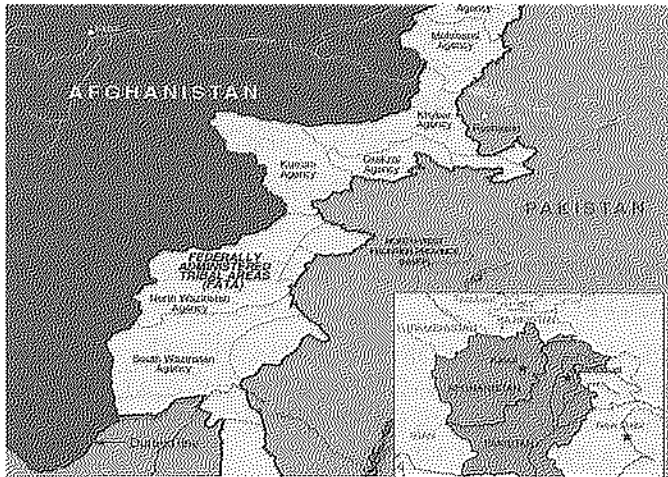


ROAD TO RECOVERY: PAKISTAN'S HUMAN RIGHTS CRISES IN THE FATA

Naji'a Tameez[†]



“For the first five days they beat us constantly with leather belts across the top and bottom of our backs throughout the day, up to an hour at a time. The pain was too much to describe. There were always five soldiers at every interrogation session; all in army uniform but usually only one of them did the talking. He would threaten to kill me if I didn't confess to being part of the Taliban. I kept telling him that neither I, nor my Ayub, ever belonged to the Taliban, we are just farmers. On hearing this [he] would scream '[y]our brother is going to die tonight! If you don't want to see him for the last time speak the truth!'”¹

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1. AMNESTY INT'L, 'THE HANDS OF CRUELTY' ABUSES BY ARMED FORCES AND TALIBAN IN PAKISTAN'S TRIBAL AREAS 20 (2012), available at http://www.amnesty.nl/sites/default/files/public/p4026_end_impunity_in_tribal_areas.pdf (last visited May 10, 2015) [hereinafter *Hands of Cruelty*].

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INTRODUCTION

Niaz, a 39-year-old farmer from Swat, and his younger brother Ayub are among the thousands of men and boys swept up in security operations by Pakistan's armed forces in areas formerly controlled by the Taliban. Niaz was released ten days after his arrest, on that same day he was confronted with Ayub's dead body, the hospital claiming he had died of "heart stroke" in army custody. This is just one of the thousands of instances of uninvestigated enforced disappearance, torture and death inflicted upon the tribal lands of Pakistan.

The tribal lands have been entrenched in a human rights crisis for decades, but since 2004 conditions in the region have taken a considerable nosedive. Due to the U.S. led efforts in Afghanistan and the Taliban² insurgency in Pakistan's tribal lands, thousands of people in the tribal lands have been subject to unjust and inhumane treatment,³ tens of thousands of people have died and millions of people have been displaced. The Pakistani government has not only made minimal effort to remedy this crisis and help its citizens, but has also exacerbated the poor conditions in the tribal lands.

This paper begins by reviewing the structure of government in the tribal lands and how said structure puts Pakistan in violation of international human rights law,⁴ international humanitarian law⁵ and

2. The Taliban presence in Pakistan is a combination of Taliban and al-Qaeda militants who fled Afghanistan and slipped through Pakistan's borders in 2001 and 2002. They formed a new insurgency and drew together Pakistani veterans of the Taliban movement and recruited new members who agreed with their platform against U.S. military operations in Afghanistan and Iraq. *Id.* at 29-30. All references to the Taliban in this note are references to the Pakistani Taliban movement, specifically the TTP.

3. In *Prosecutor v. Furundzija* the International Criminal Tribunal for the former Yugoslavia emphasized that humane treatment revolved around "the general principle of respect for human dignity[, which] forms the common foundation of both international human rights law and international humanitarian law."

"The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. . . . This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person."

Daniel Thürer, *Dunant's Pyramid: Thoughts on the "Humanitarian Space"*, 89 INT'L REV. RED CROSS 47, 57 (Mar. 2007).

4. International human rights law is comprised of international human rights treaties, which governments "undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties." INT'L HUM. RTS. L., available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited May 10, 2015).

5. International humanitarian law (IHL) is comprised of principles and rules governing

customary international law.⁶ This paper then argues that Pakistan must remedy these grave circumstances in order to meet its international legal obligations and abide by its own constitution as it applies to the rest of the country.

Pakistan must ensure that all of its citizenry, of which the people of the tribal lands are a part, is treated equally, humanely and in accordance with international law and custom. This paper then concludes by offering some of the more important reforms Pakistan must make to begin complying with international obligations. These include, but are not limited to, fully incorporating the tribal lands into the central government, setting up proper mechanisms for representation, providing adequate education and healthcare, as well as equal treatment of women.

I. THE HUMAN RIGHTS ABUSES STEM FROM POOR GOVERNING STRUCTURE AND PAKISTAN'S INABILITY TO BALANCE FOREIGN AND DOMESTIC INTEREST

Pakistan is made up of five administrative provinces,⁷ one of which is in the northwest part of the country, known as the Federally Administered Tribal Area ("FATA"). The FATA is further divided into several tribal agencies, from north to south: Bajaur, Mohmand, Khyber, Orakzai, Kurram, North Waziristan and South Waziristan.⁸ Most of

the conduct of all parties to international and non-international armed conflicts. Key provisions of IHL include the four Geneva Conventions of 1949 (which Pakistan signed in 1951) and customary international humanitarian law applicable to non-international armed conflict. *What is International Humanitarian Law?*, INT'L COMMITTEE RED CROSS (July 2004), available at https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last visited May 10, 2015).

6. "Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties." *Customary International Law*, LEGAL INFO. INST., available at http://www.law.cornell.edu/wex/customary_international_law (last visited May 10, 2015).

7. The four remaining provinces are known as Sindh, Punjab, Balochistan and Kyber Pakhtunkhwa. Before the renaming of this province in 2010, Kyber Pakhtunkhwa was known as the North West Frontier Province (NWFP). The former NWFP is also a tribal area but it is not the subject of this note. Though there is some spill over from the conflict in the FATA into Kyber Pakhtunkhwa, Kyber Pakhtunkhwa participates in the central government and has not been as gravely affected by the US' war in Afghanistan, the Taliban insurgency or by Pakistan's neglect. *Provinces and Administrative Units of Pakistan*, GOVT. PAKISTAN, MINISTRY INFO., BROADCASTING, & NAT'L HERITAGE (2012-13), available at <http://nationalheritage.gov.pk/provinces.html> (last visited May 10, 2015).

