Preventive detention for inquiry<sup>107</sup>

- (1) The Government may, for a period not exceeding thirty days and after recording reasons thereof, issue order for the preventive detention of any person who has been concerned in any offence under this Act relating to national security and sectarianism or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned, for purposes of inquiry:

*Provided* that the Anti-Terrorism Court may, for reasons to be recorded, grant extension in the period of detention for up to thirty days at a time, but the total period of detention shall not exceed ninety days.

The addition of Section 11EEE in 2002 was the byproduct of the new post-September 11, 2001 anti-terrorism legal order, also influenced by tensions with India at the time.<sup>108</sup>

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<sup>101</sup> ATA

<sup>102</sup> ATA preamble

<sup>103</sup> <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/39/html>

<sup>104</sup> *Id.*

<sup>105</sup> ATA 2002 amendment

<sup>106</sup> *Id.* at 11EEE

<sup>107</sup> *Id.* at 11EEEE

<sup>108</sup> <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/39/html> note 89

### *Maintenance of Public Order Ordinance (1960)*<sup>109</sup>

When the Maintenance of Public Order Ordinance was issued in 1960, no time limit was placed on its application and it remains in force today.<sup>110</sup> The law was amended in 1964 to declare that members of unlawful organizations were essentially strictly liable by membership alone, for acts prejudicial to public order.<sup>111</sup>

#### Section 3: Power to arrest and detain suspected persons<sup>112</sup>

- (1) Government, if satisfied that with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order, it is necessary so to do, may, by an order in writing, direct the arrest and detention in such custody as may be prescribed under sub-section (7), of such person for such period as may, subject to the other provisions of this section, be specified in the order and Government, if satisfied that for the aforesaid reasons it is necessary so to do, may extend from time to time the period of such detention, for a period not exceeding six months at a time.

Explanation II – Whoever is or was a member of an association or its Executive Committee, which association is or has been declared to be unlawful under any law for the time being in force in the province, at any time during the period of seven days immediately before it was so declared to be unlawful, or remains or becomes a member of such an association or is on the Executive Committee thereof after it has been declared to be unlawful shall be deemed to be acting in a manner prejudicial to the public order for the purposes of this section.

- (5) No person shall be detained under this section for a period exceeding three months unless the Board, before the expiry of the period of three months, has reviewed his case and reported that there is, in its opinion, sufficient cause for such detention
- (5-a) If the detention of a person is required for more than three months, the Government shall, as early as possible but not later than two weeks before the expiry of such period, request the Chief Justice of the Lahore High Court to appoint a Board to be known as the Review Board.
- (5-g) If the Board reports that there is, in its opinion, no sufficient cause for the further detention of the detained person, the Government shall rescind the detention order and direct the release of the person on the expiry of the period of three months.
- (6) If a detention order of a person is made under this section, the authority making the order:
  - (a) shall, within fifteen days of the detention of the person, communicate to the person the grounds on which the order has been made, and shall afford the person the earliest opportunity of making a representation to the Government against the detention order;
  - (b) may refuse to disclose facts to the detained person which the authority considers to be against public interest to disclose; and
  - (c) shall furnish to the Board all documents relevant to the case [...] to the effect that it is not in the public interest to furnish any document to the Board, is produced.
- (6-a) Where a representation is made to Government under sub-section (6), Government may, on consideration of the representation and giving the person detained an opportunity of being heard, modify, confirm or rescind the order.

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<sup>109</sup> Cite west pak MPOO

<sup>110</sup> F. Hussain note 46, page 183

<sup>111</sup> *Id.*

<sup>112</sup> MPOO article 3

- (7) So long as there is in force in respect of any person an order under this section directing that he be detained, he shall be liable to be detained in such custody and under such conditions as to maintenance, discipline and punishment for offences and breaches of discipline as Government may from time to time prescribe by general or special order.
- (11) The limitation of duration of detention of a person and mandatory submission of the case of a detained person to the Board under this section shall not apply in case of a person who, for the time being, is an enemy alien.

### *Security of Pakistan Act (1952)*<sup>113</sup>

The Security of Pakistan Act of 1952 is not as frequently referenced, as are newer counter-terrorism laws. It remains in force today, though repeated questions were raised as to its continuing validity in light of these subsequent laws. The Lahore High Court confirmed that it was not a dead law in *Amatul Jalil Khawaja v. Federation of Pakistan*,<sup>114</sup> where it was found that if various subsequent acts indirectly repealed the law, then the Government would have formally confirmed this occurrence in 1981, when all Federal laws were under review.<sup>115</sup>

### Section 3: Restrictions on the movements of suspected persons and their detention<sup>116</sup>

- (1) The Federal Government, if satisfied with respect to any particular person, that, with a view to preventing him from acting in any manner prejudicial to the defence or the external affairs or the security of Pakistan, or any part thereof, it is necessary so to do, may make an order –

(b) directing that he be detained

*Provided* that, within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under the clause, no person, other than a person who for the time being is, an enemy alien or who is employed by, or works for, or acts on instructions received from, the enemy, or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to any anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity, shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case.

- (4) So long as there is in force in respect of any person an order under clause (b) of sub-section (1) directing that he be detained, he shall be liable to be detained in such place as the Board may determine and under such conditions, including conditions as to discipline and punishment of offences and breaches of discipline, as the Federal Government may from time to time specify.
- (9) The revocation, otherwise than on the recommendation of the Board, of an order made under clause (b) of sub-section (1) against any person, or the expiry of any such order, shall not bar the making, against the same person and on the same grounds, of a fresh order under that clause

### Section 3-C: Detention orders not to be invalid or inoperative on certain grounds<sup>117</sup>

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<sup>113</sup> Sec. of Pak Act citation

<sup>114</sup> PLD 2003 Lahore 310

<sup>115</sup> Para 39

<sup>116</sup> Section 3 note 101 Sec of Pak Act

<sup>117</sup> Section 3-C note 101 Sec of Pak Act

No detention order shall be invalid or inoperative merely by reason:

- (a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or officer making the order, or
- (b) that the place of detention of such person is outside the said limits

### Section 6: Communication of grounds of order<sup>118</sup>

- (1) In every case where an order has been made under sub-section (1) of Sec. 3 [...], the authority making the order shall, as soon as may be, but subject to the provisions of sub-section (2) communicate to the person or association affected thereby the grounds on which the order has been made to enable him or it to make representation in writing against the order, and it shall be the duty of such authority to inform such person or association of his or its right of making such representation and to afford him or it the earliest opportunity of doing so;

*Provided* that nothing in this section shall require the authority to disclose the facts, which it considers to be against the public interest to disclose

- (2) In the case of an order made under clause (b) of sub-section (1) of Sec. 3, the authority making the order shall, except where the Federal Government in the interest of the security of Pakistan, directs otherwise, inform the person detained under that order of the grounds of his detention at the time he is detained or as soon thereafter as is practicable, but not later than fifteen days from the date of detention.

