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Duty or Faith?: The Evolution of Pakistani Rape Laws and Possibility for Non-Domestic Redress for Victims

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DUTY OR FAITH?: THE EVOLUTION OF PAKISTANI RAPE LAWS AND POSSIBILITY FOR NON-DOMESTIC REDRESS FOR VICTIMS

ABSTRACT

For years in Pakistan, the tragic story began and ended the same for all Pakistani women: with a tragic rape and the victim being brought to shame or murdered for a violation of Islamic law. Pakistan, which had historically based its laws surrounding rape and the punishment for the crime on Islamic beliefs, failed to provide adequate relief for its victims. The Islamic laws were historically biased against women placing a high burden on the victim to support her allegations. Rather than attempting, and possibly failing to prove their allegations, many victims instead hid their shame simply out of fear.

The classic story appeared to take a turn in 2006 with the passing of the Protection of Women Act. The media praised the Act as "historic" and described it as a positive move towards secularism. The passing of the law seemed to signify a change in the Islamic culture and finally an avenue for which rape victims could seek relief. However, the implementation of the Act alleged to protect women did much less in the way of women's rights than the name would suggest.

In response, this Comment criticizes the adoption of the new law and disputes the claim that the Protection of Women Act did anything to effectively overturn the Islamic-based ordinances previously put in place to prosecute rape in Pakistan. In particular, this Comment asserts that the new law fails in its implementation to provide any form of relief to victims of rape and instead has been used as a superficial tool to alleviate the negative image associated with the previous strict adherence to Islamic laws. Next, this Comment argues that due to the persistent and ongoing failure of the country to provide relief to rape victims, the women of Pakistan should be able to obtain justice through other means.

The possible avenues through which Pakistani rape victims could seek relief are limited to a small number of venues outside of the domestic court system, namely through international tribunals for violations of international human rights law, by way of a domestic transitional justice system, or through a non-domestic court system where individuals could attempt to sue heads of

state. However, the likelihood of success through any one of those avenues appears to be small. Ultimately, the greatest chance for the vindication of rape victims wanting to successfully bring their claim lies in the possible impact of international pressure on the Pakistani government. As attitudes towards women and gender stereotypes continue to change and become more progressive, there is a chance that Pakistani woman could be afforded redress through their own legal system as a result of international admonishment.

INTRODUCTION

> *The fat man was reeling, and he laughed out loud on seeing me. Then they closed the door and one man dragged me to the table by the hair. The fat policeman fell on top of me. I started screaming and struggling. I got up and ran around inside the room with one man hurtling me toward the other, grabbing me now by my hair, now by my breasts. My shirt tore from the middle. Then the fat man overpowered me, and in the presence of those two other beasts, satisfied himself of me. I felt like I was going to die.*[1]

Khurshid Begum, a poor washerwoman from Pakistan, describes the chilling series of events leading to her rape in a Pakistani police station.[2] Begum's crime was no more than one of association: a punishment for being married to a political activist.[3] Begum was returning home from visiting her husband, who had been jailed for an allegation regarding the State's national security.[4] On the night of November 13, 1991, "she was grabbed . . . blindfolded, and thrown into a car 'like a bag of trash' by some policemen."[5]

After her rape, contrary to the support and love one would expect to overwhelm a victim of rape, Begum's family distanced themselves.[6] She was told by her brother-in-law to "commit suicide," and described her own family as "'wanting her blood.'"[7] Begum did not even believe that her husband would accept her after the incident.[8]

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[1] Shahla Haeri, *Hermeneutics and Honor: Rape in Pakistan*, *in* NEGOTIATING FEMALE "PUBLIC" SPACE IN ISLAMIC/ATE SOCIETIES 59–60 (Asma Afsaruddin ed., 1999).

[2] *Id.* at 59.

[3] *Id.* at 60.

[4] *Id.* at 59.

[5] *Id.*

[6] *Id.* at 60.

[7] *Id.*

[8] *Id.*

Unfortunately, for years in Pakistan, this tragic story began and ended the same for all Pakistani women: with a tragic rape and the victim being brought to shame or murdered for a violation of Islamic law.[9] Pakistan, which had historically based its laws surrounding rape and the punishment for the crime on Islamic beliefs, has failed to provide adequate relief for its victims.[10] The Islamic laws were historically biased against women, placing a high burden on the victim to support her allegations.[11] Rather than attempting, and possibly failing to prove their allegations, many victims instead hid their shame simply out of fear.[12]

The classic story appeared to take a turn in 2006 with the passing into law of the Protection of Women Act (PWA).[13] The "media praised the [Act] as 'historic' and described it as a positive move towards secularism."[14] The passing of the law seemed to signify a change in the Islamic culture and finally an avenue for which rape victims could seek relief.[15] However, the implementation of the laws alleged to protect women did much less in the way of women's rights than the name of the Act would suggest.

This Comment criticizes the adaptation of the new law and disputes the claim that the PWA did anything to effectively overturn the Islamic-based ordinances previously put in place to prosecute rape in Pakistan. In particular, this Comment asserts that the new law fails in its implementation to provide any form of relief to victims of rape and instead has been used as a superficial tool to alleviate the negative image associated with the previous strict adherence to Islamic laws. Next, this Comment argues that due to the persistent and ongoing failure of the country to provide relief to rape victims, the women of Pakistan should be able to obtain justice through other means. In analyzing how these women will obtain justice, this Comment first determines the possible international obligations Pakistan has failed to adhere to by not

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9 Rachel Bubb, *Reform of the Pakistani Rape Law: A Move Forward or Backward?*, 11 J. GENDER RACE & JUST. 67, 67 (2007). *See generally* MUKHTAR MAI WITH MARIE-THÉRÈSE CUNY, IN THE NAME OF HONOR 1, 7 (Linda Coverdale trans., 2006) (describing Mukhtar Mai's experience of being sentenced to gang rape for her brother's crimes and subsequent shame, suicidal thoughts, and expectation that she would be killed in an honor killing).

10 Bubb, *supra* note 9, at 67; *see also* Vilani Peiris, *Musharraf's Reform of Pakistan's Rape Law—A Cynical Manoeuvre*, WORLD SOCIALIST WEB SITE (Jan. 24, 2007), http://www.wsws.org/en/articles/2007/01/paki-j24.html. *See generally* MAI, *supra* note 9.

11 Peiris, *supra* note 10.

12 Bubb, *supra* note 9, at 73; *see also* Haeri, *supra* note 1, at 65.

13 Peiris, *supra* note 10.

14 *Id.*

15 *See id.*

effectively prosecuting rape crimes. The Comment then expands on possible international sanctions against Pakistan for failure to abide by international conventions. The analysis continues by exploring the possibility of either applying international pressure to force compliance from Pakistan or developing a domestic transitional justice system to prosecute rape crimes in Pakistan. Finally, this Comment considers the possibility that Pakistani women may bring their charges of rape through a non-domestic court system.

In support of these arguments, this Comment is divided into five parts. Part I details the development and implementation of the Hudood Ordinances and addresses the difficulty that the Zina Ordinance in particular created for Pakistani women who alleged rape. Part II focuses on the law as it stands now after the implementation of the PWA in 2006. Specifically, this Part critiques the PWA for its failure to prosecute crimes of rape and provide redress for Pakistani women. In Part III, this Comment (1) proposes the idea that Pakistan's consistent failure to effectively investigate and provide redress for women who have been raped is a violation of both international human rights law and the country's obligations under the International Covenant on Civil and Political Rights (ICCPR), and (2) explores the possibility that the country might be subject to international sanctions. In Part IV, this Comment explores the possibility and likely success of applying international pressure to persuade Pakistan to adapt how they conduct rape investigations. Further, Part IV discusses the possibility of success if Pakistani rape victims brought their claims through both a transitional justice system and the United States (U.S.) federal court system through the Alien Tort Claims Act, addressing possible difficulties with both. Finally, Part V summarizes the arguments and presents conclusions.

I. DEVELOPMENT OF ISLAMIC JURISPRUDENCE

As a nation immersed in the Islamic faith, Pakistan adapted its laws in conformity with its religious beliefs.[16] Majid Khadduri, a famed scholar of Islamic law, wrote, "Islamic law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself."[17] It is due to that "spirit" that the Islamic faith has played such a prominent role in the development of the laws in Pakistan and, despite its reversal, continues to

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[16] Bubb, *supra* note 9, at 68–70.