8. The FATA is further divided into several tribal agencies, from north to south: Bajaur, Mohmand, Khyber, Orakzai, Kurram, North Waziristan and South Waziristan. North and South Waziristan are especially troubled within the FATA because they are

these agencies are astride the Durand Line, the disputed international border between Pakistan and Afghanistan.⁹

The FATA is a partially autonomous region because, under Pakistan's constitution, it is governed primarily through tribal leadership but ultimately supervised directly by the executive branch of Pakistan's central government. This executive mechanism of governing the FATA¹⁰ leaves the people living there completely unprotected. There is a total absence of law in the region since neither legislative nor judicial control officially extends there. The FATA is Pakistan's least integrated and least developed province.¹¹ The Pakistani state has failed to invest in either the human development of this area or in the physical infrastructure that would connect the FATA to the rest of Pakistan. On top of that, Pakistanis living in the FATA have no redress for the gross human rights violations that are committed at the hands of tribal heads, the Taliban, the Pakistani military, and the United States through drone strikes, because there are extensive limitations on the ability of the central government to act as a check. As a result, most FATA residents have little sense of patriotism or even responsibility towards the Pakistani state.¹²

The influx of Arab *Mujahideen* in the 1980s and of the Taliban and al-Qaeda fighters since 2001 brought "political Islam, money and illicit economic activity" to the region and "buttressed emergent Islamist leadership."¹³ The region has also undergone changes in the demographic strength of certain tribes; this, in conjunction with the infusion of new resources and militant influence, has caused discord in the traditional tribal hierarchy.¹⁴

This has allowed new charismatic, religious leaders to emerge as

Taliban strongholds, which have led them to become a heavy target of Pakistan's military campaign and the primary site of continued drone attacks from the United States. *Federally Administered Tribal Areas*, KHYBER PAKTUNKHWA FEDERALLY ADMINISTERED TRIBAL AREAS & BALUCHISTAN MULTI-DONOR TRUST FUND, available at <http://www.pakistan.mdtf.org/fata.html> (last visited May 10, 2015).

9. C. Christine Fair, Nicholas Howenstein, and J. Alexander Their, *Troubles on the Pakistan-Afghanistan Border*, U.S. INST. OF PEACE (Dec. 1, 2006), available at <http://www.usip.org/publications/troubles-the-pakistan-afghanistan-border> (last visited May 10, 2015) [hereinafter Fair].

10. See *infra* Part IV.

11. *Pakistan's Lawless, Impoverished Northwest*, ASIA SENTINEL (Aug. 2013), available at <http://www.asiasentinel.com/society/pakistans-lawless-impoverished-northwest/> (last visited May 10, 2015) [hereinafter *Impoverished Northwest*].

12. Fair, *supra* note 9.

13. *Id.*

14. *Id.*

political entrepreneurs using political Islam as their instrument of mobilization. These Islamist leaders also gained considerable credibility and resources with the influx of foreign fighters from the Soviet-jihad period and the persistent flow of financial and Islamist resources during the period of Taliban consolidation in Afghanistan. Critically, these new Islamist and militant leaders have robust ties with Pakistan's chief Islamist parties (such as the Jamiat-e Ulame- Islam and the Jamaat Islami), with the Taliban and its allied militants, as well as with al Qaeda.¹⁵

In addition to these new influences, other factors that contribute to the FATA's instability are the migration of FATA residents out of the FATA and into the more settled areas of Pakistan or abroad.¹⁶ People who leave generally come from "lower tribal lineages with relatively low social and tribal prestige" and use the opportunity away from the FATA to financially provide for their families.¹⁷ Leaving the FATA also allows them to understand the inequality in the tribal lands and bring this awareness back to those who still live there.¹⁸ In addition, the new influx of money allows the families to seek power and influence in correspondence with their new wealth, which then begets changes and conflict in the tribal structure.¹⁹

The FATA gained particular significance because of its location along the Afghan border, which resulted in remnants of al-Qaeda and Taliban militants seeking refuge in the FATA's remote villages and difficult terrain.²⁰ Militants then used these remote locations to launch attacks against international forces in Afghanistan and then also allied themselves with local insurgents, based primarily in the Waziristan agencies, which then led to concerns regarding Pakistan's internal security. Its location makes the FATA key to policing the Afghan-Pakistan border and also the primary site of U.S. drone attacks.²¹ The opposition from the FATA tribes and their alliances with each other and

15. *Id.*

16. *Id.*

17. Fair, *supra* note 9.

18. *Id.*

19. *Id.*

20. *Id.*

21. In 2012, the U.S. carried out about 48 serial drone strikes on suspected al-Qaeda and Taliban members. These strikes resulted in large numbers of civilian casualties; lack of access to these tribal areas has prevented independent verification of statistics. The U.S. drone strikes cause much controversy, outrage and civilian casualties in Pakistan. See *Pakistan: Abuses, Impunity Erode Rights*, HUM. RTS. WATCH (Feb. 1 2013), available at <http://www.hrw.org/news/2013/02/01/pakistan-abuses-impunity-erode-rights> (last visited May 10, 2015).

with militant groups across Pakistan has made the situation especially volatile in the last decade, both for Pakistan's domestic security and the war in Afghanistan.²² The continued drone attacks have also further soured the relationship between the FATA and Pakistan's central government, as there is now a feeling of betrayal and abandonment where the people of the tribal lands feel their government has allowed a foreign power to wreak complete havoc and destruction upon them.²³ While these factors all contribute to the derogation of the area and to the rise of militant violence, the lack of societal development as a result of Pakistan's longtime neglect is also a significant factor that must be taken into account.²⁴

The combination of having to balance domestic interests and the interests of foreign powers makes the situation more complicated for Pakistan and limits its military options. As a result, many of the actions Pakistan has taken in its counter-insurgency effort have been questionable. Accusations of arbitrary detentions, torture, enforced disappearances and collective punishment have steadily increased over the last few years as Pakistan has regained territory from the Taliban and shifted its focus to smaller clashes with militant groups. This is especially problematic from a legal standpoint because from 2008 to 2010 Pakistan ratified multiple human rights treaties, including the International Covenant on Civil and Political Rights ("ICCPR"), the UN Convention Against Torture ("UNCAT") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").²⁵

22. SYED FAROOQ HASNAT, GLOBAL SECURITY WATCH – PAKISTAN 144 (2011). Though the War in Afghanistan has wound down considerably there are still American troops in Afghanistan, training Afghan security forces, aiding in the reconstruction process and continuing to manage the presence of the Taliban and al-Qaeda. These foreign troops are directly affected by Pakistan's ability to manage the FATA and Waziristan especially, a fact Pakistan has to take into account when they take action in the region. *Id.*

23. Umar Farooq, *Civilians Bear Brunt of Pakistan's War in the Northwest*, FOREIGN POL'Y (Feb. 11, 2013), available at http://southasia.foreignpolicy.com/posts/2013/02/11/civilians_bear_brunt_of_pakistans_war_in_the_northwest (last visited May 10, 2015).

24. *Impoverished Northwest*, *supra* note 11.

25. Arshad Mahmood, *ICCPR Ratified*, DAWN (Aug. 2, 2010, 12:00 AM), available at <http://www.dawn.com/news/875750/iccpr-ratified> (last visited May 10, 2015); *Chapter IV Human Rights*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Mar. 31, 2015); *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS, available at <http://indicators.ohchr.org/> (last visited May 10, 2015) (Pakistan ratified CEDAW in 1996, the ICESCR in 2008, and the ICCPR and UNCAT in 2010).

Though compliance with these agreements is difficult to enforce on an international level, ratification creates a duty on Pakistan's part to fulfill the terms of the treaties.²⁶ With ratification Pakistan acknowledged that there exists a universal standard for the treatment and governing of people and that Pakistan has a responsibility to provide its citizens with that standard of living. Yet Pakistan has not fulfilled its duty of incorporating these universal standards into its governmental structure when it comes to the FATA.

