

Prosecuting Human Rights Violations: Prospects, Challenges and Solutions

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Abstract

Human rights constitute a set of norms and principles for the treatment of individuals and groups by the states on the basis of standards and principles which a society considers necessary for a quality life. Various contemporary scholars argue that prosecuting human rights violations is necessary and the only solution for the protection of human rights. They have also stated that criminal punishment for human rights violations is the only appropriate measure to enforce international obligations regarding protection of human rights. According to them, it is the duty of the states under the principles of International Human Rights Law (IHRL), International Humanitarian Law (IHL), International Criminal Law (ICL) and customary international law to prosecute human rights violations. Although certain technicalities and complications have been discussed by them, but it has been observed that there should be a balance between the sovereignty of the States, political power and their international obligations regarding protection of human rights under the territories controlled and administered by them. Therefore, this study focuses on the issue that the enforcement of human rights entirely depends on prosecution of human rights violations for which ratification of Rome Statute of International Criminal Court should be made mandatory and a pre-requisite for ratification of all international human rights instruments.

Keywords: human rights, enforcement, prosecution, sovereignty, universal jurisdiction

Introduction

Human rights are the rights which a person possesses on the basis of his simple characteristics of human being. In other words, human rights constitute a set of norms and principles for the treatment of individuals and groups by the states and non-state actors on the basis of standards and principles which a society considers necessary for a quality life. These principles have been incorporated in various national and

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international legislations for their protection and holding the violators of these norms and principles accountable and are considered human rights violations¹

Human rights are also attached with the dignity of every human being and these rights are inherent and available for human beings without any distinction on the basis of sex, race, color, creed or religion.² Human rights also regulate the relationship between individuals and the states. These are the rights of individuals which limit the power of the states and also cast a duty on them to protect these rights and to provide an environment where these groups and individuals can enjoy these rights with full protection. This concept also strikes a balance between sovereignty of the states and rights of individuals. During the past 250 years, history has been developed for the protection of these rights under various national and international human rights instruments. Many movements were started for the protection of these rights and for limiting the power of various bodies, especially the states, in respect of any violation of these rights. Some of these movements also resulted into revolutions including the American and the French Revolution, primarily aimed at the protection of human rights of individuals against the states.³ These revolutions resulting into forming a fresh legal and constitutional framework of states also made it clear that sovereignty of the states is not affected by the rights of individuals and mechanism for their protection.

Concept of human rights

The idea of human rights is not new to the humanity. It is generally believed that the idea of human rights is as old as the humanity is and the first human being on earth, though might be unaware of his rights, was born with all human rights contained in the modern international human rights instruments. However, it is debatable as to when these rights were known and claimed by the human beings. In this regard, international law experts are of the opinion that these rights were realized for the human beings with the emergence of different theories and the most popular among them was the theory of social contract and writings of

¹ Stephen P. Marks, *Human Rights: A Brief Introduction*, (New York: Harvard University, 2016), 1.

² David Robertson, *A Dictionary of Human Rights*, (London and New York: Europa Publications, 2004), 110.

³ The United Nations Office of the High Commissioner for Human Rights, 'Human Rights Handbook for Parliamentarians N° 26', *Inter-Parliamentary Union*, 2016, 19.

John Locke.⁴ He was of the opinion that the primary object for establishing a state was the protection of these rights and civil liberties of the people. Same theory was reiterated by John Rawls, in his famous work 'A Theory of Justice (1972)'. Having influenced from these theories, H.L.A. Hart says that rights based theories have replaced utilitarianism.⁵ On the other hand, after World War II, the concept and application of human rights became a controversial topic between Realists on one side and Liberal Internationalists on the other. Former group is of the opinion that the foreign policy shall be governed exclusively by the pursuit of material interests. Liberal Internationalists are disappointed on the ground that political leaders have failed to take into consideration human rights values in their international dealings.⁶ However, despite of their controversy, all recognize the importance of protection of human rights. Therefore, we can say that all these theories have contributed well in the emergence of concept of human rights, their recognition as well as protection while keeping in view all other aspects including the autonomy and sovereignty of states.