[17] *See* 1 LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 28 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

frame the judgments of the court and legal system.[18] This Part begins by first explaining the previous legal framework under the Hudood Ordinances specifically in regards to crime of Zina and the impact that those laws had on the prosecution of rape in Pakistan.

A. Sharia Law

The word Sharia, while simplified in English to mean Islamic law, carries a much more sentimental meaning among those of the Muslim faith.[19] Muslims consider Sharia to be a sort of "ultimate justice" delivered by God himself.[20] Sharia was derived from two predominate sources: one being the Qur'an and the other being the *sunna*, the life example of the prophet Mohammad.[21] In a process called *ijtihad*, Muslim legal scholars created Sharia by studying the text of the Qur'an and the *sunna* to form an interpretation of what they understood to be God's law.[22] These interpretations were then written into doctrinal rules of the Islamic faith referred to as *fiqh*.[23]

Inevitably, the process of *ijtihad* led to multiple interpretations even among likeminded scholars.[24] However, with the *ijtihad* process being accepted as "inherently human," rather than choosing one interpretation over another, all *fiqh* conclusions qualify as Sharia if they are the result of a sincere commitment to the process.[25] These varieties of interpretations thus created multiple acceptable schools of law, each being recognized as valid for Muslims living by Sharia.[26] One scholar described the paradox of the multiple *fiqh* interpretations by stating, "[t]he distinction reflects the reality that every *fiqh* rule . . . is a human-created approximation of *sharia*, but there may very well be an equally legitimate alternative *fiqh* rule on the same issue."[27] This paradox became one of the primary issues in Pakistan as the Hudood Ordinance implemented its own *fiqh* into the Pakistani Criminal Code.

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[18] *Id.*

[19] Asifa Quraishi, *What If* Sharia *Weren't the Enemy?: Rethinking International Women's Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 203 (2011).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 204.

[26] *Id.*

[27] *Id.*

B. Implementation of the Hudood Ordinance

Pakistan gained its independence from British rule in 1947.[28] Through the course of developing its laws, three constitutions were written: one in 1956, one in 1962, and one in 1973.[29] While the language of the constitutions changed, a clear trend existed as each version brought the laws closer and closer to the Islamic faith.[30] For example, unlike the Constitution of 1947, the Constitutions of 1962 and 1973 both called for the commission of a Council of Islamic Ideology to bring the existing laws into conformity with the Islamic faith.[31] Legislation dating back to British rule, such as "The Muslim Personal Law of 1937" and "The Dissolution of Muslim Marriages Act of 1939," both of which focused on a strict adherence to the Muslim faith, were used to govern the creation of each new constitution.[32]

While on its face the original Constitution of 1962 was in conformity with the Islamic faith,[33] the implementation and punishment for certain offenses, including rape, were still handled by the Pakistani Criminal Code.[34] It was not until the 1977 regime of General Zia-ul Haq that adherence to Islamic law became mandated.[35] Zia took a stricter stance than any previous leader in an attempt to inject the Islamic faith into the Pakistani Criminal Code in a movement often referred to as "Islamization."[36] Thus, the Hudood Ordinances were established, birthing a set of laws calling for a strict adherence to Sharia.

C. The Zina Ordinance

Chapter 24, verse 2 of the Qur'an defines and proscribes punishment for the crime of Zina as:

"The woman and the man
Guilty of adultery or fornication
Flog each of them

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[28] Rahat Imran, *Legal Injustices: The Zina Hudood Ordinance of Pakistan and Its Implications for Women*, 7 J. INT'L WOMEN'S STUD. 78, 79 (2005).

[29] Bubb, *supra* note 9, at 69.

[30] *Id.*

[31] Shahnaz Khan, *Locating the Feminist Voice: The Debate on the Zina Ordinance*, *in* PAKISTANI WOMEN 140, 141 (Sadaf Ahmad ed., 2010) [hereinafter S. Khan, *Locating the Feminist Voice*].

[32] Imran, *supra* note 28, at 79.

[33] Bubb, *supra* note 9, at 69.

[34] PAK. PENAL CODE, XLV of 1860, pmbl.; *see also* Bubb, *supra* note 9, at 75.

[35] Imran, *supra* note 28, at 79.

[36] *Id.*

With a hundred stripes . . . ."[37]

With the implementation of the Zina Ordinance into the Hudood, this verse of the Qur'an was interpreted to conflate adultery and fornication.[38] Legal scholars interpreted the passage to punish those people who engaged in sex who were not married with "one hundred stripes," while those who engaged in adultery were to be stoned to death.[39] Thus, with the implementation of the Zina Ordinance, illicit sex became a crime that was "non-compoundable, non-bailable, and punishable by death" for the first time in Pakistan's history.[40] Whereas adultery and illicit sex in Pakistan had previously been considered a "crime" personal to only husbands and fathers, with the implementation of the Hudood, the crime became an offense to the State.[41] As both a non-compoundable and non-bailable offense, individuals charged with Zina could not have a complaint dropped against them and were not eligible for release without bond pending trial.[42]

The offense of Zina became a frequently alleged crime under the Hudood Ordinance,[43] more likely than not due to its broad interpretation. Though the Zina Ordinance prosecuted illicit sex, it made no criminal distinction between sexual acts if those engaging in it were unmarried; thus fornication, adultery, and rape were all held to the same standard under the Ordinance.[44] While the term Zina referred to sexual intercourse engaged in while the person was not legally married, the term "Zina-bil-jaber" was used to refer to intercourse without being validly married when it occurs without consent.[45] Thus, under the law, if coercion could not be proven, the victim became an offender guilty of Zina.[46]

Under Sharia, there are two categories of punishment with which to penalize those guilty of Zina: *hadd* and *ta'zir*. The difference between the two

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[37] A. YUSUF ALI, THE HOLY QUR'ĀN: TRANSLATION AND COMMENTARY 896 (A. Yusuf Ali trans., 1983) (citing verse 24:2 of the Qur'an).

[38] *Id.*; *see also* S. Khan, *Locating the Feminist Voice*, *supra* note 31, at 141.

[39] S. Khan, *Locating the Feminist Voice*, *supra* note 31, at 141.

[40] *Id.*

[41] SHAHNAZ KHAN, ZINA, TRANSNATIONAL FEMINISM AND THE MORAL REGULATION OF PAKISTANI WOMEN 8 (2006) [hereinafter S. KHAN, ZINA].

[42] *Id.*

[43] *Id.*; *see also* S. Khan, *Locating the Feminist Voice*, *supra* note 31, at 147.

[44] S. KHAN, ZINA, *supra* note 41, at 8.

[45] The Offence of Zina (Enforcement of Hudood), No. 7 of 1979, PAK. CODE (ed. 1979), ¶ 6(1)(b) [hereinafter Zina Ordinance]. The text of the Ordinance can be found in The All Pakistan Legal Decisions [P.L.D.] 1979 Cent. Statutes 51 (Pak.).

[46] S. KHAN, ZINA, *supra* note 41, at 9.

punishments is based on their relation to the Qur'an, with *hadd* offenses derived from Islam and *ta'zir* offenses created by the legislature.[47] Traditionally, Zina was an offense liable to *hadd*, or the maximum sentence.[48] The punishment for Zina under *hadd* was death;[49] however, the high evidentiary burden made conviction under *hadd* both uncommon and unlikely.[50] In order to successfully prove a *hadd* offense, provided the accused is Muslim, he could confess, or the victim could produce four males of good moral standing who had witnessed the actual penetration.[51] In fact, despite the frequency with which Zina was alleged, no punishment had ever been administered under *hadd*.[52] If a victim could not meet the evidentiary standard for seeking justice under *hadd*, then her only remaining option was to try and seek redress through *ta'zir* punishments.[53] *Ta'zir* punishments were much less severe and varied depending on the identity of the accused. For adultery and fornication, the *ta'zir* punishment was up to ten years in prison, thirty lashes with a whip, and a fine.[54] The *ta'zir* punishment for rape was up to twenty-five years in prison and thirty lashes.[55]

D. Problems Inherent in the Zina Ordinances

"The Zina Ordinance is an extremely oppressive, controversial, and contested piece of legislation in Pakistan."[56] A major contention of the Zina Ordinance is its inherent bias against women.[57] Basing the Pakistani Criminal Code on the Qur'an, which has frequently been criticized for its gender-discriminatory nature, creates room for any interpretation of the religious document to possibly condone or even endorse violence towards women.[58] In specific passages the Qur'an goes so far as to label women as the "property" of men, using religious grounds as its justification:

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47 Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, 185 n.16 (1999).