Despite this, there are ways that Pakistan can begin to repair the damage that has been done in the tribal lands and act in accordance with its own constitution as well as international law. Pakistan can create a fair and more representative system of governing the region by integrating the FATA into the federal union, of which the other provinces are already a part. Pakistan can invest in the area's infrastructure, education, healthcare system (what little exists), and security and hold those who have committed human rights abuses accountable.

II. UNDERSTANDING HOW THE HISTORY OF THE FATA INFLUENCED THE CURRENT STATE OF AFFAIRS

The history and makeup²⁷ of the FATA explains the logic behind Pakistan's handling of the region, because the fact that the FATA borders Afghanistan makes it a very central and strategic location²⁸ from which to carry out militant operations. This, in combination with the rough and varied terrain, makes the FATA treacherous for those unfamiliar with the terrain to infiltrate. The people of the FATA, who number close to 3.9 million by recent estimates, also make effective

26. Enforcement of international agreements is difficult because all nations are sovereign and there is no overarching legal body that can force states to comply. Often economic sanctions or military force are threatened or used to create compliance but such actions are dependent upon what stake enforcing states have in another state's compliance. Julian Ouellet, *Enforcement Mechanisms*, BEYOND INTRACTABILITY (Sept. 2004), available at <http://www.beyondintractability.org/essay/enforcement-mechanisms> (last visited May 10, 2015).

27. The terrain of the tribal lands makes the region a difficult one to tame. It is a mountainous region but is also made up of forests and deserts. Its extreme winters and summers make it difficult for armed forces to carry out effective operations. Akbar Ahmed & Harrison Akins, *Waziristan: 'The Most Dangerous Place in the World.'* AL JAZEERA (Apr. 12, 2013, 9:37 PM), available at <http://www.aljazeera.com/indepth/opinion/2013/04/20134983149771365.html> (last visited May 10, 2015); HASNAT, *supra* note 22, at 145.

28. HASNAT, *supra* note 22.

military operations difficult.²⁹ The FATA operates under a tribal system of government where clans are defined by common ancestry; most FATA residents are *Pashtuns*.³⁰ Because most tribes straddle the Durand Line, cross border movement is “substantial and difficult to control.”³¹

Prior to the Taliban insurgency the tribes dealt with issues of crime, administration and politics through their own traditions, an arrangement that was accepted by the British when they were in power and later by Pakistan's government as well.³² The *Jirgas* were by no means perfect, but they emphasized mediation rather than violence as a method of conflict resolution. Safdar Dawar, a journalist from North Waziristan and head of the Tribal Union of Journalists, reminisces that “the elders and the people recall the situation before 2001, [when] they had their own culture, unity, lashkars [militias], and peace committees,” he explains, that the people of the FATA know that they were more effective than any tools from “these stakeholders in the Great Game.”³³ They kept relative peace among the tribal people they served.³⁴ But in recent years, the Taliban gained control and severed the structure of

29. AMNESTY INT'L, AS IF HELL FELL ON ME: THE HUMAN RIGHTS CRISES IN NORTHWEST PAKISTAN 20 (June 2010), available at http://www.protectingeducation.org/sites/default/files/documents/amnesty_as_if_hell_fell_on_me.pdf (last visited May 10, 2015) [hereinafter AMNESTY INT'L]. The tribes of the FATA have a history of resistance, most notably with Soviet occupation forces in 1979 but also much earlier when the British were colonizing the Indian sub continent. The British tried to establish some sort of central rule in Waziristan by sending governors into the region. These governors acted more like ambassadors; they had very limited jurisdiction and were barely effective in keeping order in the region. Ahmed & Akins, *supra* note 27. Tribes like the Mehsuds and Wazirs from North and South Waziristan regularly repelled the British when the British encroached on their territory, they would leave the British forces in shambles and refused to make concessions until the colonial troops had no choice but to retreat. David Ignatius, *Waziristan and the British Experience*, WASH. POST (Oct. 25, 2009), available at <http://articles.washingtonpost.com/2009-10-25/opinions/368562161south-waziristan-tribal-areas-tribal-leaders> (last visited May 10, 2015).

30. With a population of at least 50 million, the Pashtun people are Afghanistan's largest ethnic group, and are also the second-largest ethnicity in *Pakistan*. Pashtuns are united by the Pashto language, which is a member of the Indo-Iranian language family, although many also speak Dari (Persian) or Urdu. Kallie Szczepanski, *Who are the Pashtun*, ABOUT EDUC. (2014), available at asianhistory.about.com/od/gloassaryps/g/Who-Are-The-Pashtun.htm (last visited May 10, 2015).

31. Fair, *supra* note 9.

32. HASNAT, *supra* note 22, at 149.

33. “Stakeholders in the Great Game” is a reference to the key players in the FATA conflict, the U.S., the Taliban and Pakistan's military forces. Farooq, *supra* note 23.

34. Ahmed & Akins, *supra* note 27.

Jirgas, giving way instead to militant religious leaders, who govern on the basis of stringent religious doctrine.³⁵

The Taliban's method of tribal governing is not well taken by the people of the FATA. The people of the FATA have traditionally abided by an honor code called *Pashtunwali* that predates Islam.³⁶ This ethical code, in combination with tradition and religion is what the region's culture is comprised of; however, the religious extremism that contributed to the region's instability can largely be attributed to the relatively recent alterations to the region's power structures.³⁷

When Pakistan gained independence from India in 1947, Pakistan's founder, Mohammed Ali Jinnah "maintained the British civil structure of the tribal agency and the role of the political agent"³⁸ in administering the Tribal Areas.³⁹ Jinnah continued to operate the tribal lands in much the same way as the British had. However, his leadership differed markedly in policy when, in April 1948, Jinnah made the unprecedented move of withdrawing military forces from the province of Waziristan upon meeting with a *grand Jirga* of FATA tribesman.⁴⁰ He said,

Keeping in view your loyalty, help, assurances and declarations we ordered, as you know, the withdrawal of troops from Waziristan as a concrete and definite gesture on our part. . . Pakistan has no desire to unduly interfere with your internal freedom. On the contrary; Pakistan wants to help you and make you, as far as it lies in our power, self-reliant and self-sufficient and help in your educational, social and economic uplift. . . We want to put you on your legs as self-respecting citizens who have the opportunities of fully developing and producing what is best in you and your land.⁴¹

As Jinnah is widely considered a brilliant political mind, his speech to the grand *Jirga* can be interpreted as strategic political rhetoric meant to placate the tribes. However, it was also a practical assessment of the situation and the needs of the region. Jinnah knew that the northwest frontier of the newly created Pakistan would be difficult to incorporate; its people had a long history of tribal leadership that would not be easy

35. HASNAT, *supra* 22, at 149.

36. *Id.*

37. Fair, *supra* note 9.

38. *See infra* Part IV.

39. Ahmed & Akins, *supra* note 27.

40. *Id.*

41. HASNAT, *supra* note 22, at 148.

to transition into the central government.⁴² It is obvious from Jinnah's speech that while Pakistan was willing to aid the FATA it never intended to fully integrate the FATA, which is what created the rift that exists today.