As already observed, individuals and groups possess such rights and they are also duty bound not to violate others' rights. However, states are primary duty bearers for the protection of human rights of individuals and groups for the reason that the states have the authority to enforce these rights and most of the times, violations of human rights are committed by the states either directly or indirectly, e.g. by negligence to protect these rights and failure to prosecute and punish human rights violations. There is no denial that violations of human rights can be committed by individuals, groups and non-state actors, but failure of the states to prosecute and punish all of them would further complicate the matter and would result in complete disaster for the human rights. Investigation of the case is though also the primary duty of the state, but after investigation, its scrutiny and submission of case for a regular trial with every kind of care and caution also becomes the fundamental duty

⁴ According to Locke, an actual social contract was executed between the individuals and the state according to which in order to set up a civil society and for the protection of property of those individuals, they surrendered certain rights including coercive force, and in return, their rights including their lives, estates and liberties were protected. Thus, in order to have some rights, people were required to surrender some other rights in favor of the state, tasked with to protect other recognized rights of those individuals.

⁵ Helen Fenwick, *Civil Liberties and Human Rights* (London: Cavendish Publishing Limited, 2002), 5-7.

⁶ Richard Falk, *Achieving Human Rights* (New York and London: Routledge, 2009), 25.

of the state for the protection of rights of its individuals and for punishing the perpetrators of violations committed in respect of these rights. In this regard, keeping the prosecution of cases free from any kind of external pressure and control, political or otherwise, and keeping the investigation of the cases free from any kind of corruption, nepotism and influence is also the fundamental duty of the state towards protection of human rights and prosecution of violations of any kind committed in this regard.⁷

Therefore, in accordance with international obligations set out in international human rights instruments, three primary obligations have been imposed on the states which are, 'the duty to respect; the duty to protect; and the duty to fulfil'. The standard of their application and balance between these obligations may vary depending on the protection of the rights involved, but there is no difference of opinion that these obligations apply on all rights, including civil, political, social and economic. Furthermore, apart from above-mentioned three primary obligations, states are also duty bound to provide the remedy for the protection of all these rights under domestic law.⁸ The United Nations (UN) has called these pillars as respect, protect and remedy and according to the UN, these pillars provide that:

1. States have a duty to protect against human rights abuse by non-state actors through law, policies and practice.
2. Organisations involved in commercial activities (e.g. sports organisations) have a responsibility to respect human rights by avoiding harming people's human dignity and rights through their activities or business relationships. This includes human rights policies and human rights due diligence.
3. People whose human rights have been harmed need access to effective remedy (non-judicial and judicial) and both the state and the organisations have a role to play in providing access to remedy.⁹

All three obligations have different meanings. Firstly, 'the obligation to respect' means that the States must refrain from any act which, in any manner, affects the enjoyment of any human right by the

⁷ International Crisis Group, 'Reforming Pakistan's Criminal Justice System', Asia Report N°196, 6 December 2010, 8-9.

⁸ The United Nations Office of the High Commissioner for Human Rights, 'Human Rights Handbook for Parliamentarians.

⁹ David Rutherford, 'States' Obligations Under International Human Rights Conventions The Implications for Government Sport Policy', Commonwealth Secretariat, 2018, 4.

individuals or groups. For instance, with regard to the right of education, it would mean that a state must respect the right of parents to impart education of their choice to the children, including religious, moral and ethnic, and also respect their choice and right to establish private schools for the said purpose. Secondly, 'the obligation to protect' means that the states are under obligation to protect the human rights of individuals and groups from other individuals, groups, non-state actors and foreign elements and agents as well as states own agents working and acting outside their official capacity in an illegal manner. This type of obligation casts a twofold duty on the states which includes preventive and remedial measures. On the one hand, the states are under obligation to protect any kind of transgression on the rights of individuals and groups by taking all the necessary steps in case of any kind of apprehension in respect of violation of human rights. On the other hand, states are also under obligation to provide legal remedies to all the vulnerable segments by enacting required legislation at domestic level. If above mentioned example of the right to education is applied in this case, obligation to protect the right to education by the state would mean that the state must ensure non-interference in the education by the parents, groups, religious and ethnic segments and in case of any such interference or inculcation by any such segment, must provide expeditious legal remedies for the redress of the grievance of the aggrieved.¹⁰ Thirdly and finally, 'the obligation to fulfil' or 'remedy' would mean that the states must take positive steps for availability and protection of human rights. It further provides that the obligation of states extends beyond mere respect of human rights and it includes positive measures.¹¹ However, the standard and level of this obligation may vary according to the status and nature of the right involved as well as available resources of the state concerned. In accordance with international standards, states are under obligation to ensure the existence of conditions and environment where the individuals and groups can easily enjoy their human rights without any hindrance and barrier. Again with regard to the right of education, the obligation to fulfil would mean that the states are under obligation to provide free primary and secondary education; make available all the resources for free higher education; to eliminate illiteracy by establishing sufficient

¹⁰ The United Nations Office of the High Commissioner for Human Rights, 'Human Rights Handbook for Parliamentarians', 31.