### Section 6-A: Reference to Board and its procedure<sup>119</sup>

- (1) A person shall not be detained under an order made under clause (b) of sub-section (1) of Sec. 3 for a period exceeding three months unless the Board, to which a reference shall be made by the Federal Government, has reviewed his case and reported before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of three months, unless the Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.
- (2) A person affected by an order under clause (b) of sub-section (1) of Sec. 3 shall be entitled to be heard in person by the Board and to consult, in the presence of an officer nominated by the Federal Government, but not to be represented before the Board by a legal practitioner.
- (4) All proceedings of the Board shall be secret.

The provisions of the Security of Pakistan Act that related to detention replicate, more or less, the provisions of the Constitution of Pakistan, though the Constitution was issued almost twenty years later.

### *Foreigners Act (1946)*<sup>120</sup>

### Section 3: Power to make orders<sup>121</sup>

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<sup>118</sup> Section 6 Id.

<sup>119</sup> Id. Section 6-A

<sup>120</sup> Cite foreigners act

<sup>121</sup> Id. section 3

- (2) In particular and without prejudice to the generality of the foregoing power, order made under this section may provide that the foreigner:
- (g) shall be arrested and, in the interest of the security of Pakistan, detained or confined Provided that a person shall not be detained for a period longer than two months without the authority or a Board consisting of a Judge of the Supreme Court who shall be nominated by the Chief Justice of the Court and another senior officer in the service of Pakistan, who shall be nominated by the President.
- (4) The provisions of sub-section (2) of Section 6 of the Security of Pakistan Act, 1952 (XXXV of 1952) and those of Section 6-A of that Act, shall *mutatis mutandis*, apply in relation to a person detained under this Act as they apply in relation to a person detained under that Act.

#### Section 4: Internees<sup>122</sup>

- (1) Any foreigner (hereinafter referred to as internee) in respect of whom there is in force any order made under clause (g) of sub-section (2) of section 3, directing that he be detained, or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Federal Government may from time to time determine.

#### ELEMENTS OF PREVENTATIVE DETENTION LAW

The broad timeline between the various laws that govern preventative detention necessitates a comparison of the essential elements of those laws. Breaking down these laws into their basic elements provides an understanding of their current status, serving the eventual goal of facilitating their evaluation under international law and the laws of other states.

##### *Persons Subject to Preventative Detention Laws*

Those subject to preventative detention laws are identified with various labels that place them into certain categories. Broadly speaking, any “person” may be potentially detained and their status then determines the preventative detention regime to which they are subject. To this end, it is significant to note that the word “person” is used, instead of “citizen” as the subject of these laws. This means that Pakistan’s preventative detention law does not pivot upon citizenry or lack thereof.

In the Constitution, Article 10 applies preventative detention to two categories of persons, as well as enemy aliens.<sup>123</sup> First, there are those persons in category one that are “acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services.”<sup>124</sup> Then there are those persons in category two that work for or act on the instructions of the “enemy,” those that act or attempt an act that is prejudicial to the integrity, security or defense of Pakistan or amounts to anti-national activity or if they are a member of a group that indulges in anti-national activity.<sup>125</sup> Finally, there are “enemy aliens,” undefined in the Constitution.<sup>126</sup>

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<sup>122</sup> Id. section 4

<sup>123</sup> Const. of Pak, Art. 10

<sup>124</sup> Id. Art. 10(4)

<sup>125</sup> Id. Art. 10(7)

The difference in status results in the different application of procedures. Yet, there is no firm line dividing these three categories from one another. The grounds for detention for each category differ only marginally and within that margin is perhaps the definition of each status. Category one persons are seemingly those that are detained for acting in a manner prejudicial to the external affairs of Pakistan, public order or the maintenance of supplies or services. Category two persons, those that do not benefit from the legal time limit on detentions within twenty-four months, are those that work directly for, receive instructions from or are members of a declared enemy. They indulge in anti-national activity or support groups that participate in such acts.

Enemy aliens are not further described in the Constitution and may thus be defined by analogy. If viewed as a progression, category two sits above category one based on its severity and enemy aliens above category two. Thus, enemy aliens are presumably held on more serious grounds than persons in the other categories. The more serious status of enemy aliens is derived from their violation of Article 5 of the Constitution<sup>127</sup> and, accordingly, their lack of citizenship.<sup>128</sup>

The Protection of Pakistan Act, 2014 defines both enemy aliens and combatant enemies, both definitions are used in the Act collectively and both support the interpretation of enemy aliens derived from the Constitution. An “enemy alien” is someone that cannot establish their citizenship or has their citizenship revoked by the Federal Government. Those with enemy alien status are suspected of involvement in the waging of war or insurrection against the state through the scheduled offences.<sup>129</sup> A “combatant enemy” is someone that:

[R]aises arms against Pakistan, its citizens, the Armed Forces or Civil Armed Forces or aids or abets the raising of arms or waging of war against Pakistan or threatens the security and integrity of Pakistan or commits or threatens to commit any Scheduled Offence and includes a person who commits any act outside territory of Pakistan for which he has used the soil of Pakistan for preparing to commit an act that constitutes an offence under the laws of Pakistan and the laws of the state where such offence has been committed<sup>130</sup>

The language employed by both definitions indicates that the waging of war and the raising of arms against Pakistan are the acts that characterize enemy aliens and combatant enemies. These acts rise beyond other categories of persons that may be subject to preventative detention and they are automatically declared non-citizens. As a result, the law provides for the detention of enemy aliens, but does not provide any further procedural guidelines.