48 *See* Zina Ordinance, *supra* note 45, ¶ 5(1); S. KHAN, ZINA, *supra* note 41, at 8.

49 Zina Ordinance, *supra* note 45, ¶ 6(3).

50 *See id.* ¶ 5; Chadbourne, *supra* note 47, at 185 nn.16–17.

51 *See* Chadbourne, *supra* note 47, at 185 nn.16–17; Bubb, *supra* note 9, at 71–72, S. KHAN, ZINA, *supra* note 41, at 8–9.

52 S. KHAN, ZINA, *supra* note 41, at 9.

53 Bubb, *supra* note 9, at 72.

54 S. KHAN, ZINA, *supra* note 41, at 9.

55 *Id.*

56 *Id*. at 15.

57 *See* Imran, *supra* note 28, at 87.

58 *See id*.

> Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard.
>
> As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for God is Most High Great (above you all).[59]

Under the guidance of passages such as this, Sharia does not attempt to hide its discrimination against women; because of the discretion given to legal scholars in the process of *ijtihad*,[60] *fiqh* interpretations have enabled the laws to be taken a step further to protect men to the detriment of women's rights.[61]

This protective male framework becomes most evident with respect to the Zina Ordinance in terms of its classification and prosecution of rape. The most egregious flaw of the Zina Ordinance lies in its failure to distinguish between consensual and non-consensual intercourse.[62] While evidentiary standards under *ta'zir* were less stringent than those under *hadd*, women who reported rape put themselves in a difficult and often self-incriminating position.[63] The victims of rape who brought claims under the Zina Ordinance were admitting that Zina had taken place.[64] Thus, if they failed to provide enough evidence to convict their attacker, they and they alone could be charged with the crime of Zina (as was more often the case than not) because the victim alone was admitting to sexual intercourse.[65] The deep disparity between the sentencing of women as compared to men for Zina spoke volumes about the gender bias inherent in the prosecution of the Zina Ordinance;[66] a law that inherently required participation by two people in a heterosexual relationship but was only prosecuted against women.[67] As a result, up to ninety percent of the reported rape victims who brought their claims to the State were imprisoned

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59 ALI, *supra* note 37, at 190–91 (citing verse 4:34 of the Qur'an).

60 Quraishi, *supra* note 19, at 203–04.

61 *See id.* at 214–15.

62 *See* Imran, *supra* note 28, at 78 n.2.

63 *See* Michael F. Polk, *Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a Basis for Asylum Claims in the United States*, 12 GEO. IMMIGR. L.J. 379, 384 (1998).

64 *Id.*

65 *Id.*

66 S. KHAN, ZINA, *supra* note 41, at 83–84.

67 *See id*. at 84.

because they failed to produce credible witnesses to sustain their allegations of rape.[68] A newsletter published by the Human Rights Commission of Pakistan reported that between forty to fifty percent of the female prisoners were there due to Zina-related offenses.[69]

In addition to the failure of the law to adequately prosecute rape and the disproportionate amount of women incarcerated under the Zina offense, women faced different battles when entering into the jurisdiction of the court. Women faced the threat of sexual, physical, and emotional violence and extortion both when their families accused them of Zina and while under the supervision of the law enforcement.[70] The U.S. State Department reported that at times, Pakistani police were implicated in rape cases either by threatening the victim, accepting bribes from the attackers, or actually raping the women themselves.[71] The U.S. State Department further reported that medical personnel "were generally untrained in collection of rape evidence," and women who had been accused of adultery or Zina offenses were forced to submit to medical exams "against their will" despite the fact that the law required their consent.[72] Women interviewed in the prison system often admitted that they believed that they were being imprisoned due to violating their families' wishes, and few had any knowledge of the law or the legal process.[73] With a lack of legal knowledge and an unwavering reliance on legal aid, women could face years of incarceration before they were put to trial.[74] Once incarcerated, women were held in "lockup" leading to increased threats of abuse, rape, and torture from prison guards.[75]

Thus, with attackers receiving impunity for committing rape, it was no surprise that under the Zina Ordinance, rape continued in astonishing numbers. Reports from human rights organizations such as Amnesty International and the Human Rights Commission of Pakistan reported that "800 cases of rape were reported in the national press in 1994; half of them were gang-rapes and most of the victims were under-aged girls."[76] It was because of the persistent

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[68] Polk, *supra* note 63, at 384.

[69] S. KHAN, ZINA, *supra* note 41, at 84.

[70] *Id.* at 85.

[71] *See Pakistan*, U.S. DEP'T STATE: BUREAU DEMOCRACY, HUM. RTS., & LABOR (Mar. 11, 2008), http://www.state.gov/j/drl/rls/hrrpt/2007/100619.htm.

[72] *Id.*

[73] S. KHAN, ZINA, *supra* note 41, at 85.

[74] *Id.*

[75] *Id.*

[76] Polk, *supra* note 63, at 384 (internal quotations omitted).

threat of rape in combination with the lack of prosecutions and possibility of failing to meet the high burden of proof for rape allegations under the Zina Ordinance that only one third of rape cases were actually reported to the authorities.[77]

II. THE PROTECTION OF WOMEN ACT

A new form of hope came for the women of Pakistan in November 2006 with the passing of the PWA.[78] Among other things, in an effort to protect the women of Pakistan, the Act moved rape prosecutions out of the Hudood Ordinance and into the Pakistani Criminal Code while simultaneously eliminating the eyewitness requirement previously necessitated by the Zina Ordinance.[79] Immediately after its implementation, the Act was praised as "historic" and viewed as "a positive move towards secularism."[80] In time, however, the optimistic attitude towards the new Act would prove to be misguided, as the actual implementation failed to move either rape prosecution or women's rights away from the previous Sharia ideals.

A. Overturning the Zina Ordinance

It was not until national attention was brought to the tragic and violent rape of Mukhtar Mai that the Hudood Ordinance caught the attention of both the Pakistani community and leaders in the international law community.[81] Mai, a peasant woman living in the village of Meerwala, Pakistan, was brutally raped by four village leaders—a punishment decided on by members of her own family.[82] Mai's punishment, a ritual commonly referred to as "honor justice" was handed down as a result of her brother's crime of openly flirting with a woman from their village.[83]

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[77] *Id.*

[78] *See generally* The Protection of Women Act, No. 302 of 7646, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Dec. 2, 2006.

[79] *See id.*; *see also* Quraishi, *supra* note 19, at 208–09.

[80] Peiris, *supra* note 10.

[81] Bubb, *supra* note 9, at 73–74.

[82] MAI, *supra* note 9, at 1, 5, 9–10.

[83] *Id.* at 8–9, 14 (explaining that Mai's rape was a way to restore honor in the family after her brother had committed a crime). *But see* Farooq Tirmizi, *Mukhtaran Mai: A Story of Extraordinary Courage*, EXPRESS TRIB. (Apr. 22, 2011), http://tribune.com.pk/story/154316/mukhtaran-mai-a-story-of-extraordinary-courage/ (indicating that Mai's rape was not a sentence handed down but rather an ambush after she was sent to the temple in order to apologize for her brother's actions).

Mai's tragic story became a matter of national news when, six days after the rape, the imam of a local mosque spoke out publically against the rape in the Friday prayers and invited newspapers and journalists to speak with Mai's family.[84] While the majority of honor rapes carried out in manners such as this go unreported,[85] Mai did something unprecedented when she decided to press charges against her rapists.[86] The original conviction sentenced the six men who had participated in either the ordering or the execution of the rape to death; however, an appeals court overturned the conviction, "citing a lack of evidence."[87]

Outrage was incited as Mai's story spread, and as a result, provoked a debate questioning both the morality and implementation of the Hudood Ordinance in Pakistan.[88] The Asia Director of Human Rights Watch, Brad Adams, described Mai's case as "[t]he failure to ensure justice in what by all accounts was a straightforward prosecution" and an indication of "the justice system's appalling disregard for women's rights."[89] Adams's opinion expressed sentiments felt by those around the world as both the domestic and international communities began to pressure Pakistani leaders to consider a reform to the Zina Ordinance.[90]

B. The Protection of Women Act

President Pervez Musharraf passed the PWA in 2006.[91] The Preamble of the Act describes its purpose by stating, "[w]hereas it is necessary to provide relief and protection to women against misuse and abuse of law and to prevent their exploitation."[92]

Among other things, the Act's main function was to move rape and adultery cases out of prosecution under the Hudood Ordinance and back into the prosecution under the Pakistani Criminal Code (as it was before the

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[84] Tirmizi, *supra* note 83.