¹¹ Gabor Rona and Lauren Aarons, 'State Responsibility to Respect, Protect and Fulfill Human Rights Obligations in Cyberspace', *Journal of National Security Law & Policy*, Vol. 8:503, 506.

number of schools, employment of teachers and remunerating them adequately for upgrading the standard of education.¹² All these aspects and obligations of state are primarily derived from John Rawls's theory. The theory of John Rawls has been criticised by many of his contemporary as well as subsequent scholarship. For instance, Robert Nozick¹³ is the main critic. According to his work, 'Anarchy, State and Utopia' (1974), he has demanded explanation on Rawls theories from political thinkers. The primary reason for this criticism appears to be that John Rawls has based his theory on hypothetical and not an actual contract. On the other hand, social contract has been considered an actual contract on the basis of which a state was created and the primary object behind creation of state was that the people considered the existence of an entity which shall be responsible for the protection and enjoyment of their rights. People also demanded up-gradation of their life standard in such like state and protection of their fundamental guarantees, most importantly, protection from arbitrary arrest, protection from inhumane and degrading treatment and availability of the right to fair trial¹⁴. Unlike Rawls, other scholars, such as Ronald Dworkin, have supported the execution of an actual contract instead of an hypothetical contract, because according to them surrender of all the rights by the people in favour of a state and protection of these rights by the state for these people is not possible without an actual and physical contract¹⁵. This

¹² The United Nations Office of the High Commissioner for Human Rights, 'Human Rights Handbook for Parliamentarians', 32.

¹³ Robert Nozick (1938–2002) was an American philosopher. His first and most celebrated book, *Anarchy, State, and Utopia* (1974) a libertarian answer to John Rawls' *A Theory of Justice* (1971), in which Nozick also presented his own theory of utopia as one in which people can freely choose the rules of the society they enter into, for detail see, <http://www.iep.utm.edu/nozick/> (last accessed, 13 December 2016).

¹⁴ Ibid.

¹⁵ Helen Fenwick, *op.cit.*, 5-7. Major outcome and difference between the theories of John Rawls and Ronald Dworkin is that in former case the protection of the rights of the citizens of a state is entirely dependant at the will of those citizens and only those rights will be protected which are deemed necessary by the majority will of that state, while in the later case the standard of protection of the rights of people does not depend at the will of the people of that state rather at that state itself, hence rights of every human being will be protected irrespective of the willingness of the people of that state. Dworkin theory has been declared to be more appropriate and compatible with the principles of justice on the ground that in the former case rights of minority cannot be protected in a society or state where majority belongs to some other religion, race, caste or group, whereas in the

discussion of all these scholars becomes relevant in respect of human rights because the protection of human rights on the basis of these theories is also the primary duty of a state.

Based on the concept that the states are primarily responsible for the protection of human rights of individuals and groups within their territorial limits, it is also well settled that the primary protection of human rights is the responsibility of the states at domestic level and the protection of human rights at domestic level is directly proportional to their protection at national level. In other words, it is generally believed that if human rights are not protected at domestic level, they cannot be protected at international level, because IHRL also demands states to protect human rights. This concept is widely understood all over the world and was expressly recognized by Mrs. Eleanor Roosevelt, chairperson of the committee that introduced first draft of the Universal Declaration of Human Rights (UDHR). In 1948, she answered to question asked, as to where universal human rights begin. She replied:-

In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person. The neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹⁶

Of course, protection of these rights at home, school, factory, farm or elsewhere can only be done by the domestic authorities of the state where that individual lives and the protection of his rights is not only an option rather an obligation which is required to be fulfilled at any cost. Therefore, the primary protection of human rights has been given in the hands of the states where the subject is residing and international bodies only come into play in case of failure of domestic system to protect these human rights¹⁷. Based on the same, it is further clear that the states are under obligation to recognize human rights of individuals, make available all these human rights to their citizens and provide remedies for

later case protection of their rights is the primary duty of the state irrespective of the majority opinion and same may differ in this respect.