Although the Anti-Terrorism Act, 1997 conforms to Article 10 of the Constitution, its approach towards identifying those persons that may be preventatively detained differs in procedure. Section 11EEE of the Act permits detention of those persons included in a list established under

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<sup>126</sup> Id. Art. 10(9)

<sup>127</sup> Cite Article 5 and (1) Loyalty to the State is the basic duty of every citizen. (2) Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

<sup>128</sup> The citizenship may have been revoked as per Sec. 16 of Pakistan Citizenship Act

<sup>129</sup> PoPA note 85 section 2(d)

<sup>130</sup> Id. section 2(ca)

Section 11EE.<sup>131</sup> This list, contained in the Fourth Schedule of the Anti-Terrorism Act, was amended in 2014 to include those persons who are reasonably believed to be “concerned” in terrorism, associated with any organization involved in terrorism or acting on behalf of any person or organization that may be engaging in terrorism as per this provision.<sup>132</sup> Sub-section (2) of Section 11EEE directly applies Article 10,<sup>133</sup> which allows those persons contained in the list to be then further divided by status as discussed above.

### *Grounds for Detention*

The grounds for detention refer to the reasons for which a person may be preventatively detained. Article 10(4) of the Constitution provides that those, “acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services” may be preventatively detained.<sup>134</sup>

Membership in an unlawful organization also constitutes an act prejudicial to the maintenance of public order and therefore becomes grounds for preventative detention as well, under the Maintenance of Public Order Ordinance.<sup>135</sup> The Actions (in Aid of Civil Power) Regulations allow detention on grounds of obstruction of military operations, the potential to commit acts that benefit miscreants,<sup>136</sup> for acts prejudicial to the security, solidarity or integrity of Pakistan and for an alleged offences committed during the armed conflict.<sup>137</sup>

Grounds for detention also include those acts that carry with them the status of an enemy alien and combatant enemy. Under the Protection of Pakistan Act, 2014, this includes, “waging of war or insurrection against Pakistan or depredation on its territory, by virtue of involvement in offences specified in the Schedule.”<sup>138</sup> It also includes raising arms against Pakistan, its citizens or Armed Forces; aiding and abetting of these acts; threatening the security and integrity of Pakistan; and committing or intending to commit any scheduled offence.<sup>139</sup>

Pursuant to the laws controlling preventative detention, a person may only be detained if there are valid grounds. The Supreme Court of Pakistan held that the grounds given by the authority must be “complete and full,” to share with the detainee the allegations permitting their detention.<sup>140</sup> The Supreme Court also previously held, “A detention order based on irrelevant, vague or extraneous grounds is a nullity”<sup>141</sup> and the Karachi High Court held the same if even one ground is determined to be “irrelevant or vague or extraneous.”<sup>142</sup> The Peshawar High Court

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<sup>131</sup> See earlier discussion of 11EEE

<sup>132</sup> ATA Sect. 11EE

<sup>133</sup> 11EE(2)

<sup>134</sup> Const. 10(4)

<sup>135</sup> MPOO 3(1)

<sup>136</sup> AACPR 2(1)

<sup>137</sup> Id section 9(1)

<sup>138</sup> PoPA 2(d)

<sup>139</sup> PoPA 2(ca)

<sup>140</sup> Govt of E. Pakistan v. Mrs RB Shaukat PLD 1966 SC 286.

<sup>141</sup> Get Citation from F. Hussain page 186

<sup>142</sup> *same*

further held that it is upon the detaining authority to prove that the grounds for detention are valid.<sup>143</sup>

Article 10(5) of the Constitution of Pakistan clearly states that when a person is preventatively detained, the detaining authority must, within fifteen days, communicate the grounds on which the order for preventative detention was made. The language is plain, in that, fifteen days is the maximum time limit for the supply of grounds of detention.<sup>144</sup> The Security of Pakistan Act, 1952 also applies the fifteen day limit, but further stipulates that grounds for detention be shared at the time of the detaining or as soon as possible thereafter, unless Pakistan's security interests suggest otherwise.<sup>145</sup>

The Lahore High Court considered the communication of the grounds of detention to be essential because "it is the material ingredient upon which the authority relies to pass orders of detention."<sup>146</sup> The Court further held that the grounds of detention must precede the order, meaning that "first there should be grounds in the form of material which is to be considered by the authority"<sup>147</sup>

The Protection of Pakistan Act, 2014, though it does not specifically include a time limit for disclosing the grounds for detention, does indicate that the detention of a person will be within the scope of Article 10 of the Constitution.<sup>148</sup> The Act, however, was amended to include the following provision, "subject to the Constitution, the Government may not in the interest of the security of Pakistan disclose the grounds for detention or divulge any information relating to a detainee, accused or internee, who is an Enemy Alien or Combatant Enemy."<sup>149</sup> This is established in the Constitution, which provides "the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose."<sup>150</sup>

### *Executive Authority & Judicial Review*

It is the executive that issues preventative detention orders and the judiciary that verifies if the orders are made according to a reasonable standard. While the power of the executive to detain is written into the specific preventative detention laws,<sup>151</sup> the authority for judicial review comes from Article 199 of the Constitution of Pakistan, which expands the jurisdiction of the High Court to include orders, "directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner."<sup>152</sup> Individuals that are

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<sup>143</sup> *same*

<sup>144</sup> *Mamoona Saaed v. Government of Punjab*, 2007 P Cr. L J 268. Paragraph 8

<sup>145</sup> Sec. of Pak Act 6(2)

<sup>146</sup> *Mamoona Saaed v. Government of Punjab* at paragraph 10

<sup>147</sup> *Id.*

<sup>148</sup> PoPA 6(1)

<sup>149</sup> Section 9(1b)

<sup>150</sup> Const. 10(5)

<sup>151</sup> See for example PoPA section 6(1)

<sup>152</sup> Const. 199(1)(b)(i)

preventatively detained also need not wait for their appearance before the Review Board to seek judicial review of their detention.<sup>153</sup>