Instead of fighting them into submission with resources and time the new government did not have, Jinnah made sure they were aware of their internal autonomy, while still being subject to the central government. Though keeping the tribal lands autonomous was a practical necessity at the time it was ultimately detrimental. Because despite their autonomy, the tribal lands are subject to Pakistan's central government, yet are inadequately represented in the central government. Jinnah had promised the tribesmen economic and social aid to lift their society,

Pakistan will not hesitate to go out of its way to give every possible help— financial and otherwise—to build up the economic and social life of our tribal brethren across the border. . . It will certainly be my constant solicitude and indeed that of my Government to try to help you to educate your children and with your co-operation and help we may very soon succeed in making a great progress in this direction.⁴³

For the next fifty years or so Pakistan struck a balance between the tribal structure in the FATA and Pakistan's central government with mechanisms in place to ensure law and order.⁴⁴ This balance, which was just non-interference from the central government, did little to actually lift Waziristan or any of the FATA out of its impoverished conditions, in fact the non-interference, and therefore isolation, only pushed the FATA further into the Taliban's hands.⁴⁵

For example, in 1996, the government extended voting rights for adults to the FATA.⁴⁶ But, "mainstream parties were not allowed to mobilize in FATA as the elections were supposedly held on a non-party basis."⁴⁷ The problem though is that Islamist parties held great influence over mosques and schools, and therefore their candidates

42. Pakistan had just seceded from India and creating a new country was challenging enough without taking on the arduous task of integrating an autonomous tribal region that was used to battling those who attempted to conquer it.

43. HASNAT, *supra* note 22, at 148.

44. Ahmed & Akins, *supra* note 27.

45. "According to a WHO report, nearly 50 percent of tribesmen live in abject poverty, 75 percent have no access to clean drinking water. Annual population growth rate is almost 4 percent as compared to nationally cited figures of 2 percent." *Impoverished Northwest*, *supra* note 11.

46. Fair, *supra* note 9.

47. *Id.*

could effectively lobby for votes.⁴⁸ As a result, the tribal lands elected *mullahs* to represent them in the National Assembly in 1997 and again in 2002.⁴⁹ This is a major departure from tradition. Previously, *maliks* chose their tribal representatives to Parliament on a “secular and tribal basis.”⁵⁰ The collapse of the *maliki* system because of Pakistan’s neglect and the Taliban’s influence, is significant to the FATA because it created a power vacuum that *mullahs* and Islamic militants then eagerly filled.

Pakistan continued to treat the tribal lands as separate and apart but never gave them true autonomy as far as governing. Jinnah’s political promises remained just that; the central government continued to neglect the people of the FATA.⁵¹ The people of the tribal lands have always lived in destitute conditions. For shelter, most people live in pueblo-like constructions,⁵² usually with no electricity. The area remains impoverished, with extremely low rates of literacy and little to no healthcare services. Much of the FATA is completely inaccessible because of the lack of infrastructure, including lack of roads and railways.⁵³ This lack of attention to a major segment of its population is a large part of Pakistan’s problem in the FATA.

While the central government has neglected to govern the area and has floundered to regain control in the last decade, the Taliban “seem to operate with a clear chain of command and high level of discipline, and ha[ve] demonstrated strong—and growing—operational and strategic cohesion.”⁵⁴ Residents of the FATA who joined the Taliban have done so for a host of reasons, most of which are ultimately traceable to unemployment and poverty.⁵⁵ Further proving that the rise of Taliban influence and religious extremism in the FATA is directly traceable to the lack of social development and infrastructure, a responsibility the

48. *Id.*

49. *Id.*

50. *Id.*

51. Fair, *supra* note 9.

52. Pueblos were housing constructions built from stone, mud and other local material that were built by Native Americans in the Southwestern United States.

53. HASNAT, *supra* note 22, at 147.

54. AMNESTY INT’L, *supra* note 29, at 30.

55. Naveed Ahmad Shinwari, *Understanding FATA: 2011 Attitudes Towards Governance, Religion & Society in Pakistan’s Federally Administered Tribal Areas (Vol. V 2012)*, COMM. APPRAISAL & MOTIVATION PROG., available at http://www.understandingfata.org/uf-volume-v/Understanding_FATA_Vol-V-11.pdf (last visited May 10, 2015).

central government should be handling.⁵⁶ In fact, while more than 30% of the FATA characterizes the Taliban as “terrorists,” almost 23% recognize them to also be uneducated youth.⁵⁷ The lack of literacy and jobs make supporting the Taliban fruitful for those who join their ranks and those who do not join are too intimidated to resist in any meaningful way.⁵⁸

III. GOVERNING THE FATA: CONTRADICTING THE CONSTITUTION

The Pakistani Constitution of 1973 (“the Constitution”) gives special status to the tribal areas and directs that neither the power of Parliament nor of the power of the judicial system shall extend to the tribal areas without the President’s assent.⁵⁹ While the rest of Pakistan functions as a parliamentary democratic republic, the FATA does not. Under Article 51 of the Constitution, the FATA is included among the territories of Pakistan.⁶⁰ The FATA functions as a combination of exclusive executive authority and tribal tradition.⁶¹ The extent of the FATA’s involvement in the central government is that FATA representatives can be elected on a non-party basis to the National Assembly and the Senate, but it still remains under the direct executive control of the President.⁶² Despite election to the National Assembly and Senate, representatives cannot exercise any legislative powers with regard to the FATA, meaning that any laws passed by the National Assembly do not apply to the FATA unless ordered by the President.⁶³

56. *Id.*

57. *Id.* at 95.

58. HASNAT, *supra* note 22, at 147.

59. *History of FATA, FEDERALLY ADMINISTERED TRIBAL AREAS*, available at <http://fata.gov.pk/Global.php?ild=28&fid=2&pld=23&mlid=13> (last visited May 10, 2015) (“Soon after [Pakistan’s] Independence [from India], the various tribes in the region entered into an agreement with the Government of Pakistan, pledging allegiance to the newly created state. The agreement . . . did not include political autonomy of the tribes. The instruments of agreement, signed in 1948, granted the tribal areas a special administrative status. Except where strategic considerations dictated, the tribal areas were allowed to retain their semi-autonomous status, exercising administrative authority based on tribal codes and traditional institutions. This unique system was crystallized in Pakistan’s Constitution of 1973.”).

60. PAKISTAN CONST. art. 51; see also *Administrative System, FEDERALLY ADMINISTERED TRIBAL AREAS*, available at <http://fata.gov.pk/Global.php?ild=29&fid=2&pld=23&mlid=13> (last visited May 10, 2015).

61. HASNAT, *supra* note 22, at 149; PAKISTAN CONST. arts. 51, 59, 246–47.

62. *Administrative System, supra* note 60; PAKISTAN CONST. arts. 51, 59, 246–47.