¹⁶ Bahmueller ed., *Human Rights Violations*, xx.

¹⁷ Ibid.

their protection in compliance of their threefold obligation of respect, protect and fulfil.

Human rights violations

Despite of universal recognition of human rights, human rights violations are also committed all over the world and despite of fundamental obligation of the states, these violations are mostly committed by the states or their agents acting on their behalf. Violations of human rights are dealt with both under the provisions of IHRL as well as IHL. IHL is a set of rules which limits the effects of armed conflict.¹⁸ IHL is primarily applicable during armed conflict, whereas, IHRL is applicable during armed conflict as well as all other situations outside an armed conflict and the concept of *lex-specialis* has been overruled. Therefore, protection of human rights violations during an armed conflict is regulated simultaneously by IHRL and IHL and outside an armed conflict by IHRL alone.¹⁹

A few violations of human rights are considered quite serious. Although a few international law experts believe that every human rights violation is serious in nature, but some of them are considered grave for the reason that they affect and curtail enjoyment of several other fundamental rights. For instance, violations of human rights during an armed conflict by a state or non-state actor seriously affect the enjoyment of the right to life, liberty, security and freedom from torture.²⁰

The term ‘a serious violation of human rights law’ can be interpreted in twofold manner. On one hand, every violation of human rights can be termed a serious violation of human rights. Whereas, on the other, impact of arms and their misuse amounts to violation of certain

¹⁸ International Committee of the Red Cross, ‘What is International Humanitarian Law?’ Advisory Service on International Humanitarian Law, available at https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf, last accessed on 06 September, 2022.

¹⁹ International Court of Justice, Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, 9 July 2004, General List No. 131, available at <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>, last accessed on 07-09-2017.

²⁰ ‘What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty’, Geneva Academy of International Humanitarian Law and Human Rights, 6 August 2014, available at https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf, last accessed on 06-09-2022.

fundamental rights including the right to life, liberty, security and freedom from torture. States are though at liberty and sovereign to keep sufficient armed capacity for their defense, but there should be some check in this regard. Therefore, it can be safely said that the impact of use of arms and their misuse give rise to various serious violations of human rights. In order to curtail this practice, Arms Trade Treaty (ATT) was concluded and its preamble describes that 'states parties are guided by the purposes and principles of the Charter of the United Nations'. It further says that ATT 'recognizes the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms'. The purpose of the treaty has been further elaborated in its Article 1, which states that 'the purpose of the treaty is to contribute to international and regional peace, security, and stability, and to reduce human suffering'. Thus, the object of the treaty is to protect and safeguard the human rights contained in the UN Charter as well as Universal Declaration of Human Rights (UDHR).²¹ However, despite of these obligations contained in various IHRL instruments, violations of human rights could not be stopped and the primary reason appears to be misuse of arms and unlimited use of force by the states and non-state actors. Therefore, limiting the use of force, by curtailing use of weapons or otherwise, is also necessary for protection of human rights of individuals.

Human rights violations in Pakistan

Human rights violations are also directly connected and proportional to the use of force and misuse of authority by the state or non-state actors. The basic human rights violations in Pakistan are violations of the right to life, liberty and security of persons and top of them are unidentified and targeted killings and issue of enforced disappearances. With regard to the right to liberty and security of persons, Pakistan has though ratified fundamental human rights instruments, but not yet ratified the International Convention for the Protection of All Persons from Enforced Disappearance despite of several state recommendations. Enforced disappearance often results in unidentified killing. It has been reported that in the year 2011 alone, 936 dead bodies were recovered from Baluchistan with heavy marks of torture. Previously, Human Rights Watch (HRW) and Amnesty International (AI) condemned unidentified killings by declaring these killing as 'kill and dump policy by the security forces' and proposed various recommendations to curtail this practice, but no concrete measures have been adopted by the state in this regard. 'The Pakistani Commission of Inquiry on Enforced Disappearances' was

²¹ Ibid.