The courts originally adhered to the policy that a properly made detention order showing the satisfaction of the authority was enough to justify detention, and a court of law could not probe into the reasonableness or sufficiency of reasons for such orders.<sup>154</sup> Thus, judicial review was limited to inquiring into the satisfaction of the authority with regards to the detention. The Lahore High Court held subsequently that it is a “condition precedent” for the authority to exercise its personal judgment in making a detention order.<sup>155</sup> The Court also found that detention orders passed in a “routine and mechanical manner, without giving due care and caution” are not valid.<sup>156</sup> This implies that it is not the “satisfaction of the detaining authority alone which is sufficient” because the authority also has a duty “to satisfy the Court that there existed material on which any reasonable person could have formulated the opinion as to the necessity of the detention.”<sup>157</sup>

*Ghulam Jilani v. Government of West Pakistan*<sup>158</sup> was the landmark case that then established a precedent for further judicial control over executive authority.<sup>159</sup> It altered the standard of review performed by the court from subjective to objective satisfaction, by holding, “the existence of reasonable grounds is essential and a mere declaration of satisfaction is not sufficient.”<sup>160</sup> The Supreme Court held subsequently that it was no longer acceptable for the authority to merely state its satisfaction before the court, the validity and reasonableness of the action required demonstration.<sup>161</sup> The Karachi High Court reinforced this position in *Muhammad Yunus v. Government of Sindh*.<sup>162</sup> It held, “The exercise of power by the detaining authority is subject to the ascertainment of responsible grounds, which is a judicial or quasi-judicial function.”<sup>163</sup>

The Anti-Terrorism Act, 1997, under Section 11EEEE, provides a basis within the law itself for immediate review by a judicial authority. The detainee, as it were, must be produced within twenty-four hours of detention in front of the appropriate authority.<sup>164</sup> The detainee must also reappear for review if and when an extension is necessary as per the law.<sup>165</sup>

#### *Time Limitations on Detention*

Pakistan’s law on preventative detention provides time limitations with regards to both initial periods of detention (pre-review) and the maximum period for which persons in various

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<sup>153</sup> AIR 1952 Cal. 26

<sup>154</sup> *Id.*

<sup>155</sup> Cite found in footnote 81 F. Hussain

<sup>156</sup> *Abdul Ghaffoor v. Crown*, PLD 1952 Lah 624.

<sup>157</sup>

<sup>158</sup> F. Hussain 189

<sup>159</sup> Constitution Book pg 399 para 11

<sup>160</sup> *Ghulam Jilani v. Government of West Pakistan* P L D 1967 Supreme Court 373

<sup>161</sup> F. Hussain pg 190

<sup>162</sup> PLD 1973 Kar 694, at 709-10

<sup>163</sup> *Id.*

<sup>164</sup> 11EEEE(3)

<sup>165</sup> *Id.*

categories may be detained. The pre-review time limitations on detention have varied over the years. As it stands, the Constitution permits detention for a maximum of three months, prior to consideration before the appointed Review Board.<sup>166</sup> Thereafter, the Review Board must reconsider the detention every three months to maintain its satisfaction that there is sufficient cause for detention.<sup>167</sup> Within the Constitution, there is also prescribed a maximum period of post-review detention. Over twenty-four consecutive months, persons subject to preventative detention may not be held more than a total of eight months for those acting in a manner that is prejudicial to public safety or twelve months for other cases.<sup>168</sup> The law states however, that this eight or twelve month limitation does not apply to those employed by or working on behalf of the enemy.<sup>169</sup> Neither the pre-review nor the post-review limitations apply to persons detained as enemy aliens,<sup>170</sup> although the Foreigners Act allows only two months of detention for non-citizens preventatively detained, “in the interest of the security of Pakistan,” prior to review.<sup>171</sup>

The Maintenance of Public Order Ordinance, like the Constitution, limits pre-review detention to three months.<sup>172</sup> The Ordinance goes so far as to say that the reviewing body must be appointed no later than two weeks prior to the expiration of those three months.<sup>173</sup> After a review confirming the validity of continued detention, the Government determines the maximum period for further detention, which may not exceed six months.<sup>174</sup> The Actions in Aid of Civil Power Regulations provide an exception to the Constitutional limit of three months, as the Regulations require review of detention within 120 days of the issuance of the order.<sup>175</sup>

The Anti-Terrorism Act also applies the provisions of Article 10 to those detained under the Act.<sup>176</sup> Yet, Section 11EEE, permitting detention for those listed under Section 11EE, only states that the detainee shall remain in custody for such time as specified in the order, which may be extended, though not beyond twelve months.<sup>177</sup> Those persons detained, not formally arrested, pursuant to any potential acts criminalized in relation to national security and sectarianism, may only be held for thirty days prior to review and must receive reconsideration every thirty days for a maximum of ninety days.<sup>178</sup>

### *Right to a Response & Right to Counsel*

The right to challenge an order of detention, to make representations against the order, is guaranteed in Article 10 of the Constitution.<sup>179</sup> A detainee must be afforded the earliest opportunity for that representation, but, in doing so, they are not guaranteed the assistance or

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<sup>166</sup> Const. 10(4)

<sup>167</sup> *Id.*

<sup>168</sup> Const. 10(7)

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* 10(9)

<sup>171</sup> Foreigners Act sect. 3(2)(g)

<sup>172</sup> MPOO sect. 3(5)

<sup>173</sup> MPOO sect. 3(5-a)

<sup>174</sup> MPOO sect. 3(1)

<sup>175</sup> AACPR 14(1)

<sup>176</sup> ATA 11EEEE(2)

<sup>177</sup> ATA 11EEEE(1)

<sup>178</sup> ATA 11EEEE(1)

<sup>179</sup> Const. 10(5)

defense of legal counsel.<sup>180</sup> Enemy aliens are altogether barred from availing the right to make representations against their detention order, along with denial of access to legal counsel.<sup>181</sup> The mandated appearance before the Review Board after the expiration of three months in detention (not applicable to enemy aliens) is often the earliest opportunity for detainees to make representations against their order and have the case reviewed, in accordance with the law.<sup>182</sup>

The Protection of Pakistan Act, 2014<sup>183</sup> and the Maintenance of Public Order Ordinance, 1960<sup>184</sup> contain similar requirements. The Security of Pakistan Act, 1952, however, provides rights beyond what the Constitution offers. Not only is a detainee entitled to make a representation to the Review Board, but also to consult a legal practitioner, though the detainee is not eligible to be represented by them during a hearing.<sup>185</sup>

Article 199(1)(b)(i) of the Constitution is open ended regarding filing suit on behalf of another. It specifically allows “on the application of *any* person,” the review of the custody of “a person.” Sections 199(1)(a) and 199(1)(c) both contemplate the applications of “aggrieved persons.” As a result, the deliberateness of the use of “any person” may be assumed. The resulting implication is that within Article 199(1)(b)(i) there is scope for the right of response and the right to counsel for the detainee. If a person, subject to preventative detention, cannot personally access counsel, there is nothing ostensibly barring the appointment of counsel by an alternative party to file a petition on their behalf.