63. AMNESTY INT’L, *supra* note 29, at 27; *Administrative System, supra* note 60.

The special mechanism for governing this region falls under a body of law called the Frontier Crime Regulations ("FCR").⁶⁴ The FCR dates back to the 1870s when Pakistan was still part of India and the whole subcontinent was under British rule.⁶⁵ Despite India's independence from Britain, then Pakistan's secession from India, and multiple revised constitutions, the FCR has been retained.⁶⁶ Through reliance on the concept of Collective Punishment, the FCR codifies the government's ability to commit human rights violations and fails to recognize "the rule of law, due process, political representation or democratic institutions."⁶⁷ Under the FCR, "the government may hold an entire tribe or subgroup accountable for the actions of alleged wrongdoers."⁶⁸ This kind of legal framework and the associated mechanisms for law enforcement are specific to the FATA. Segments of FATA tribes, Pakistani human rights organizations and even Pakistan's Supreme Court have decried the FCR; the court going so far as to deem the FCR unconstitutional.⁶⁹

Though Pakistan's central government has often promised to reform the FCR and improve the status of those living in the tribal lands, it has not made any substantial changes to the FCR in 113 years.⁷⁰ The millions who live in the FATA still have "second-class legal status."⁷¹ Pakistan's constitution lays out a list of guaranteed fundamental rights for all citizens, but it then excludes the FATA from benefiting from said rights and excludes the majority of judicial, legal and parliamentary control from reaching there.⁷²

Since the control of parliament and the judiciary do not extend to the FATA, it is essentially under direct executive control. The President

64. It is worth noting that under art. 247(6) of the 1973 constitution, the president of Pakistan has the constitutional authority to end the applicability of the FCR to any agency after consulting with a tribal Jirga. AMNESTY INT'L, *supra* note 29, at 26-27; PAKISTAN CONST. art. 247, § 6.

65. *History of FATA*, *supra* note 59.

66. PAKISTAN CONST. art. 247.

67. AMNESTY INT'L, *supra* note 29, at 26; Umar Farooq, *Pakistan's FATA: Lawless no more?*, ALJAZEERA (Mar. 22, 2014, 12:10 AM), available at <http://www.aljazeera.com/indepth/features/2014/03/pakistan-fata-lawless-no-more-2014321111550828897.html> (last visited May 10, 2015).

68. Fair, *supra* note 9.

69. *Id.*

70. *Id.*; Umar Farooq, *Pakistan's FATA: Lawless no more?* ALJAZEERA (Mar. 22, 2014, 12:10 PM), available at <http://www.aljazeera.com/indepth/features/2014/03/pakistan-fata-lawless-no-more-2014321111550828897.html> (last visited May 10, 2015).

71. Fair, *supra* note 9; Farooq, *supra* note 70.

72. PAKISTAN CONST. art. 8(3).

appoints a Political Agent⁷³ ("PA") for each agency within the FATA who exercises a broad range of administrative, executive and judicial powers.⁷⁴ The PA wields so much power that he can "order whole villages to be burnt down and tribes to be blockaded or sent into exile."⁷⁵ The only check on the PA is that he may consult with the *Jirgas*⁷⁶ when resolving disputes.⁷⁷ However this is a discretionary option left up to the PA.⁷⁸ Currently, the FATA is administered by the Governor of the Khyber Pakhtunkhwa ("KP") "in his capacity as an agent to the President of Pakistan, under the overall supervision of the Ministry of States and Frontier Regions in Islamabad."⁷⁹

IV. CONFLICT BETWEEN THE TALIBAN AND PAKISTANI ARMED FORCES

The current conflict between Pakistan's armed forces and the insurgents in the FATA is widely considered Pakistan's largest security threat. Though the social tensions that underlie this conflict are hardly new, the war itself began after the U.S. and its coalition invaded Afghanistan in 2001.⁸⁰ The fall of Afghanistan's Taliban regime caused many Taliban officers and leaders to cross the border into the FATA.⁸¹ As a strategic safe haven, Waziristan was ideal for escaped Taliban

73. The Political Agent position was created by the British around 1901. "Each agency was administered by a Political Agent who was vested with wide powers and provided funds to secure the loyalties of influential elements in the area." *History of FATA*, *supra* note 59.

74. AMNESTY INT'L, *supra* note 29, at 26.

75. Farooq, *supra* note 70; see Fair, *supra* note 9 ("The role of the Political Agency has continued to erode both due to the diminished quality and rank of the civil servants assigned to the position and due to the ever-expanding corruption within the agency since 1947. In recent years, the army has further supplanted the PA's authority in key agencies such as North and South Waziristan.").

76. *Jirgas* are traditionally made up of 3 elder tribesmen, known as *Maliks*, who are appointed and dismissed at the whim of the PA. Though they are meant to function as a check on the Political Agent's extensive authority, practically speaking, they serve at the pleasure of the executive appointed PA. Around the same time as when the role of the Political Agent was carved out, the Maliki system was developed as well. The Maliki system allowed the "colonial administration to exercise control over the tribes. Under this system, local chiefs (Maliks) were designated as intermediaries between the members of individual tribes and the colonial authorities, and also assisted in the implementation of government policies." *History of FATA*, *supra* note 59.

77. Farooq, *supra* note 70.

78. HASNAT, *supra* note 22, at 149.

79. *Administrative System*, *supra* note 60.

80. HASNAT, *supra* note 22, at 143.

81. AMNESTY INT'L, *supra* note 29, at 20.

members to carry out attacks on the U.S.-led coalition.⁸² From there, they could assist whatever remained of al-Qaeda and the Taliban in Afghanistan, who had by then escaped into the villages and mountains to avoid further attack.⁸³ The northern agencies in the FATA began noticing a significant increase in Taliban presence in 2006. By 2009 a substantial portion of the Federally Administered Tribal Area was under Taliban control.⁸⁴

Due to this increase in Taliban presence the U.S. government put pressure on Pakistan, particularly on then-president General Pervez Musharraf, to contain the militant forces that had escaped into the FATA's mountain terrain and then into the rest of the FATA.⁸⁵ Musharraf was pressured into launching his own military operation to assist the U.S. and its allies. This was a difficult decision for Pakistan because its military had developed a close working relationship with the tribesmen since 1979.⁸⁶ Launching a military operation, at the insistence of the U.S., against those same tribes was not an easy proposition for Pakistan's military to carry out. The fact that the FATA tribesmen, especially those already sympathetic to the Taliban, considered the struggle between the U.S. and the Taliban as a justified "war of liberation" from the U.S.' "War on Islam" made Pakistan's decision even more difficult.⁸⁷

Musharraf succumbed to U.S. pressure and beginning in 2002 Pakistan carried out unenthusiastic military operations, relying on paramilitary forces. In 2008 and 2009 Taliban forces blocked supply routes through the Khyber agency, which the U.S. and NATO forces used, and proceeded to seize, loot and burn several hundred supply trucks. Due to U.S. pressure, Pakistan "conducted fierce battles to maintain this supply line" in June 2008, January 2009 and March 2010.⁸⁸ Operations like these were often botched and then followed with urgent peace

82. HASNAT, *supra* note 22, at 143.

83. *Id.*

84. AMNESTY INT'L, *supra* note 29, at 20.

85. HASNAT, *supra* note 22, at 143.

86. Waziristan has been kept mostly autonomous because of their tradition of militaristic service and support in the defense of Pakistan. Since 1979, Pakistan's military established a close relationship with the tribesmen of the FATA to encourage them to help the Afghans in their struggle against Soviet occupation. Waziristan was central to the support of the Mujahideen forces attempting to repel the Soviets. HASNAT, *supra* note 22, at 143, 145, 147.

87. *Id.* at 143.

88. AMNESTY INT'L, *supra* note 29, at 20.

agreements with the tribes that later fell apart.⁸⁹ It was obvious from Pakistan's halfhearted efforts that they had no desire to establish state rule in the FATA by inserting the central government into the largely autonomous region, at least not through military means.