established in 2010 and had located almost 982 cases, but it had failed to solve remaining 1273 reported cases of enforced disappearances from all over the country and particularly from tribal areas and the Province of Baluchistan. The United Nations also sent a Group to Pakistan. After its visit, 'The UN Working Group on Enforced Disappearances' reported that on this issue and 'the UN Working Group on Enforced Disappearances' reported that the issue of enforced disappearances has not been solved and almost 14000 persons remained missing from the country.²² Many cases of extra judicial killings were reported specially by the security forces in 2020.²³ Before that many cases of arbitrary and unlawful killings by the government were also reported in 2019.²⁴ The UN has proposed various recommendations in this regard for instance, calling for the production of disappeared persons and their return and prosecution of perpetrators, but the same have not been implemented. It has also been alleged that lifting the ban on death penalty in 2014 was also in violation of human rights norms and by lifting this ban, specific categories of people, groups and ethnicities were targeted by awarding death sentence by the Military Courts, the legality and constitutionality of which, was though affirmed by the apex court of the country,²⁵ but has been questioned by all the human rights bodies at international level.²⁶

Administration of justice in Pakistan

Flawed justice system and particularly weak Criminal Justice System (CJS) is also one of the main reasons for human rights violations in Pakistan. Colonial old criminal laws failed to meet the challenges of the

²² Unrepresented Nations and Peoples Organization, 'Human Rights Violations in Pakistan', Submission to the UN Office of the High Commissioner for Human Rights for the consideration of the 3rd Universal Periodic Review of the Islamic Republic of Pakistan during the 28th Session, November 2017, Belgium, 5-6.

²³ 'Pakistan Human Rights 2020 Report', Country Reports on Human Rights Practices for 2020: United States Department of State, Bureau of Democracy, Human Rights and Labor, available at <https://www.state.gov/wp-content/uploads/2021/03/PAKISTAN-2020-HUMAN-RIGHTS-REPORT.pdf>, last accessed on 22-04-2022.

²⁴ Ibid.

²⁵ District Bar Association, Rawalpindi and others Federation of Pakistan, PLD 2015 Supreme Court 401.

²⁶ Unrepresented Nations and Peoples Organization, 'Human Rights Violations in Pakistan', *op.cit.*, 5-6.

21st century.²⁷ Inadequate judicial remedies against the perpetrators of human rights violations and lack of authority of police officials to lodge criminal cases against state functionaries — if any kind of human rights violations are alleged against them — also contributes in the weaknesses of CJS to apprehend the perpetrators of human rights violations. For instance, in cases of enforced disappearance, police is always reluctant rather unwilling to lodge criminal cases and the families of the victims always have to move to the Courts to avail their remedies. On the other hand, police powers Under Sections 54 read with 151 Cr.P.C. are unlimited to arrest any person if he is suspected to commit any cognizable offence even without any proof against him. In this regard, Pakistan has not complied UNPO's 2012 recommendations to revise the legislation in respect of arrest of persons and providing that no such arrest can be affected without clearly defining charges against them. Apart from the crimes and human rights violations committed by the state and its agents, the situation of ordinary crimes and control over them is also very dismal. Despite of various legislations on the protection of rights of women and children, there appears to be no deterrent impact on the society. For instance, despite of Criminal Law Amendment Act, 2004, which further amended the provisions of Pakistan Penal Code, specifically criminalizing honour killing, around 1000 cases are reported annually in Pakistan which reflects that there is no effective impact of the legislation and the perpetrators are seen showing themselves victorious in chilling environment.²⁸ It is also observed that most of Pakistani criminal laws are out-dated and the amendments are introduced without any thorough analysis and thus these amendments do not ring any significant change.²⁹ The components of CJS appear to be influenced by the powerful elite and the corruption in different components is also one of the main reasons for hindrance in the administration of justice. The judiciary has also been alleged to be partial, the independence of which is a pre-requisite for the administration of justice in any civilized

²⁷ Fasihuddin, 'Criminology and Criminal Justice System in Pakistan', in Liu J., Heberton B., Jou S. (eds.), *Handbook of Asian Criminology*, Springer, New York, 2013, 247.