#### **IV. ADVANCING THE PREVENTATIVE DETENTION LAW OF PAKISTAN**

##### INTERSECTING A CRIMINAL JUSTICE AND ARMED CONFLICT LEGAL FRAMEWORK

Preventative detention is often discussed under both a criminal justice and armed conflict framework, particularly detention that is pursuant to terrorism-related national security concerns. Fitting neatly in neither category, preventative detention, like the terrorism it seeks to dissuade, cannot be addressed through the application of either legal regime alone as demonstrated below. The criminal justice model, operating under the umbrella of the law of human rights, is dominant during peacetime. It maintains a higher threshold for the deprivation of liberty, as well as its subsequent procedures. The criminal justice model functions according to the premise that an unlawful act is committed and a corresponding punishment is assigned. Thus, the ultimate aims of the criminal justice process, retribution, restoration and rehabilitation after the fact, do not necessarily line up with the preventative portion of preventative detention. Nevertheless, the increased protections the criminal justice model provides and the inevitable occurrence of terrorism outside of armed conflicts make this legal framework relevant to a discussion on the law of preventative detention.

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<sup>180</sup> Id. at 10(3)

<sup>181</sup> Id. at 10(9)

<sup>182</sup> Id. at 10(4)

<sup>183</sup> PoPA 6(1)

<sup>184</sup> MPOO 3(5-d)

<sup>185</sup> Sec of Pak 6A(2)

International humanitarian law, on the other hand, exercises fewer procedural constraints vis-à-vis the deprivation of liberty during armed conflict. Ultimately, the law of war provides greater scope for detention because it allows legal space for incapacitation, rather than requiring traditionally restrictive act-based liability. However, fewer restraints increase the likelihood for abuse of the law, in letter and spirit. This is in addition to the limited application that international humanitarian law has as *lex specialis*. Thus, while the law of armed conflict may appear to be the most appealing of choices for preventative detention pursuant to counter-terrorism operations, it alone does not suffice.

Forgoing the application of one framework in lieu of the other, it appears that the development of the law of preventative detention is most fruitful when the criminal justice and armed conflict models converge. The nature of the interaction between humanitarian and human rights law is regularly discussed amongst international law scholars, part of the *Palestinian Wall Advisory Opinion*<sup>186</sup> referenced above is the manifestation of just such a discussion, yet there is no uniformity of consensus on their exact relationship.

For the purposes of this discussion, it is not the issues of the application of human rights law to the supposed NIAC that is of concern. It is more the scope for application of the law of armed conflict beyond the literal theater of war, to the remaining state that poses a challenge. This challenge exists because non-state actors in a NIAC fail to recognize boundaries established by the laws of armed conflict, openly and vigorously attacking soft targets. Accordingly, rigidity in adhering to such legal boundaries becomes a costly hindrance to states attempting to exercise self-defense.<sup>187</sup> To overcome this challenge, traditional notions regarding the geographical limitations of an NIAC must be relinquished.<sup>188</sup> In light of increasing prevalence of drones and “cyber operations,” perceived geographical constraints in applying the law of armed conflict to combat terrorism are becoming less relevant.<sup>189</sup> Though it may be exercised pursuant to counter terrorism operations occurring beyond the geographical span of a war zone, preventative detention still receives legal cover of international humanitarian law.

In reference to the proceeding section, the criminal justice and armed conflict models collectively serve as a grounds from which the further development of Pakistan’s domestic law relating to preventative detention may be contemplated.

#### USING A HYBRID FRAMEWORK TO EXPAND THE ELEMENTS OF PAKISTAN’S PREVENTATIVE DETENTION LAW

The assumption undertaken in this paper, that Pakistan is engaged in a non-international armed conflict, must be reiterated at this point to preempt any questions regarding the violation of human rights law through the use of preventative detention. Though, the full-fledged application

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<sup>186</sup> *Supra* note above

<sup>187</sup> It is becoming widely accepted (if it was ever doubted before) that there is a right to self-defence against non-state actors. This right is embedded in UN Security Council Resolutions 1368 and 1373 following the 9/11 attacks.

<sup>188</sup> <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/011012summary.pdf>, pg 8

<sup>189</sup> *Id.*

of human rights law during an armed conflict would give rise to conflict between the two legal regimes, the use of the derogation mechanism allows for a more harmonious overlap.

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) requires that measures derogating from a state's obligations under the ICCPR only be taken "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."<sup>190</sup> The ICCPR permits derogation during armed conflict to the extent that commentary on Article 4 derogation during an armed conflict is allowed "only if and to the extent" that a threat to the life of the nation persists.<sup>191</sup> ICCPR General Comment 29 further provides that in proclaiming a state of emergency, states must "act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers."<sup>192</sup>

Essentially, while filing a derogation during an armed conflict, specifically, is not required per se, the circumstances themselves, to allow for derogation, must reach the same threshold. The situation of armed conflict must threaten the life of the nation, the emergency must be publicly proclaimed and the derogation measures must be proportional to what the situation requires. For the purposes of this supposed NIAC, all three requirements may be deemed to be satisfied.