[85] Catriona Davies, *Gang Rape Victim Fights Back for Girls' Education*, CNN (Feb. 21, 2013, 4:48 AM), http://www.cnn.com/2013/02/19/world/asia/mukhtar-mai-pakistan-gang-rape/.

[86] *See* MAI, *supra* note 9, at 68–69.

[87] *See* Bubb, *supra* note 9, at 74.

[88] *Id.*

[89] *Pakistan: Prevent Injustice for Gang-Rape Victim*, HUM. RTS. WATCH (Apr. 22, 2011), http://www.hrw.org/news/2011/04/22/pakistan-prevent-injustice-gang-rape-victim.

[90] Bubb, *supra* note 9, at 74.

[91] Rubya Mehdi, *The Protection of Women (Criminal Laws Amendment) Act, 2006 in Pakistan*, 59 DROIT ET CULTURES 191, ¶ 28 (2010).

[92] The Protection of Women Act, *supra* note 78.

presidency of General Zia).[93] With the addition of the PWA to the Pakistani Criminal Code, there appeared to be a clear shift towards secularism in expanding women's rights, particularly in regards to rape.[94]

Under the PWA, unlike under the Zina Ordinance, rape is both fully defined and prescribed a criminal punishment.[95] The Act recognizes rape under five circumstances:

> (1) against [a woman's] will; (2) without [a woman's] consent; (3) with [a woman's] consent, when the consent has been obtained by putting her in fear of death or of hurt; (4) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or (5) with or without her consent when she is under sixteen years of age.[96]

The crime for rape under the Act is punishable by either death or imprisonment between ten to twenty-five years.[97] This addition of the PWA to the Criminal Code was potentially one of the most important factors for those advocating for reform. With the PWA now recognizing a variety of circumstances in which rape could occur, a victim could no longer be prosecuted for her participation in Zina.[98] Further, the law prohibits the prosecution of rape victims for Zina when the "absence of consent" cannot be proven.[99] Though consensual fornication is still considered a crime, the Act stipulates that allegations of consensual sex must be fully investigated before charges can be brought.[100]

The Act takes another step away from the Zina Ordinance by effectively eliminating the previous evidentiary standard for rape.[101] Whereas the Zina Ordinance required the testimony of four male witnesses with good moral

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93 *See* Bubb, *supra* note 9, at 74–75.

94 *See* Peiris, *supra* note 10.

95 The Protection of Women Act, *supra* note 78, ¶¶ 375–76.

96 *Id.* ¶ 375.

97 *Id.* ¶ 376.

98 *See id*. ¶¶ 375–76.

99 *PAK102659.E, Pakistan: The Protection of Women (Criminal Laws Amendment) Act, 2006 and its Implementation*, IMMIGR. & REFUGEE BOARD CAN. (Dec. 3, 2007), http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=451609.

100 *Id.*

101 Because the PWA moved rape prosecutions to the authority of the Pakistani Criminal Code, the previous evidentiary standards necessary under the Zina Ordinance were no longer required. Zina Ordinance, *supra* note 45, ¶ 8.

standing who had actually witnessed the penetration,[102] the Pakistani Criminal Code enables a victim to bring forth credible witnesses of either gender to support her claim.[103]

C. Problem of Parallel Legal Systems

Despite the praise and recognition that the Act received from both the international community and media outlets,[104] the PWA did not drastically move Pakistan's criminal system towards secularism as was previously expected.[105] The PWA had many inherent flaws as well as battles to persuade a culture engrained in the Islamic faith to accept a law that arguably went against their belief system.

One persistent problem with the implementation of the PWA was the existence of plural legal systems.[106] Pakistan has, over the years, established several court systems such as the Federal Shariat Courts and the Shariat Appellate Bench, the Special Trial Courts, the Customary Practices and the Frontier Crimes of Regulation, and International Human Rights Law all in addition to the existence of the State judicial system.[107] With all of these legal systems recognized under the Pakistani Constitution, each system had equal weight in terms of judicial opinion, enabling police to have discretion as to which legal system they wanted to bring charges under.[108] This created confusion as the systems overlapped in jurisdiction, allowing people to be punished differently for committing the same crime.[109]

In the context of rape, it is no surprise that the ability to prosecute crimes under either the Pakistani Criminal Code or the Hudood Ordinance made all of the difference to victims. Although the implementation of the PWA created an

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102 *Id.*

103 *See* PAK. PENAL CODE, *supra* note 34, § 375; The Protection of Women Act, *supra* note 78, ¶ 203A; *see also* Mehdi, *supra* note 91, ¶ 27. After the passage of the PWA, with the removal of rape crimes from the Shariat Court to the Pakistani Criminal Court, the requirement of four pious male witnesses was eliminated in exchange for the evidentiary requirements of the Penal Code, which are not gender specific as applied to witnesses.

104 Peiris, *supra* note 10.

105 *Id.*

106 NAT'L COMM'N ON THE STATUS OF WOMEN ISLAMABAD, STUDY TO ASSESS IMPLEMENTATION OF WOMEN PROTECTION ACT 2006, at 11 (2006), http://www.ncsw.gov.pk/prod_images/pub/StudyonWomen ProtectionAct2006.pdf.

107 *Id.*

108 *Id.*

109 *Id.*

easier system whereby women could bring forth allegations of rape to the Pakistani Criminal Court without the same strict evidentiary standards required under the Hudood Ordinance,[110] because the Shariat courts were still recognized as a valid court of law,[111] the Zina Ordinance was still a very real threat looming over rape victims' heads. The standard for rape prosecution remained unchanged and, as of June 2014, there had been zero rape convictions in the country for the previous six years.[112]

The PWA was also widely criticized for its implementation in a historically patriarchal society.[113] "Because of gender biases at the personal level, there is not a genuine acceptance of the PWA amongst the police and the judiciary."[114] In a society traditionally run by males, a bill that sought to protect women for crimes that were punishable under Islamic law created many reservations among members of the judiciary.[115] One repercussion of societal disapproval of the PWA was an increase in the incidents of honor killings.[116] Whereas under the Hudood Ordinance people were able to rectify the shame brought upon the family of a rape victim by simply accusing them of Zina, under the protection of the PWA there was no longer a legal remedy to punish crimes dealing with violations of honor.[117] As a result, families began to take matters into their own hands, leading to a spike in the number of honor killings.[118]

Finally, even with the implementation of the PWA, Pakistan did nothing to reform the investigative methods associated with cases of sexual assault.[119] Since the PWA was enacted, the investigative methods have not been adapted to implement a program that establishes a standard procedure for dealing with victims of sexual crimes.[120] The delay in prosecution has also caused a

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110 *Id.* at 10–11.

111 *See id.* at 11.

112 *Zero Conviction of Rapists, Extortionists, and Killers*, PAK. OBSERVER (June 28, 2014), http://pakobserver.net/detailnews.asp?id=245651; *see also* Azam Khan, *Zero-Conviction Rate For Rape: Senator Proposes Constitutional Changes*, EXPRESS TRIB. (June 30, 2014), http://tribune.com.pk/story/728949/zero-conviction-rate-for-rape-senator-proposes-constitutional-changes [hereinafter A. Khan, *Zero-Conviction Rate For Rape*].

113 *See* NAT'L COMM'N ON THE STATUS OF WOMEN ISLAMABAD, *supra* note 106, at 12.

114 *Id.*

115 *Id.*

116 *Id.*; *see also Nearly 1,000 Pakistani Women Killed for Honor*, AL ARABIYA NEWS (Mar. 22, 2012), http://english.alarabiya.net/articles/2012/03/22/202385.html (describing the number of Pakistani women and girls murdered in honor killings after the implementation of the PWA).