The drawback to this lack luster effort was that it gave legitimacy to the Taliban in the FATA, allowing them to eventually establish their own party, the *Tehrik-i-Taliban Pakistan* (The Pakistani Taliban Movement, also referred to as the "TTP"). Through Pakistan's every botched military operation and failed peace agreement, the TTP was able to gain sympathy and support from the tribesmen, which led to new resources and recruits, eventually creating a serious obstacle for the military.⁹⁰ The Taliban was no longer just a formidable militant force but now also an emboldened and legitimized political influence.

Through a series of peace agreements, Pakistan released Prisoners of War, weapons and territory back to TTP militants, actions that both the TTP and the tribes in the FATA saw as a weakness.⁹¹ Encouraged by this display of vulnerability the TTP took steps to challenge state rule throughout the FATA by carrying out terrorist activity across the country against law enforcement, military facilities and civilian targets⁹² and by appointing their own members to positions of political influence.

This is where the decline of the *maliki* system is especially problematic. The decline of the tribal governing structure impaired the authenticity and legitimacy of the *maliks'* leadership.⁹³ Political Agents favored *maliks* whose cooperation they could bribe, creating an environment of corruption and mistrust. As a result, the tribes no longer recognize or trust *maliks* as their legitimate representation.⁹⁴ They instead turned to other political forces, more specifically the "charismatic, religious and militant" alternatives offered by the Taliban.⁹⁵ "These new leaders have effectively captured the various forms of simmering discontent within the tribes and have emerged as more legitimate defenders of tribal interests. Thus, the mullahs have now become respected representatives of the tribes, as have key Islamist militants in FATA."⁹⁶

89. HASNAT, *supra* note 22, at 144.

90. *Id.*

91. *Id.*

92. *Id.*

93. Fair, *supra* note 9.

94. *Id.*

95. *Id.*

96. *Id.*

The increased influence of the TTP had widespread ramifications across Pakistan. Constantly on the defensive in order to preserve the interests of the U.S. rather than the interests of Pakistani citizens, Pakistan ended up prolonging the conflict. Its indecisive military strategy damaged the military's prestige, caused much human casualty, property damage and displaced thousands of people, all while causing massive strain on Pakistan's economy.⁹⁷ Residents of the FATA were affected much worse, dying by hundreds due to random and violent terrorist attacks, U.S. drone strikes and indiscriminate action by Pakistan's military.⁹⁸

The U.S. drone attacks and the subsequent bombings by Pakistani warplanes further soured the FATA's relationship and opinion of the central government, causing them to seek refuge in the only viable opposition, the TTP.⁹⁹ Anti-U.S. sentiment is still strong in the FATA, with 79.3% of tribal people opposing American military presence in the area, a number heavily influenced by the continuing drone strikes.¹⁰⁰ There is also bitterness towards the Taliban for having destroyed the peace of the region and bringing upon the FATA the chaos caused by continued drone strikes and Pakistan's military.¹⁰¹

Nearly 70% of the FATA opposes the presence of Pakistani Taliban fighters¹⁰² because in addition to suicide bombings across Pakistan, the TTP has also become an oppressive presence in the FATA by constantly eliminating its opponents, fighting the Pakistani state and its security forces, and carrying out beheadings and kidnapping people for ransom. By 2009, the TTP had carried out so many violent and disruptive operations, both outside and within the FATA, especially against military sites that it forced the military's hand to end the conflict

97. HASNAT, *supra* note 22, at 144.

98. *Id.*

99. See Rahimullah Yusufzai, *Waziristan – the Mother of all Battles*, NEWS (Oct. 20, 2009), available at <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=204037&Cat=9&dt=9/2/2009> (last visited May 10, 2015).

100. Shinwari, *supra* note 55, at 87.

101. Tribesmen have often banded together to expel al-Qaeda, the Taliban, or other extremist groups from their land. But they have also consistently claimed that the source of their current problems lies in Afghanistan and the U.S. invasion of 2001. "If you are asking about Americans," Dawar says, "100% [of the people] here are hating Americans. They are thinking that this whole drama is from the side of America, because they came to Afghanistan. That is why they are demanding America leave Afghanistan." Farooq, *supra* note 23.

102. Shinwari, *supra* note 55, at 87.

as swiftly as possible, leading to more violence and death in the FATA.¹⁰³

In 2009, Pakistan renewed air and ground offensives against the TTP in the FATA. These attacks were intended to target militant strongholds but were often inaccurate since Pakistan was working with very limited and often unreliable intelligence, a result of having little to no public support or assets in the area.¹⁰⁴ From the beginning of the war in Afghanistan, public opinion in the FATA favored the Taliban and their efforts to rid the region of the infiltration of a foreign power. However, the TTP's violent and destructive tactics have caused them to lose much of the public sympathy they gained when Pakistan first began military operations.

This does not imply that public opinion has shifted in Pakistan's favor. Pakistan's most recent military campaign in the FATA, Operation Zarb-e-Azb, an air and ground offensive launched on June 15, 2014 in North Waziristan, has caused mass civilian casualty and is yet another source of major human rights violations exacted by Pakistan against FATA residents.¹⁰⁵ Zarb-e-Azb was launched after government peace talks with Taliban leaders once again fell through, and though the military had been planning the offensive well before, the Operation was pursued ultimately because of the major Taliban attack on Pakistan's largest airport on June 9, 2014.¹⁰⁶

Zarb-e-Azb was aimed to be a "comprehensive operation against foreign and local terrorists who are hiding in sanctuaries in North Waziristan" but practically resulted in the displacement of 500,000 of

103. See Yusufzai, *supra* note 99.

104. See *id.*

105. Rebecca Santana & Asif Shahzad, *Pakistan Launches Offensive Against Military Near Afghan Border*, HUFFINGTON POST (June 15, 2014, 10:23 AM), available at http://www.huffingtonpost.com/2014/06/15/pakistan-army-says-launch_n_5496487.html (last visited May 10, 2015).

106. On June 9, 2014, the TTP claimed responsibility for an attack on Pakistan's Jinnah International Airport, located in Karachi. The nearly 12-hour siege left 28 dead, including 10 TTP attackers. The TTP released a statement following the attack stating, "the biggest reason for attacking Karachi airport is because it serves as the biggest air logistics center supplying goods for the Crusaders' war in Afghanistan and Pakistan." This statement referred to the Afghanistan-bound U.S.-NATO cargo, which comes in through Karachi. The siege has also been attributed as the TTP's revenge for the death of Hakimullah Mchsud, a prominent Taliban leader who was killed by U.S. drone strike in November 2013. Declan Walsh, *Pakistani Forces Begin Assault on Militant Strongholds*, N.Y. TIMES (Jun. 30, 2014) available at http://www.nytimes.com/2014/07/01/world/asia/pakistan-army-begins-ground-assault-on-militants.html?_r=2 (last visited May 10, 2015); *TTP claims attack on Karachi airport*, DAWN (Jun. 9, 2014) available at <http://www.dawn.com/news/1111397/ttp-claims-attack-on-karachi-airport> (last visited May 10, 2015).

people and hundreds of casualties.¹⁰⁷ Zarb-e-Azb has caused Pakistan's "biggest conflict-driven humanitarian crises since 2009."¹⁰⁸ The Pakistani military has claimed that no civilian casualties resulted from Zarb-e-Azb, this claim is unrealistic on its face and has been disproven through by refugees from the area who have given accounts of the military's indiscriminate attacks which have resulted in mass civilian death and grave injuries.¹⁰⁹ While Pakistan may claim that Operation Zarb-e-Azb has been successful in ridding the area of militants and dismantling the TTP's power in the FATA, especially in North Waziristan, the TTP has made it clear that these claims are inaccurate.