#### *Persons Subject to Preventative Detention Laws*

During a non-international armed conflict (NIAC), the use preventative detention is contemplated under international humanitarian law (IHL). The law applicable to NIACs, however, provides nothing further, as mentioned in Section II. This relegates the remaining lawmaking to the states, assuming customary international law, Common Article 3 of the Geneva Conventions<sup>193</sup> and to a limited extent, human rights law are satisfied. Therefore, Pakistan is permitted to preventatively detain people and its domestic law provides both the legal basis and the procedure to do so.

As regards persons subject to preventative detention, the principle of distinction may be evaluated in determining who may be lawfully preventatively detained in an NIAC. Customary international law dictates that parties to a conflict must distinguish between civilians and combatants<sup>194</sup> and no attacks may be directed against civilians.<sup>195</sup> The principle of distinction here refers specifically to attacks and thus the separation of those that may be targeted and those that are protected is quite distinct. For the purposes of speculation, it may be true that the severity in distinction between who may or may not be detained may in fact be lesser. Yet, without sound IHL provisions to reference, categories of persons found in NIACs may serve as the most appropriate point of reference in determining those that may be legitimately detained.

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<sup>190</sup> Article 4 ICCPR

<sup>191</sup> GC 29 para 3

<sup>192</sup> GC 29 para 2

<sup>193</sup> Pakistan is not a party to Additional Protocol II. Its provisions only apply to the extent that they may be considered customary international law.

<sup>194</sup> Combatants is used in the general sense of the word, not those persons in international armed conflicts that acquire combatant-status

<sup>195</sup> rule 1 Customary IHL [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule1](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1)

Common Article 3 only references those persons “taking no active part in the hostilities.”<sup>196</sup> Thus, one way to distinguish who may be detained is to center the distinction upon direct participation in hostilities. This method of identifying potential detainees, however, is too narrow to serve its counter-terrorism purpose. Non-state actors that commit acts of terrorism have not necessarily committed any predicate acts of aggression and thereby have not directly participated in hostilities. If detention based on this distinction relies on the commission of an act of terrorism, then the preventative portion of preventative detention serves no purpose.

Distinguishing those persons that may be subject to preventative detention then must rely on broader notions of those participating in hostilities. In the criminal justice model, punishment is based on the commission of an unlawful act<sup>197</sup> and correspondingly there is act-based liability. Detention in an armed conflict model relies on what may be called status-based liability. Under IHL, there continues to be an emphasis on association-based status as the primary grounds for detention, where act-based status plays a secondary role.<sup>198</sup> Status-based preventative detention has roots in the law governing international armed conflicts.<sup>199</sup> Because the law governing NIACs leaves these provisions to the discretion of domestic law, Pakistan may consider applying this method of status-based distinction to its own law. Application of this distinction would resolve the limitations imposed by the direct participation in hostilities model above because detention based on status anticipates the commission of any detrimental act and is therefore truly preventative.

Status-based preventative detention does exist in Pakistan’s domestic law, though it is heavily overshadowed by detention that is act-based. Article 10(4) is limited to detention based on acts, for example, “acting in a manner prejudicial to the integrity, security or defence of Pakistan.”<sup>200</sup> Article 10(7), though it does not provide a basis for detention, does eliminate time constraints for those detainees that are members of groups that “indulge in anti-national activity.”<sup>201</sup>

The Protection of Pakistan Act is the prime legislation addressing preventative detention today, but the detention, again, is primarily based on the actions, not status. Those classified as enemy aliens and combatant enemy, for example, wage war<sup>202</sup> or raise arms against the state,<sup>203</sup> making them liable for what they do, rather than who they are. However, the Protection of Pakistan Act does permit detention based on status for those persons that cannot verify their identities captured during military operations.<sup>204</sup>

Preventative detention authorized under the Anti-Terrorism Act is substantially status-based. Persons included on a list under Section 11EE may be detained and the list incorporates those persons that are, “[I]n any way concerned or suspected to be concerned with such organization or

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<sup>196</sup> CA 3(1)

<sup>197</sup> Wake Forest article pg 3

<sup>198</sup> Id. pg 5

<sup>199</sup> Id. pg 5-6

<sup>200</sup> Const 10(4)

<sup>201</sup> Const 10(7)

<sup>202</sup> Popa definition of enemy combatant

<sup>203</sup> PoPA definition of combatant enemy

<sup>204</sup> PoPA 5(5) + 6(2)

affiliated with any group or organization suspected to be involved in terrorism.”<sup>205</sup> Though detention based on a set list of persons is cumbersome, the status-based liability scheme exhibited within the Anti-Terrorism Act serves as a method of expanding the scope of the Constitution and the Protection of Pakistan Act.

The doctrines of criminal conspiracy and joint criminal enterprise may serve as model provisions to be incorporated into Pakistan’s preventative detention regime to legitimately expand the scope of detention in the future, again on the basis of status. Criminal conspiracy, traditionally, does not rely on any particular act; it only requires intent in forming an association with another party to commit or to assist in the commission of an unlawful act.<sup>206</sup> Similarly, the doctrine of joint criminal enterprise, developed by the International Criminal Tribunal for the Former Yugoslavia, made all the members of an organization equally liable, whether or not there was evidence that the individuals did not physically participate.<sup>207</sup> Though joint criminal enterprise was originally used for the prosecution of war crimes, it, along with criminal conspiracy may be adapted into Pakistan’s domestic detention law.

### *Grounds for Detention*

All arbitrary deprivation of liberty is prohibited.<sup>208</sup> Both customary IHL and human rights law support this provision and arbitrary deprivation of liberty is not permitted during a NIAC. The concept of “arbitrariness,” however, is a matter for interpretation under both the criminal justice and armed conflict models. Arbitrariness, under these frameworks, may be mitigated “by specifying the grounds for detention based on needs, in particular security needs.”<sup>209</sup> While neither IHL nor human rights law specifically contemplate the criminalization of arbitrary detention, several states have initiated the practice nonetheless.<sup>210</sup>

In Pakistan’s own domestic law, Section 156 of the Police Order, 2002, serves as an example of a statute aimed at deterring the arbitrary detention of persons by the state.<sup>211</sup> It criminalizes any act of a member of law enforcement that “vexatiously and unnecessarily detains, searches or arrests any persons” and includes a threat of imprisonment for up to five years.<sup>212</sup> It may be prudent to incorporate similar provisions into the Protection of Pakistan Act or the Anti-Terrorism Act to strengthen perceptions regarding Pakistan’s commitment to its international law obligations. Overall, the arbitrariness factor must be a consistent consideration in all matters, substantive and procedural, relating to preventative detention in Pakistan’s domestic law.