117 NAT'L COMM'N ON THE STATUS OF WOMEN ISLAMABAD, *supra* note 106, at 12.

118 *Id.*

119 *Id.* at 13.

120 *Id.*

problem in the effective administration of the law, resulting in as many women in prison while awaiting trial as actually convicted.[121] This delay not only causes an overcrowding of penitentiaries, but also a violation of womens' rights to justice.[122] It is for these reasons that even with the implementation of the PWA, Pakistan has failed to provide any adequate form of relief to its rape victims. With the lack of efficient training methods and investigative procedures culminating in zero rape convictions since the implementation of the PWA, rape victims in Pakistan should be afforded other means of redress.

III. THE STATUS OF RAPE AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS

The PWA has not become the cure-all it was intended to be when it comes to the protection of rape victims in Pakistan.[123] Despite its intended purpose, rape victims still suffer from a lack of adequate procedure and investigation, misinformation about their rights, and the possibility of being punished under the old system the new law was intended to eliminate.[124] With such lack of redress afforded to rape victims in Pakistan, the possibility of the persistent nature of unprosecuted rape in the country being classified as a violation of international human rights law seems to be a plausible adaptation to the standards previously recognized.

A. Current Violations of International Human Rights Law

International human rights gained its strongest push towards normalization with the United Nations's (U.N.) adoption of the ICCPR in 1966.[125] The ICCPR defined the basic civil, political and cultural rights to which all human beings are entitled.[126] The ICCPR, in combination with the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR), form the International Bill of Human Rights.[127]

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121 *Id.*

122 *Id.*

123 *See supra* Part II.C.

124 *See id*.

125 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

126 *See generally id. See also International Human Rights Law*, OFF. HIGH COMM'R HUM. RTS., http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx (last visited Feb. 3, 2016).

127 *International Human Rights Law*, *supra* note 126.

The Preamble of the ICCPR establishes the foundation on which the treaty is based.[128] As a basic assumption of the ICCPR, all men and women have a birthright that cannot be alienated, entitling them to inherent dignity and equal rights.[129] Article 2 of the ICCPR further defines the scope of the "equality" to be indiscriminate—especially in regards to "race, colour, sex, language, [and] religion . . . ."[130] However, perhaps the most important language of Article 2 comes from its description of the obligations of signing parties to the ICCPR.[131] According to the Covenant, "[e]ach State party to the present Covenant undertakes . . . [t]o ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[132]

With the broad language used in Article 2's call for an effective remedy, the ICCPR opens itself up to interpretations and expansions through differing court systems. The first area where an expansive approach can be taken is in Article 2's limitation to provide an effective remedy only when the perpetrators are State actors. The language of the ICCPR stipulates that the violations must be committed by persons acting in an official capacity or through the authority of the State.[133] Adhering to a strict interpretation of the language of the ICCPR would then prohibit sanctions against Pakistan for the failure to adequately prosecute rape allegations because few, if any, reported rapes have been recognized as actions committed under State authority.[134]

In recent years, however, there has been a trend towards a broader interpretation of a State's obligations to provide its citizens a remedy under the ICCPR.[135] This expansive approach has begun to consider a State's obligations in relation to non-state actors.[136] In the landmark case, *Velasquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights declared that:

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128 ICCPR, *supra* note 125, pmbl.

129 *Id.*

130 *Id.* art. 2.

131 *Id*. art. 2(3)(a).

132 *Id*.

133 *Id*.

134 A. Khan, *Zero-Conviction Rate For Rape*, *supra* note 112 (stating that ninety-three percent of the rapes occurring in the country were categorized as marital rape).

135 Juan E. Mendez, *The 60th Anniversary of the UDHR*, 30 U. PA. J. INT'L L. 1157, 1158–60 (2009).

136 SARAH FULTON, REDRESS, REDRESS FOR RAPE: USING INTERNATIONAL JURISPRUDENCE ON RAPE AS A FORM OF TORTURE OR OTHER ILL-TREATMENT 29–30 (2013), http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20%281%29.pdf.

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[137]

Therefore, according to *Velasquez-Rodriguez*, a State may incur responsibility for failing to prevent or respond to certain acts or omissions of even non-state actors.[138] When applied in the context of Pakistan, the State's obligations under the ICCPR, according to *Velasquez-Rodriguez*, require the State to enforce those basic human rights and perform due diligence, even if the perpetrators are non-state actors.[139] In the last six years,[140] Pakistan's failure to convict in any of the more than two thousand rape cases brought to domestic courts[141] demonstrates the State's lack of due diligence in providing an effective remedy to rape victims in the country. Thus, under an expansive interpretation of Article 2 of the ICCPR.[142] Pakistan's failure to provide an effective remedy for its citizens constitutes a violation of a binding international covenant.

The concept of an "effective remedy" also presents its own difficulties in interpretation. Articles 2[143] and 14[144] of the ICCPR both address what would constitute an effective remedy through very broad language. With those two articles being the only times that an effective remedy is mentioned in the ICCPR's entirety,[145] Article 14 only mentions the right to compensation in a fair trial[146] and Article 2 simply stipulates to the very "existence of effective remedies."[147] The scope of an effective remedy, though explained through fairly general terms in the ICCPR, is given more context when viewed in light

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137 Velasquez-Rodriguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

138 *Id.*; FULTON, *supra* note 136, at 30.

139 FULTON, *supra* note 136, at 30. *See generally* Velasquez-Rodriguez v. Honduras, *supra* note 137.

140 *Zero Conviction of Rapists, Extortionists, and Killers*, *supra* note 112 (citing statistics from 2009-2015).

141 A. Khan, *Zero-Conviction Rate For Rape*, *supra* note 112.

142 ICCPR, *supra* note 125, art. 2.

143 *Id.*

144 *Id.* art. 14.

145 *See* ANNE GALLAGHER, THE RIGHT TO AN EFFECTIVE REMEDY FOR VICTIMS OF TRAFFICKING IN PERSONS: A SURVEY OF INTERNATIONAL LAW AND POLICY 4 (2010). *See generally* ICCPR, *supra* note 125.

146 ICCPR, *supra* note 125, art. 14.

147 *Id.* art. 2.

of other international covenants. The European Convention, for example, defines effective remedy as "the right to access the court" as detailed through Articles 13[148] and 41.[149] Similar definitions can be found in Articles 1[150] and 25[151] of the American Convention, which both recognize an effective remedy as a general right to legal and judicial protection.[152] Thus, if interpretations of what could constitute an effective remedy are viewed in light of the definitions provided through other international covenants, an effective remedy under the ICCPR could reasonably be interpreted as providing access to judicial protection and a legal remedy.

Article 2's mention of the State's duty to provide an effective remedy for its citizens, indiscriminate of gender,[153] outlines the main point of contention between Pakistan's obligations as a signatory to the ICCPR[154] and the Pakistani Criminal Code in practice. Pakistan's desire to adhere to Islamic law creates a disparity between the country's obligations under the ICCPR and the State's ideological duties in attempting to abide by both Sharia and the Qur'an.[155] Whereas one calls for the equality of all people indiscriminate of gender, the other has historically recognized women as second-class citizens;[156] whereas one calls for an effective remedy, the other has repeatedly failed to provide redress for rape victims.[157]

By analyzing Pakistan's obligations to all of its citizens through reasonable interpretations of the ICCPR, Pakistan's consistent failure to prosecute and effectively try rape crimes within the country constitutes a violation of its obligations under Article 2 of the ICCPR.[158] However, despite the ability and

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148 GALLAGHER, *supra* note 145, at 4. *See generally* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, *amended by* Protocols Nos. 11 and 14, Nov. 4, 1950, C.E.T.S. No. 5, http://echr.coe.int/Documents/convention-eng.pdf [hereinafter European Convention].

149 GALLAGHER, *supra* note 145, at 5. *See generally* European Convention, *supra* note 148.

150 Organization of American States, American Convention on Human Rights art 1, Nov. 22, 1969, U.N.T.S. 123.

151 *Id.* art. 25.

152 *Id.* arts. 1, 25; *see also* GALLAGHER, *supra* note 145, at 4.