²⁸ Unrepresented Nations and Peoples Organization, 'Human Rights Violations in Pakistan', *op.cit.*

²⁹ Hamza Hameed, Undergrad (LLB), University of London Mohammad Kamil Jamshed, LLB (Hons), University of London, 'A study of the criminal law and prosecution system in Pakistan', *Manzil Pakistan*, October 2013, available at <http://manzilpakistan.org/pdf/Law-and-Justice-Study-on-Criminal-Prosecution.pdf>

society.³⁰ Therefore, the overall performance of CJS demands major reforms and strong commitment, because the CJS of any country is the backbone for the protection of human rights in any society.

Prosecution of human rights violations

In normal circumstances, the administration of justice and protection of human rights are to be governed under the ordinary legal system. However, in special circumstances, the same is required to be done under special legal regime. Legal scholars have termed it 'transitional justice'. The scholars have coined the term on the ground that justice is required to be done at all times, including at the time of political and institutional crises. When ordinary machinery of administration of justice cannot work properly, they have proposed the idea of transitional justice. In the words of Ruti Teitel, 'what is fair and just in extraordinary political circumstances was to be determined from the transitional position itself.'³¹ On these bases, Teitel says that transitional justice cannot be declared to be complete and satisfactory justice, rather it is imperfect and partial. In other words, transitional justice is opposed to ideal justice. According to Teitel, a few factors undermine the ideal justice that include 'retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and compromised judiciary'.³² Whatever may be the case, as already observed, at the first phase, domestic legal system of any country is primarily responsible to hold the perpetrators of human rights violations accountable and in case of failure of domestic legal system to do so, international legal system comes into operation? However, enforcement of international legal system for the prosecution of human rights violations is not an easy task. In Pakistan, as already highlighted, weak and outdated justice system and lack of its implementation due to political influence, corruption, incompetency and partiality, are the main factors for hindrance in just and fair administration of justice. Therefore, we can say that number of factors including political will of the state and its commitment to international obligations are involved for the enforcement of human rights and prosecuting their violations at international level and the most controversial topic in this regard is Universal Jurisdiction.

³⁰ Unrepresented Nations and Peoples Organization, 'Human Rights Violations in Pakistan', *op.cit.*

³¹ Melissa Nobles, 'the Prosecution of Human Rights Violations', *Annu. Rev. Polit. Sci.* 2010. 13:165–82, 167.

³² *Ibid.*

Universal jurisdiction

Rule of universal jurisdiction is unique in its character. Usually, national law of a state provides both geographical and legal boundaries for the trial of a crime committed within these boundaries. Universal jurisdiction, on the other hand, provides that certain criminals and perpetrators can be apprehended and subjected to trial irrespective of geographical boundaries. However, the principle of universal jurisdiction is confined in respect of subject matter. This means that universal jurisdiction can only be exercised in respect with genocide, war crimes and crimes against humanity. 'Crimes against humanity include systematic or widespread acts of murder, extermination, enslavement, torture, deportation or forcible transfers of population, arbitrary imprisonment, enforced disappearance of persons, persecution on political, religious, racial, or gender grounds, and rape, sexual slavery and other serious forms of sexual violence'. Genocide 'involves acts such as killing or persecuting members of a racial, religious or ethnic group with the purpose of destroying that group'. War crimes are defined in Article 8 of the Rome Statute of International Criminal Court and the Four Geneva Conventions and their Additional Protocols. Some serious war crimes include 'killing of prisoners or civilians, torture, conducting unfair trials, unlawful deportation or transfer, the taking of hostages, and attacks on the civilian population'.³³ However, according to this principle, any country can assume jurisdiction over the individuals charged with the commission of these crimes even if such individual is neither national of that country nor the crime has been committed in that country. The principle of universal jurisdiction has been recognized in respect of genocide, war crimes and crimes against humanity for the reason that prosecution of these crimes and punishing their perpetrators is the concern of all states irrespective of the nationality of perpetrator or victim and irrespective of the fact as to when and where any such crime was committed. All these crimes violate the fundamental obligations of international law and it is the duty of every state to uphold the principles of international law. Moreover, these crimes not only affect the states where they are committed nor the citizens against whom they are committed, rather affect all the states and all the people around the world, undoubtedly such crimes are considered to be committed against

³³ 'Hard Cases: Bringing Human Rights Violators to Justice Abroad: A Guide to Universal Jurisdiction', *International Council on Human Rights Policy*, 1999, 4-5, available at https://reliefweb.int/sites/reliefweb.int/files/resources/F8D2DF85C8AE339EC125742B0039BD54-ichrp_dec1999.pdf, last accessed on 06-03-2022.

the whole world. Therefore, acceptance of concept of universal jurisdiction should not only be encouraged rather should be included mandatorily in international criminal law (ICL) for effective prosecution of human rights violations at international level.