The International Covenant for Civil and Political Rights (ICCPR) stipulates that no person may be deprived of their liberty “except on such grounds and in accordance with such procedure as

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<sup>205</sup> ATA 11EE(1)(c)

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<http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18&div=0&chpt=9&sctn=3&subctn=0> also wake forest pg 3

<sup>207</sup> <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1309&context=californialawreview> pg 107

<sup>208</sup> [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99)

<sup>209</sup> Id.

<sup>210</sup> Fn22 Id.

<sup>211</sup> <http://punjabpolice.gov.pk/system/files/police-order-2002-updated-version.pdf>

<sup>212</sup> Id.

are established by law.”<sup>213</sup> However, commentary regarding Article 9 clarifies that arbitrariness of arrest or detention is not to be understood as equivalent to “against the law.” Determinations of arbitrariness include, “inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>214</sup> In regards to preventative detention (what is termed in ICCPR General Comment 35 as security detention), arbitrariness does not apply to the original act of detention alone, meaning there must be sufficient grounds for continued detention.<sup>215</sup> Thus, it must be demonstrated that the detention lasts only as long as is absolutely necessary and that there is regular review by a judicial body.<sup>216</sup> Customary international humanitarian law supports this provision that there must be a valid reason not only for the initial deprivation of liberty, but also the continuation of detention.<sup>217</sup> Detention that exceeds what is provided for by law may be considered arbitrary and therefore unlawful.<sup>218</sup>

As international humanitarian law does not provide procedures regarding preventative detention in a NIAC, state practice may serve as a guide for permissible lengths of time within which the grounds for detention must be disclosed. While Pakistan generally requires that such disclosure take place within 15 days, international state practice varies to a certain degree, though deference is given by many states to the spirit of Article 9(2) of the ICCPR. States including Australia, Denmark, Italy, Malaysia, Singapore and the United Kingdom statutorily require disclosure of grounds as soon as possible, generally at the time of the initial detention.<sup>219</sup> Both India and Bangladesh require disclosure within fifteen days, but India states directly within its law that the disclosure on grounds for detention must be made as soon possible, but not later than fifteen days.<sup>220</sup> In this way, Pakistan may seek to amend its law to include that grounds must be disclosed as soon as possible to uphold the spirit of Article 9 of the ICCPR. It is a matter of merely codifying the domestic jurisprudence that already governs this regime. Taking a step further, Tanzanian law may be adopted, which requires disclosure within fifteen days or formal entitlement to release,<sup>221</sup> again present in Pakistan’s jurisprudence, but not formally codified.

### *Executive Authority & Judicial Review*

The right of judicial review is comprised of both the right to seek and the right to grant said review. IHL and IHRL do not envision the manifestation of judicial review in the same manner. Looking at IHL as it applies to international armed conflicts, Geneva Convention III references administrative review of a combatant’s status<sup>222</sup> and Geneva Convention IV requires subsequent periodic review of the need for continuing detention.<sup>223</sup> Domestic law governs the procedural

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<sup>213</sup> ICCPR 9(1)

<sup>214</sup> para 12 of GC 35

<sup>215</sup> para 15 of GC 35

<sup>216</sup> *Id.*

<sup>217</sup> [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99#refFn\\_17\\_33](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99#refFn_17_33)

<sup>218</sup> *Id.*

<sup>219</sup> See generally annex 1 Stella Burch Elias

[http://www3.law.columbia.edu/hrlr/hrlr\\_journal/41.1/Burch\\_Elias\\_Charts.pdf](http://www3.law.columbia.edu/hrlr/hrlr_journal/41.1/Burch_Elias_Charts.pdf)

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> GC III Art. 5

<sup>223</sup> GC IV Art. 78

aspects of detention in a NIAC and, thus, by association, international human rights law applies. Customary international law enforces the prohibition on arbitrary detention, as previously discussed and to ensure that detention is not arbitrary, “prompt and regular review” by an independent judicial body is necessary. The ICCPR provides that a detainee has a right to challenge the lawfulness of their detention. Even in derogating from the application of the ICCPR in its entirety, human rights law requires that for the protection of non-derogable rights, detainees retain the ability to appear before a court and the court retains the ability to decide on the lawfulness of detention.<sup>224</sup>

Review boards, such as the one constituted under the Constitution and various other laws, exercise quasi-judicial review and the High Courts, which also have jurisdiction over petitions challenging the lawfulness of detention, exercise formal judicial review as guaranteed by the Constitution. Unlike proceedings of detainees in the High Courts, the outcomes of which may be made known, the procedures and determinations of review boards remain undisclosed. The Protection of Pakistan Act provides, “the Federal Government shall make Regulations to regulate the internment orders, internment camps, and appeal mechanism against the internment orders.”<sup>225</sup> The obvious recommendation here is to enforce this provision and establish by law such procedures to ensure that judicial review through the review boards does not violate principles of IHL or human rights law.

Enhancing Pakistan’s domestic law in relation to the right of judicial review requires further discussion not on whether a detainee may seek judicial review, but to what extent that review may be provided to those declared enemy aliens. An enemy alien may potentially seek judicial review on the lawfulness of their status upon application to the High Courts, but they are not subject to periodic review by established review boards. Here, guidance may be derived from *Boumediene v. Bush*<sup>226</sup> a landmark judgment from the United States Supreme Court, that granted access to U.S. courts to non-citizen enemy detainees held outside U.S. territory. In the *Boumediene* judgment, no further procedure was established by the courts, thus the question remained open as to the extent of the right provided.<sup>227</sup> The debate that ensued after this judgment and the debate that applies here considers the number of times a particular class of detainees may access judicial review procedures. If the right of judicial review is “one and done,” then enemy aliens in Pakistan may, under existing law, only be able to challenge the lawfulness of their detention once and receive no periodic review. If, however, this right is viewed as the trigger of an open door policy, enemy aliens in Pakistan may seek continuous judicial review to enforce their right to regularly have their status reevaluated. A more practical solution is to apply existing review board mechanisms to detainees declared enemy aliens to maintain consistency with the requirement of non-arbitrariness in customary international law.