153 ICCPR, *supra* note 125, art. 2.

154 Pakistan has been a signing member of the ICCPR since April 17, 2008. UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en (last visited Feb. 3, 2016).

155 Jonathan Russell, *Human Rights: The Universal Declaration vs. the Cairo Declaration*, MIDDLE EAST CTR. BLOG (Dec. 12, 2010), http://blogs.lse.ac.uk/mec/2012/12/10/1569/ (explaining that Saudi Arabia refused to sign the UDHR believing that it violated the Qur'an and Sharia law).

156 *See supra* Part I.C.

157 *Zero Conviction of Rapists, Extortionists, and Killers*, *supra* note 112.

158 *See supra* notes 130–37 and accompanying text.

practice of countries such as Pakistan failing to abide by their duties under the ICCPR,[159] countries can and do avoid international sanctions by simply refusing to ratify the First Optional Protocol of the ICCPR, discussed below.

B. First Optional Protocol of the ICCPR

The First Optional Protocol was adopted by the U.N. General Assembly in 1966[160] and was designed as an enforcement mechanism to investigate and prosecute violations arising under the ICCPR.[161] Signatories to the First Optional Protocol on Civil and Political Rights subject themselves to an individual complaint procedure.[162] The individual complaint procedure allows complainants alleging to have suffered systematic abuse without remedy from their domestic country, in violation of the ICCPR, to be investigated by the U.N. Human Rights Committee.[163] The Human Rights Committee then examines and addresses the reports, and submits concerns and recommendations to the State in the form of concluding observations.[164] However, because of the authority this would give an international court over domestic laws, many countries, including Pakistan, are not signatories to the First Optional Protocol despite having ratified the ICCPR.[165] Without having signed the First Optional Protocol of the ICCPR, Pakistan is not subject to the individual complaint procedure, an avenue which, if available, would have allowed victims to present their complaints to the Human Rights Committee directly.[166]

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159 *See supra* Part II.C (referencing Pakistan's failure to prosecute rape crimes due in part to dualistic legal systems).

160 *See* ICCPR, *supra* note 125.

161 *ICCPR*, U.S. HUM. RTS. NETWORK, http://www.ushrnetwork.org/our-work/issues/iccpr (last visited Feb. 3, 2016).

162 *Human Rights Committee*, UNITED NATIONS OFF. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx (last visited Jan. 29, 2016).

163 *Id.*

164 *Id.*

165 UNITED NATIONS TREATY COLLECTION, *supra* note 154 (providing an updated list of States, which does not include Pakistan, that have signed the First Optional Protocol).

166 *See Human Rights Committee*, *supra* note 162. The First Optional Protocol gives the Human Rights Committee the authority to investigate individual complaints and determine if violations have occurred in light of a party's obligations under the ICCPR. Because Pakistan is not a signatory to the First Optional Protocol, victims are not entitled to submit complaints through the individual complaint procedure and as a result have no direct means to have Pakistan's conduct investigated in light of its obligations under the ICCPR. *Id.*

IV. DIFFERENT AVENUES FOR THE PROSECUTION OF PAKISTANI RAPE CRIMES

A. Possibility of International Pressure and Forced Compliance with the ICCPR

Though it is a relatively new area of study,[167] scholars have begun to take into account the potential impact of international pressure on human rights reform.[168] In the past, consistent and persistent international condemnation has led to landmark success stories such as the abolition of apartheid in South Africa[169] and the signing of multiple human rights treaties by China.[170] The impact of international pressure, however, is dependent on several factors outlined in the book *Conflict and Compliance* by Sonia Cardenas, author and professor at Trinity College, known for her research discussing the intersection between international relations and human rights.[171]

Scholars have described five relevant factors that can contribute to the degree of human rights compliance: (1) the existence of relevant international norms, (2) the material interests of a major power, (3) transnational network activism, (4) domestic allies in target States, and (5) domestic political elites who either view themselves as vulnerable or care about their reputations.[172] In light of these five factors, when international pressure is considered as an option for the present situation in Pakistan, the chance for immediate success seems minimal at best. This conclusion is reached for two reasons.

First, Cardenas emphasizes the importance of international pressure from countries that are ideologically similar.[173] Therefore, for Pakistan to sign the First Optional Protocol or change its human rights practices regarding the treatment of rape prosecution, other countries with similar Islamic-based laws would have to persistently and consistently condemn the actions of Pakistan.[174]

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167 *See* SONIA CARDENAS, CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE 17 (2007).

168 *Id.* at 18.

169 *See* Catherine Barnes, *International Isolation and Pressure for Change in South Africa*, 19 ACCORD 36, 36 (2008).

170 SONYA SCEATS & SHAUN BRESLIN, CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM, at vi (2012), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.

171 *See* CARDENAS, *supra* note 167, at 17–36.

172 *Id.* at 25; *see also* SUSAN BURGERMAN, MORAL VICTORIES 4–5 (2001).

173 CARDENAS, *supra* note 167, at 18–20.

174 *See id.*

Because the Sharia laws are modeled after Islamic law,[175] it is unlikely that any country whose laws also comply with Islamic law would condemn the actions of Pakistan.

Second, international pressure is only a distant remedy because of the changes that Pakistan already attempted to make by enacting the PWA. The PWA was established almost entirely as a result of the fifth factor,[176] "domestic political elites who either view themselves as vulnerable or care about their reputations."[177] It was because of this feeling of political vulnerability that Pakistani leaders enacted the PWA in the first place.[178] If international pressure would only bring the State to options which are facially in compliance with international human rights standards yet have failed in implementation, like the PWA, then it should be clear that international pressure that prompts political change out of fear could not lead to any formidable changes.

Thus, for international pressure to incite any significant change to either force compliance with the ICCPR or create an effective mechanism to handle rape prosecutions in Pakistan, there would need to be consistent and persistent pressure from countries with similar ideologies. Anything short of that would produce a superficial solution resulting in a circumstance no different than that created by the PWA.

B. A Transitional Justice Mechanism

In terms of addressing claims that would arise under Article 2 of the ICCPR, a "new horizon" has been developing relating to struggles against impunity and the failure of governmental bodies to provide an effective remedy: a transitional justice system.[179]

The transitional justice system concentrates on "the struggle against impunity" and specifically on the idea of a right to remedy under human rights law.[180] Transitional justice programs are unique to each country taking into consideration the root cause of the underlying conflict, the identification of vulnerable groups, and the condition of the country's justice system and

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175 *See supra* Part I.A.
176 *See supra* Part II.A.
177 CARDENAS, *supra* note 167, at 25 (citing BURGERMAN, *supra* note 172); *see also supra* Part II.A.
178 *See supra* Part II.C.
179 Mendez, *supra* note 135, at 1163.
180 *Id.*

security sectors.[181] The responsibility for running these transitional justice programs is entrusted to local and national actors with human rights institutions coming into play as a means of advancing public participation in the process and, when necessary, recommending implementation mechanisms or participating in the implementation.[182]

The International Center for Transitional Justice (ICTJ) helps to implement a variety of mechanisms geared at addressing the specific needs of a particular country in regards to humanitarian assistance.[183] Depending upon the needs of the country, the ICTJ will use one of seven approaches: prosecutions, reconciliation, gender, memory, truth seeking, reparations, or vetting.[184] For the purposes of achieving equality for the women of Pakistan and adequately prosecuting rape claims within the country, a gender-based model would likely be most beneficial. In a gender-based approach, the ICTJ would work with the country to develop a tribunal to address the specific gender patterns of abuse that affect women with regards to the justice systems in Pakistan including "entrenching impunity."[185]

A problem with this gender-based transitional model arises in the context of implementation in countries such as Pakistan in which gender inequality is such a persistent and fundamental norm. In countries where gender inequality is a pattern, seeking a remedy through transitional justice mechanisms for crimes involving gender-based violence (primarily sexual assault) creates a cumbersome task.[186] The social stigma of reporting such crimes in combination with women's exclusion from the public decisionmaking processes would make it challenging for Pakistani women in particular to fully utilize a transitional justice system under its current conception.[187]

For a transitional system to be effective, not only must victims feel comfortable bringing claims to domestic courts, but the State must also do

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[181] U.N. Secretary-General, Guidance Note of the Secretary General, United Nations Approach to Transitional Justice 5 (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010 FINAL.pdf.