Some states including Spain and Belgium have made attempts to give practical effect to the principle of universal jurisdiction by incorporating the same in their penal codes, but majority of the states is reluctant to apply the same as such, where the principle remains as a theoretical concept than practical.³⁴ Although the principle is well-known all over the world as no state can endorse the commission of crimes falling within the mandate of universal jurisdiction, but many have shown concerns over its application. A few states have seriously opposed it and their primary argument is that it is interference in the judicial system of a sovereign state. Apart from opposition in respect of implementation of universal jurisdiction, lack of uniform policy for implementation of this principle, dispute over the definition of crimes falling within the mandate of universal jurisdiction, lack of international cooperation, political situation of each country and cultural differences are the main reasons for non-implementation of this principle.³⁵ However, though no verdict has been given by International Criminal Court in this regard, but application of the principle seems an effective and a deterrent factor for making the perpetrators accountable at least to a certain degree and to redress the grievances of the victims and the same is reflected from Augusto Pinochet case.³⁶

As far the question regarding who can exercise universal jurisdiction is concerned, generally the authority to prosecute any of the crimes included within the mandate of universal jurisdiction rests with the government or state prosecutors. On the other hand, in a few countries, private prosecutors can also be engaged and they can prosecute any crime falling within the domain of universal jurisdiction with the permission of the government prosecutors. However, the legal systems all over the world

³⁴ Xavier Philippe, 'the principles of universal jurisdiction and complementarity: how do the two principles intermesh?', *International Review of the Red Cross*, (2006), Volume 88 Number 362, 380.

³⁵ Ibid., 395-96.

³⁶ See R., ex parte Pinochet v Bartle and ors, Appeal, [1999] UKHL 17, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827, (1999) 38(3) ILM 581, (2002) 119 ILR 135, ILDC 1736 (UK 1999), 24th March 1999, United Kingdom; House of Lords [HL], available at <file:///C:/Users/Saqib%20Jawad/Downloads/Ex%20parte%20Pinochet%20-%20Decision%20of%2025%20November%201998.pdf>, last accessed on 24-04-2022.

differ from each other and on the basis of the same, uniform policy or rules cannot be framed for the exercise of universal jurisdiction. On the other hand, victims and human rights organizations are not prepared to prosecute any of the above-mentioned crimes though they can help in selection of any such cases and preparation of material and evidence for their prosecution. Selection of crimes to be prosecuted under the head of universal jurisdiction is another most important task and the foremost requirement in this regard is complete exclusion of bias so that the entire system could be relied upon and national and international resources applied in this respect should be properly utilized.³⁷

Conclusion

Human rights are not only rights rather core values of the human beings which must be protected at any cost. The primary obligation for protection of human rights is on the shoulders of the state where any violations in this regard are committed and such protection can only be ensured effectively by prosecuting human rights violations and punishing the perpetrators. For the said purpose, effective criminal justice system is required. Unfortunately, the criminal justice system in Pakistan is at the weaker footing and remained unable to stop human rights violations. It demands strong commitments for bringing legislative, and institutional reforms.

Since the major human rights are provided in international legal system, therefore, mechanism for their protection is also provided. Apart from institutional framework for the protection of human rights, international criminal justice system comprises of International Criminal Court and Tribunals. It is unfortunate that limited categories of crimes have been included in the jurisdiction of International Criminal Court. However, principle of universal jurisdiction in respect of subject matter jurisdiction of International Criminal Court has been made available for each state. Although many states have not yet ratified the Rome Statute of International Criminal Court, but effective and unbiased prosecution of crimes by the states can develop trust in international criminal justice system and the same can ultimately lead to an effective criminal justice system which can come into play in case of failure of national justice system and the victims of human rights violations cannot be left at the mercy of host state or perpetrators.

³⁷ 'Hard Cases: Bringing Human Rights Violators to Justice Abroad', *op.cit.*