On December 16, 2014, in what can only be described as retaliation for Zarb-e-Azb, seven TTP militants laid siege on a school in Peshawar for hours ("Peshawar Attaack").¹¹⁰ The school, Army Public School and Degree College, is primarily for the children of active military members.¹¹¹ By the time the siege ended later that day, there were at least 100 injuries and 152 casualties; 132 children, 10 school staff members, three soldiers and the seven militants.¹¹² The attack is considered the deadliest attack in Pakistan since October 2007.¹¹³

Pakistan, in a very opportunistic fashion, has used the Peshawar Attack to institute fast track avenues around the criminal justice system. On December 17, 2014, the day after the Peshawar Attack, the Prime Minister, Nawaz Sharif, lifted a moratorium on the death penalty, which has been in place since 2008, and promised that death warrants would follow in the coming days.¹¹⁴ Given that the rise of Taliban control in the FATA and the main source of criticism against the Pakistani government in the FATA is based on the lack of fair governing – the renewal of the death penalty is particularly problematic.

107. Syed Azeem & Noaman G. Ali, *Zarb-e-Azb and the Left: On Imperialism's Materiality*, TANQEED (Aug. 2014) available at <http://www.tanqeed.org/2014/08/zarb-e-azb-and-the-left-on-imperialisms-materiality/> (last visited May 10, 2015); Santana & Shahzad, *supra* note 105.

108. Walsh, *supra* note 106.

109. *Id.*; Santana & Shahzad, *supra* note 105.

110. Sophia Saifi & Greg Botelho, *In Pakistan School Attack, Taliban Terrorists Kill 145, Mostly Children*, CNN (Dec. 17, 2014), available at <http://www.cnn.com/2014/12/16/world/asia/pakistan-peshawar-school-attack/> (last visited May 10, 2015).

111. *Id.*

112. *Id.*

113. *Id.*

114. Shree Sardar & Katharine Houreld, *Pakistan PM Lifts Moratorium on Death Penalty After School Attack*, REUTERS (Dec. 17, 2014), available at <http://in.reuters.com/article/2014/12/17/pakistan-school-deathpenaltyidINKBN0JV0LJ20141217> (last visited May 10, 2015).

Currently, more than 8,000 prisoners sit on Pakistan's death row, and about 10% of them are convicted of "terrorism" related offenses.¹¹⁵ Pakistan's definition of terrorism is very broad, to the point where almost any crime can fall under the category of "terrorism," as a result more than 17,000 cases of terrorism are pending in special courts.¹¹⁶ Those convicted of terrorism are often denied their basic rights; they are tortured into confessions, denied lawyers, and denied adequate living conditions.¹¹⁷ Many defendants who have been convicted of terrorism were charged on the basis of crimes that bore no relation to terrorism in the first place; they were sentenced to death despite incredibly unfair trials.¹¹⁸

What makes this situation even worse, especially for those in the FATA who suffer most from these government injustices, is that this heavy crackdown on "terrorism" has not stopped militant attacks.¹¹⁹ These crackdowns, which essentially pervert the criminal justice system, have done nothing to alleviate the actual problem of Taliban militancy. Instead, they are just another way in which Pakistan's central government commits human rights violation through the justification of maintaining security in the FATA and in Pakistan as a whole.

115. *Id.*

116. *Id.* Under Section 6 of the 1997 Anti-Terrorism Act (ATA), "Terrorism" is defined as "the use or threat of action" where among other things, "the use or threat is designed to coerce and intimidate or overawe the government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause." *The Anti-Terrorism Act (ATA), 1997*, FED. INVESTIGATION AGENCY, GOVT. OF PAKISTAN, available at <http://www.fia.gov.pk/ata.htm> (last visited May 10, 2015). In 2013, the ATA was amended so as to expand Section 6 - adding in that "intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies" would also be considered "terrorism." Amendment of Section 6, Act XXVII of 1997, GAZETTE OF PAKISTAN EXTRAORDINARY, Mar. 26, 2013, at 2, available at http://www.na.gov.pk/uploads/documents/1365050846_309.pdf (last visited May 10, 2015). This means that almost any criminal action can be categorized as terrorism. Such language lends itself to abuse, hence the large amount of terrorism related cases pending in Pakistani courts and the hundreds of people sitting on death row.

117. Sardar & Houreld, *supra* note 114.

118. *Id.*

119. *Id.*

V. PAKISTANI ARMED FORCES AND CENTRAL GOVERNMENT COMMIT INTERNATIONAL HUMAN RIGHTS VIOLATIONS UNDER THE GUISE OF MAINTAINING SECURITY

The human rights crisis in the FATA can be attributed to three main sources, the neglect and mistreatment from the Pakistani government and military, Taliban militancy and influence and the U.S.' drone attacks. Actors are largely able to continue committing human rights violations because the very setup of the FATA leaves the area susceptible to corruption and abuse. Although the FATA accounts for 7% of the national population, it receives a mere 1% of the national budget.¹²⁰ The estimated unemployment rate reliably rests somewhere between 60% and 80% but it often reaches higher numbers depending on patterns of migrant labor.¹²¹ In regards to healthcare, the ratio of doctors to people in the FATA is about 1 to 7670, whereas the national average is about 1 to 1226.¹²² There is about one hospital for every fifty square kilometers, which serve large populations, sometimes extending to those living Afghanistan's side of the border.¹²³ The FCR is responsible for this neglect because the various branches of government are barely accountable to the FATA.

Relying on the FCR to govern the FATA violates Pakistan's human rights obligations under the international human rights conventions.¹²⁴ The extension of the FCR's power is in direct conflict with the Constitution and the rights it guarantees to the rest of Pakistan's provinces. The FCR denies FATA's residents equal protection under the law, as well as voting rights.¹²⁵ Pakistan's central government and military forces often exploit the FCR to justify human rights violations, such as collective punishment and unwarranted detention of tribal leaders' relatives, in an effort to pressure those leaders for State purposes.

Since the jurisdiction of Pakistan's judiciary does not extend to the FATA, the FCR has its own judicial mechanism, which consequently has negative human rights implications. Under the FCR, a *Jirga*

120. See *Impoverished Northwest*, *supra* note 11.

121. See *id.*

122. See *id.*

123. See *id.*

124. See *infra* discussion Section VI, Pakistan is Obligated to Act in Compliance with the International Human Rights Obligations it is a Party to.