[182] *Id.*

[183] INT'L CTR. FOR TRANSITIONAL JUST., ANNUAL REPORT 2004-2005, at 17–18 (2005), https://www.ictj.org/sites/default/files/ICTJ_AnnualReport_2004-5.pdf.

[184] *Id.*

[185] *Id.* at 18.

[186] *See id.* at 40.

[187] *See* Palash Ghosh, *India Has a Rape Crisis, But Pakistan May Be Even Worse*, INT'L BUS. TIMES (Jan. 13, 2013, 9:18 AM), http://www.ibtimes.com/india-has-rape-crisis-pakistans-may-be-even-worse-1011268 (describing the social stigma of rape in Pakistan).

something to show the victims that their perpetrators will not be set free. The ICTJ describes the success of the process as being reliant on "societies . . . confront[ing] the past in order to achieve a holistic sense of justice for all citizens."[188] This task may be somewhat more difficult in a country such as Pakistan, in which the rape prosecutions have been described as "often institutionalized and ha[ving] the tacit and at times the explicit approval of the state."[189] For such a country where rapes are unprosecuted, and victims either rarely report rape or are discredited when they do,[190] the only way a transitional system could survive would be if local government and domestic courts were not involved. Having already failed to uphold its duty under Article 2 of the ICCPR and arguably showcasing its reluctance to seriously investigate and prosecute rape, the current status of rape in Pakistan has dictated not only the unwillingness of women to trust the government, but the unwillingness of the government to deliver an effective remedy to rape victims. "State institutions cannot earn public trust or operate with accountability where perpetrators continue to wield power; yet, attempting to remove these individuals from office or bring them to justice may destroy a nation's fragile intermittent peace."[191]

V. BRINGING RAPE CLAIMS THROUGH NON-DOMESTIC COURT SYSTEMS

While countries claim to uphold and abide by the human rights provisions set forth in the ICCPR, they consistently fall short.[192] After failed attempts to adhere to the provisions of various human rights documents, States are met with little or no repercussions.[193] This dichotomy between the theory of human rights implementation and practice is largely based on the sovereignty of States to handle affairs within their own borders.[194] However, in countries such as Pakistan, where States claim to provide equal representation of the law to both men and women, commitments to upholding human rights are often made for political reasons rather than out of an intent to actually uphold the rights of

188 INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 183, at 1.

189 Ghosh, *supra* note 187 (detailing the statement of Shahla Haeri).

190 *The Stigma of Reporting Rape in Pakistan*, PBS (May 28, 2013, 9:31 PM), http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/outlawed-in-pakistan/the-stigma-of-reporting-a-rape-in-pakistan/ (containing excerpts from interviews with Sarah Zaman, former director of War Against Rape).

191 INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 183, at 5.

192 *See* Abdullahi Ahmed An-Na'im, *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights*, *in* ASIAN PERSPECTIVES ON HUMAN RIGHTS 73–74, 76 (Claude E. Welch, Jr. & Virginia A. Leary eds., 1990).

193 *Id.* at 74.

194 *Id.*

citizens.[195] Leaders find it politically beneficial to declare their country's commitment to human rights in order to hold favor with other foreign governments and gain popular support at home.[196] "In order to hold governments to their declared commitment to human rights, it is essential to establish the principle that human rights violations are not matters within the exclusive jurisdiction of domestic courts."[197]

A. The Alien Tort Claims Act

Because of the systematic and unprosecuted nature of rape crimes in Pakistan, the victims should be able to bring their claims to U.S. federal district courts through the Alien Tort Claims Act (ATCA). The ATCA grants jurisdiction to U.S. federal courts over "any civil action by an alien for a tort committed in violation of the law of nations."[198] The United States is unique in that it is one of the only legal systems to extend jurisdiction over civil actions for damages.[199] With this in mind, an expansion of the previous scope of the ATCA to adjudicate claims of rape outside the context of an armed conflict could present a likely and perhaps necessary possibility.

B. ATCA and the Prosecution of Rape in Times of Armed Conflict

The ATCA was not always viewed as a law for the promotion of human rights.[200] It was not until the landmark decision in *Filártiga v. Peña-Irala* that U.S. courts were able to adjudicate human rights issues under the ATCA.[201] Dr. Filártiga and his daughter were both Paraguayan nationals living in the Eastern District of New York.[202] Prior to moving to New York, Dr. Filártiga's son had been murdered and tortured in Paraguay while in police custody.[203] Dr. Filártiga brought a claim under the ATCA when he saw one of his son's

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195 *Id.*
196 *Id.*
197 *Id.*
198 Alien Tort Claims Act, 28 U.S.C. § 1350 (West 2012).
199 *E.g.*, Johan D. van der Vyver, *Treatment of International Human Rights Violations in the United States*, 6 DUKE F.L. & SOC. CHANGE 61, 64 (2014).
200 *Id.* at 82.
201 *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878, 887 (2d Cir. 1980); *The Alien Tort Statute*, CTR. FOR JUST. & ACCOUNTABILITY, http://www.cja.org/article.php?id=435 (last visited Jan. 29, 2016). *See generally* Lisa A. Rickard, *Filartiga v. Pena-Irala: A New Forum for Violations of International Human Rights*, AM. U.L. REV. 807 (1981).
202 *Filártiga*, 630 F.2d at 878.
203 *Id.*

murderers walking the streets of Manhattan.[204] A federal court in New York upheld Dr. Filártiga's wrongful death claim and further noted that torture by a State actor is a violation of international law.[205] *Filártiga* opened the door for scores of ATCA cases to be filed against individual actors who had fled to the United States.[206]

It was not until 1995 in the case of *Kadic v. Karadžić* that the ATCA was used to afford a remedy to rape victims, though it was confined to the victims of "state-sponsored sexual violence" during an armed conflict.[207]

In *Kadic*, two groups of victims from Bosnia-Herzegovina brought actions against the then president of the unrecognized Bosnian Serb Entity.[208] The Plaintiffs brought their claim to a U.S. federal court alleging a violation of international law under the ATCA.[209] They alleged under international law that they had been the victims of brutal rape, forced prostitution, forced impregnation, and torture at the hands of the Bosnian Serb Military.[210] The court referenced *Filártiga* to reiterate the requirements to bring a claim under the ATCA: (1) an alien (2) suing for a tort (3) committed in violation of the law of nations.[211] The first two requirements under the ATCA were easily met, meaning that the only question that the court had to consider was whether the atrocities committed against the Bosnians were a violation of the law of nations.[212] In its final decision, the Court of Appeals of the Second Circuit explained two important concepts in terms of adjudication under ATCA.[213] First, the court recognized that the ATCA does not confine its reach solely to State action.[214] Second, the court held that State-sponsored sexual violence is a violation of the law of war and consequently a violation of the law of nations.[215] Ultimately, the expanded interpretation of the ATCA in *Kadic* allowed victims of rape to bring forth claims against non-state actors in times of armed conflict. Because of the Second Circuit's willingness to expand the scope of the ATCA to enable rape adjudication in times of armed conflict and

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204 *Id*. at 878–79.
205 *Id*. at 889.
206 Alien Tort Claims Act, 28 U.S.C. § 1350 (West 2012). *See generally Filártiga*, 630 F.2d at 876.
207 Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995).
208 *Id*.
209 *Id.* at 237.
210 *Id.*
211 *Id.* at 236.
212 *Id.* at 238.
213 *Id. See generally* Alien Tort Claims Act, 28 U.S.C. § 1350 (West 2012).
214 *Kadic*, 70 F.3d at 239. *See generally* 28 U.S.C. § 1350.
215 *Kadic*, 70 F.3d at 242.

against non-state actors,[216] federal courts should also be able to adjudicate rape cases in times of peace against non-state actors, as discussed below.