### *Time Limitations on Detention*

As previously referenced, time limitations on detention manifest as both pre-review and post-review limits. Common Article 3 to the Geneva Conventions provides only that the treatment of

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<sup>224</sup> General Comment 29 ICCPR para 16

<sup>225</sup> PoPA 6(4)

<sup>226</sup> Cite the case

<sup>227</sup> Blum article

those persons engaged in a NIAC, not taking active part in hostilities, be humane.<sup>228</sup> As this relates to pre-review detention, Pakistan allows pre-review detention to extend to three months in most cases, with certain exceptions including the Actions (in Aid of Civil Power) Regulations (AACPR),<sup>229</sup> which prescribe 120 days<sup>230</sup> and the Anti-Terrorism Act, which stipulates nothing beyond a maximum detention of twelve months.<sup>231</sup> Limitations in Pakistan’s law regarding arrest under the criminal justice system provide a twenty-four hour limit before review.<sup>232</sup> Commentary pursuant to the ICCPR also provides various guidelines including that the review of detention should be “prompt and regular,” demonstrating respect for the guarantees provided in the ICCPR during preventative detention.<sup>233</sup> Prompt, undefined in the ICCPR, may, for reference, be read as not to exceed a few days.<sup>234</sup> With the exception of the AACPR employed during military operations, pre-review detention extended to three months may potentially be incompatible with the notion of humane treatment or prompt review.

Humane treatment under Common Article 3 also governs post-review detention under Pakistan’s law. Additionally, it is argued that the requirements governing the length of detention are more stringent in NIACs due to the application of human rights law. In addition to the promptness requirement, post-review detention must be guided by provisions that include a proportionality requirement derived from the idea that the longer an individual is held, the greater the showing must be of the threat that person poses.<sup>235</sup> This is pursuant to the idea that detention should only persist until and unless the detainee ceases to pose a serious threat to national security. Customary international law also follows the principle that detention continuing beyond what the law provides for constitutes detention that is arbitrary and therefore unlawful.

In Pakistan’s domestic law, post-review detention extends for several categories of persons beyond time limitations provided by, for example, Article 10(7) of the Constitution. For those categories of detainees held beyond a fixed time (i.e. twelve months), domestic law may be amended to include an escalating threshold for the lawfulness or legitimacy of continued preventative detention, proportional to the length of time the detainee is held.

### *Right to a Response & Right to Counsel*

Customary international law provides certain fair trial guarantees,<sup>236</sup> including the right to appear before the judicial body and the right to seek the assistance of legal counsel. These particular rights, again in relation to trials, exist under both IHL and human rights law. Customary law may be used to gauge the importance of this right as applies by analogy to the law of preventative detention. The prevailing legal framework in this instance is that of the humane treatment requirement in Common Article 3. Additional guidance may be sought from human rights law

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<sup>228</sup> Common article 3

<sup>229</sup> Cite to aacpr generally

<sup>230</sup> Citation to the section in AACPR

<sup>231</sup> Cite to section 11EEE

<sup>232</sup> Const. Art. 10(2)

<sup>233</sup> General comment 35 para 15

<sup>234</sup> Id. para 33

<sup>235</sup> Jelena Pejic, Procedural Principles and Safeguards for Internment /Administrative Detention in Armed Conflict and Other Situations of Violence, 87 INT’L REV. RED CROSS 375, 382 (2005).

<sup>236</sup> [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule100](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100)

through the criminal justice system. Commentary under the ICCPR, for example provides that “access to independent legal advice” is a “necessary guarantee” to ensure full respect for the Article 9 of the Covenant.

Where access to legal counsel is guaranteed to persons arrested pursuant to Article 10(1) of the Constitution of Pakistan, it is denied to all persons subject to preventative detention under Article 10(3). This means that before a review board, detainees are not permitted access to legal counsel, but it does not bar a person bringing a petition for judicial review on the behalf of the detainee from engaging legal representation. The Security of Pakistan Act also provides a limited right to consult with, but not be represented by counsel. However, the Constitution veritably overrules this provision because access to counsel is denied “under any law providing for preventive detention.”

Considering the nature of the application of human rights law in a NIAC, the denial of access to counsel within Pakistan’s law on preventative detention is disingenuous in its regard for Article 9 of the ICCPR. To ensure national security and to securely detain those that pose a threat to the life of a nation, it is not necessary to totally deny all access to a legal representative. Take, for example, the Israeli model. A military order issued in 2002 allowed, the suspension of the right to access counsel for up to thirty-four days, “if the officer believed that such a meeting with the lawyer would impede the effectiveness of the interrogation.”<sup>237</sup> The balancing test employed by the Israeli Supreme Court weighed the need for immediate access to an attorney against the potential risk of damage to the ongoing investigation and to national security.<sup>238</sup> Subsequently, this issue was raised before the Supreme Court once again, and once again, the suspension of access to legal counsel was upheld, even though detainees would face judicial review without counsel in the interim. This decision was again justified on the basis of “significant security considerations.” The test derived in this decision required the element of necessity to be present, because the claim of seeking to advance an investigation was not sufficient.

For Pakistan, the Israeli model provides a method of operating in light of the NIAC-based derogation from strict adherence to the plethora of human rights law. Access to counsel is granted, but limited based on national security concerns. Human rights law itself requires “access to independent legal advice” during preventative detention, which leaves the exact nature of this “advice” open to interpretation. It is recommended that domestic provisions denying access to counsel for detainees be amended to incorporate similar provisions to those referenced herein.

## V. CONCLUSION

The aim of this paper was to not only comprehensively review the preventative detention regime in Pakistan’s domestic law, but also to review it in light of international law standards stemming from the joint application of the law of armed conflict and human rights law. Ultimately, the purpose of the review was to highlight a possible future course for the development of the law related to preventative detention in light of Pakistan’s current national security concerns.

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<sup>237</sup> Blum pg 7

<sup>238</sup> *Id.*