C. Recognition of Rape During Times of Peace Under the ATCA

The atrocities of rape are not unique to the circumstances under which they occur. Whether committed in the context of an armed conflict or during times of peace, the nature of rape does not change. Currently, one major distinction between the systematic use of rape during an armed conflict and those occurring in Pakistan is that victims of rape committed during an armed conflict have a chance to seek remedy under the ATCA. However, for the purposes of international law, it is not the emotional toll on the victims that the courts use to classify the crime. Rather, courts rely on its effect in relation to the laws of war to determine that in such a context, systematic and mass rapes encouraged and committed by a country's government are unacceptable.[217] Thus, in order for rapes committed outside of an armed conflict to be classified as a violation of international law, international courts would have to recognize that persistent yet unprosecuted sexual violence in a country is a violation of *jus cogens* absent an armed conflict.[218]

Thus far, when rape has been prosecuted on an international scale, U.S. federal courts have accepted the claims under a theory that the rape was "state-sponsored" because it occurred under the color of authority or actual authority of the government. However, if federal courts were to broaden the current understanding of "state-sponsored sexual violence," a country's persistent failure to prosecute rape[219] could fall within the meaning of "state-sponsored."[220] While recognizing the actions of Pakistan's government as "state approval" is a large expansion of the holding in *Kadic*, it is not an implausible interpretation of the standard in international law.

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216 Van der Vyver, *supra* note 199, at 64.

217 *See generally Kadic*, 70 F.3d at 232 (focusing on the impact of rape as a war crime but not considering rape outside of the context of an armed conflict).

218 *See generally* van der Vyver, *supra* note 199.

219 Ghosh, *supra* note 187.

220 Ayesha Asghar, *Systematic Sexual Violence and Abuse of Power in the Sindh*, GENDER FOCUS (Jan. 6, 2013), http://www.gender-focus.com/2013/01/06/systemic-sexual-violence-and-abuse-of-power-in-sindh/.

D. Future Difficulties in Allowing State-Sponsored Rape Claims Under the ATCA

If U.S. federal courts were to expand upon the concept of "state-sponsored sexual violence," perhaps the biggest problem would be the potential volume of cases brought. Despite the unlikelihood of having their claim effectively investigated, a large number of Pakistani women still brought claims to their government in an attempt to seek justice.[221] Without investigations, the government has failed to convict anyone of rape since the implementation of the PWA.[222] Further, authorities estimated that those thousands represented only a fraction of the crimes that actually occurred.[223] It would be unrealistic for the U.S. federal court system to overextend its own resources in order to afford redress to all foreign nationals through the ATCA based solely on the grounds that the State had persistently failed to prosecute rapes within the country. Thus, if expanded, the courts would need to implement a certain minimum standard that would classify a case as being "state-sponsored." This simple action would eliminate the ninety-three percent of the cases that were reported involving marital rape[224] and even further limit the cases in which the State had either no involvement or no knowledge. This would, however, leave open the federal court system to the victims whose rape was either inadvertently endorsed, committed by law enforcement officials, or encouraged by tribal leaders and left unprosecuted by the Pakistani government.[225]

Another substantial difficulty would be naming the proper defendant after bringing suit under the ATCA. Due to Pakistan's failure to prosecute the crimes and the suit being brought under a theory that the activity was State-sponsored, naming Pakistan as a defendant would seem to be the easiest and most likely choice. However, due to the basic sovereignty that States are afforded to handle matters within their own borders,[226] it would be an

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221 *See* Ghosh, *supra* note 187; *see also Zero Conviction of Rapists, Extortionists, and Killers*, *supra* note 112.

222 *Zero Conviction of Rapists, Extortionists, and Killers*, *supra* note 112.

223 Asghar, *supra* note 220; *see also* Ghosh, *supra* note 187.

224 *Zero Conviction of Rapists, Extortionists, and Killers*, *supra* note 112.

225 *See generally* Mai, *supra* note 9 (stating that her rape was encouraged by tribal leaders and issued as a punishment for her brother's crime). After bringing suit against her rapists, Mai's case was dismissed for lack of evidence. Cases such as this would warrant "state-sponsored activity" under an expanded definition. *Id.*

226 *See generally* Underhill v. Hernandez, 168 U.S. 250, 18 S. Ct. 84 (1897) (explaining, for the first time, that a country is given sovereignty to make decisions within its own borders and introducing the Act of State Doctrine).

improbable circumstance for the federal courts to bring the suit naming Pakistan as a defendant. The most likely defendants for these cases alleging State sponsorship would be Pakistani officials. Under a theory of the ATCA that mandates a somewhat rigorous standard for recognizing State-sponsored sexual activity, it would only make sense that those who sponsored the activity be held responsible. This responsibility, depending upon the circumstance, could fall on either religious leaders,[227] leaders in law enforcement, or heads of State that deliver tacit approval for the actions of rapists in their country. Holding leaders responsible would encourage the Pakistani government to fully investigate rape crimes, leading to a more effective prosecutorial system.[228]

E. Likelihood of Success

While the suggested limitations[229] would make trying rape during peacetime under the ATCA more plausible, that Pakistani leaders will be tried in a U.S. court for their failure to prosecute rape crimes is still unlikely under the current laws. Protection of human rights, specifically the protection of women and women's rights, has not yet risen to the level of international acceptance necessary to compel the intervention of foreign governments. However, if the law continues to develop along gender lines as it has done in recent years,[230] trying rape during peacetime as a violation of international law under the ATCA could be a distant likelihood. To establish a more plausible scenario in which Pakistan's actions could be considered a crime worthy of prosecution under the ATCA,[231] two crucial elements would need to be satisfied. First, there would need to be a stronger emphasis on women's rights as an international norm. Second, the international community would need to accept and recognize that rape is atrocious under any circumstance. With these normative developments, holding Pakistan accountable for its failure to provide an effective remedy for rape victims could eventually become a reality.

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227 *See generally* MAI, *supra* note 9.

228 *See supra* Part II.C (describing the current issues with prosecuting rape crimes within Pakistan despite implementation of the PWA in 2006).

229 *See supra* Part IV.C.

230 *See Global Issues: Women*, UNITED NATIONS, http://www.un.org/en/globalissues/women/ (last visited Jan. 29, 2016); *see also International Women's Rights Action Watch*, U. MINN., http://www1.umn.edu/humanrts/iwraw/Basic_Facts.html (last visited Jan. 29, 2016).

231 *See generally* Alien Tort Claims Act, 28 U.S.C. § 1350 (West 2012).

CONCLUSION

The situation in Pakistan presents itself as the age-old struggle between duty and faith. The competing values of the Pakistani government, in attempting to adhere to their obligations under both international conventions and culturally-engrained Islamic ideals, have created a circumstance in which rape victims consistently lose. Pakistan's feigned attempts at satisfying their international obligations and creating a more secular legal system are embodied by the PWA—a law that has consistently fallen short of carrying out its principal purpose of defending women's rights.

The implications of these shortcomings, while technically violations of Pakistan's obligations under the ICCPR, have resulted in virtually no backlash from the international community. Unless Pakistan signs the First Optional Protocol of the ICCPR, there is little the international community can do to provide redress to victims short of working with Pakistan to implement a transitional justice system or condemning Pakistan for failing to abide by its obligations under the ICCPR. While a transitional justice system could be implemented in Pakistan, because of the Islamic ideals that govern the country in combination with Pakistani women's lack of access to the governmental processes, it would have little chance for success.[232] The same could be said of the possibility that international pressure could impact the current human rights situation in Pakistan. Without pressure from countries whose laws and faith are based on Islamic ideals (an unlikely circumstance), Pakistan's reaction to international pressure would be minimal at best.[233]

If redress for rape victims in Pakistan cannot be sought through domestic channels, then international law should develop in a way that would allow victims to obtain a remedy through non-domestic legal systems. As the law currently stands, no court system has recognized rape during peacetime as a violation of the law of nations. However, U.S. federal courts have come closest to this concept with the trying of rape committed in times of armed conflict as a violation under the ATCA.

To consider Pakistan's consistent failure to prosecute rape committed during peacetime as a State-sponsored action, and thus a violation of the law of nations, the law would have to develop in a number of ways—beginning with a change in the views of the international community towards women and

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[232] *See supra* Part III.B.
[233] *See supra* Part III.A.

women's rights. Without a stronger foundation admonishing violations of women's rights in the international community, violations such as those in Pakistan will not prompt any immediate action to provide redress. The law would also need to recognize that rape is atrocious regardless of the circumstances in which it occurs. If such developments were to occur throughout the international community, rape committed during peacetime in Pakistan could be considered a violation of the law of nations worthy of prosecution under the ATCA.[234]

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[234] *See supra* Part IV.E.

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