125. See PAKISTAN CONST., arts. 8-28.

decides all civil and criminal matters arising in the FATA.¹²⁶ Should a FATA resident wish to appeal a *Jirga's* decision they may do so to the Supreme Court of Pakistan (Pakistan's highest court) or to the Peshawar High Court through a constitutional writ challenging the decision.¹²⁷ The FATA is divided into two administrative categories, protected areas, which are under the direct control of the government and non-protected areas, which are administered (indirectly) through local tribes.¹²⁸

In protected areas, criminal and civil cases are decided by political officers vested with judicial powers. After completing the necessary inquiries and investigations, a *Jirga* is constituted with the consent of the disputing parties. The case is then referred to the *Jirga* who issues a verdict, which is examined by the Political Agent. This decision can be appealed against to the High Court and Supreme Court. Once appeals are exhausted, execution of the verdict is the responsibility of the political administration. In non-protected areas, cases are resolved through a local *Jirga* at the agency level. Local mediators first intervene to achieve a truce (*tiga*) between parties in a criminal case, or to obtain security (*muchalga*) in cash or kind for civil disputes. Thereafter, parties must arrive at a consensus concerning the mode of settlement (arbitration), *riwaj* (customary law) or *Shariah* (Islamic law). Once the mode of settlement is agreed upon, mediators arrange for the selection of a *Jirga*, with the consent of the parties to the case.¹²⁹

Under customary international human rights law, international humanitarian law and Pakistan's own Constitution, the right to a fair trial and an impartial court is necessary, but Pakistan has not extended that principle to the FATA.¹³⁰ As it stands, the PA, or a *Jirga* appointed by the PA, carries out judicial functions. However, neither can be considered impartial judicial bodies, and under the FCR their decisions may not always be appealable to Pakistan's higher courts.

This has always been problematic but is more so now because under the FCR the power of the PA is so extensive that on "vaguely defined grounds he can order that individuals or entire communities be detained without trial for years at a time seize their property and impose fines, all without any requirement of ordinary criminal trial."¹³¹ This

126. *Administrative System*, *supra* note 60.

127. *Id.*

128. *Id.*

129. *Id.*

130. AMNESTY INT'L, *supra* note 29, at 27; PAKISTAN CONST. art. 10.

131. AMNESTY INT'L, *supra* note 29, at 27.

provision has often been used to justify collective punishment during recent military operations in the FATA. One of the more notable instances was during the large-scale military operations in Waziristan in October 2009. The military blocked tribal access to necessary humanitarian aid when they suspected members of the Mehsud tribe to be involved in Taliban activities, punishing an entire population of people for the suspected actions of a few.

In recent years, with the increased presence of the Taliban, Pakistan's military operations in the region, and the U.S. drone attacks, the tribal mechanism of policing and redress fell subject to the Taliban. The Taliban openly killed *Maliks* and entire *Jirgas* for their alleged cooperation with Pakistan's central government and military. They then replaced this already corrupt system with insurgents or *Mullahs* who are more sympathetic to the Taliban.¹³²

Before the Taliban insurgency, tribes in the FATA had largely policed themselves through their own traditions, mainly the *Jirgas*. This method of enforcement was unfair to begin with because the *Jirgas* and *Maliks* were appointed on the basis of how useful they could be to the PA.¹³³ As structured under the FCR, the *Jirgas* also discriminated against women by denying women access to tribal councils, even when many of the decisions directly impacted them. This is just another way the FCR contradicts the broader constitution, which guarantees, "all citizens are equal before law and are entitled to equal protection of law" and that "there shall be no discrimination on the basis of sex alone."¹³⁴

In the last few years, Pakistan has managed to regain control over most of the FATA from the Taliban. But in order to accomplish this goal the military has detained thousands of suspected Taliban supporters without giving any cause for such action.¹³⁵ In an effort to combat Taliban insurgents Pakistan passed legislation to give the military a wider breadth of discretion. The Actions in Aid of Civil Power Regulations (AACPR) was passed in 2011.¹³⁶ While the FCR allows expansion of executive power into the FATA and limits the reach of parliament and the judiciary, the purpose of the AACPR is to enable the military to operate against the Taliban and other "armed groups" in the

132. *Id.* at 28-29.

133. *Id.* at 28.

134. PAKISTAN CONST. art. 25, §§ 1, 2.

135. *Hands of Cruelty*, *supra* note 1, at 12.

136. *Report Exposes 'the Hands of Cruelty' in Pakistan's Tribal Areas*, AMNESTY INT'L (Dec. 12, 2012), available at <http://www.amnesty.org/en/news/report-exposes-hands-cruelty-pakistan-s-tribal-areas-2012-12-12> (last visited May 10, 2015).

Tribal areas “in accordance with the law.”¹³⁷ The AACPR also gives the armed forces the flexibility to take on “law and order duties” and “law enforcement operations.”¹³⁸

In combination with the FCR, the AACPR gives the military enough legal coverage to arrest and detain suspects without justification. What is more troubling is that the military’s arrest and detention practices go way beyond the enhanced powers granted to them under the AACPR, human rights violations committed by the military extend as far as enforced disappearances, torture and other ill treatment of prisoners, which sometimes lead to death.¹³⁹ Amnesty International reports that on a weekly basis “[m]en and boys allegedly arrested and detained by the Armed Forces are being returned dead to their families or reportedly found dumped across the Tribal Areas.”¹⁴⁰

Though the families of the detained and the dead often seek redress, they are given no explanations for why their loved ones were taken or what happened to them in the months and years they were gone. The military conducts no investigations into why the detainees were arrested in the first place, what happened to them while they were in prison or what led to their deaths.¹⁴¹ Regional high courts have called for local authorities to look into the dumped bodies and a host of other illegal activities, but investigations are rarely carried out and the military has not been called upon to give any sort of accounting.¹⁴² This type of treatment and lack of accountability further degrades the image and reputation of the government and the military in the eyes of those living in the FATA. The only way for Pakistan to rectify these extensive human rights violations and its reputation is to make significant policy reforms and effective mechanisms of redress.

One would think that the government and military are not held accountable because their violations are hard to prove or because records do not exist. However, there are reports that document the military’s activities regarding forced detention, disappearances and torture as a method of combating the Taliban in the FATA. The military has admitted to some of these reports, acknowledging the detention of some 700 militants held without charges or possibility of

137. *Hands of Cruelty*, *supra* note 1, at 8-9.

138. *Id.*

139. *Id.* at 13.

140. *Id.*

141. *Id.* at 17.

142. *Hands of Cruelty*, *supra* note 1, at 17.

trial.¹⁴³ Upon inquiry, Pakistan's Attorney General, Irfan Qadir, told the Supreme Court, "There is a military operation in Waziristan. Under the law we cannot try these 700 people, nor can we release them, unless the operation is over."¹⁴⁴

A case that has become famous throughout Pakistan is the case of the Adiala 11. Eleven prisoners were arrested from different places because they were believed to be connected to terrorist activity,¹⁴⁵ but in April 2010, they were all acquitted of the charges by an anti-terrorism court.¹⁴⁶ Despite their acquittal the eleven prisoners remained in a detention facility for about a month. Finally, in May 2010, a regional high court called for the release of the prisoners, declaring their detention illegal, but shortly after that the eleven had disappeared from the prison.¹⁴⁷ Pakistan's intelligence agencies continued to give contradictory statements for sometime before finally admitting to having them in custody, by which time four had died.¹⁴⁸

VI. PAKISTAN IS OBLIGATED TO ACT IN COMPLIANCE WITH THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IT IS A PARTY TO

Obligations to citizens within a country's borders do not arise from just domestic legislation. Countries are bound by an international legal system as well. International human rights law, international humanitarian law and customary international law all play a role in making sure that all people are given equal opportunities and are treated

143. *Pakistan Admits to Holding 700 Militants Without Charge*, REUTERS (Jan. 24, 2013, 7:02 AM), available at <http://www.reuters.com/article/2013/01/24/us-pakistan-detainees-idUSBRE90N0HD20130124> (last visited May 10, 2015).

144. *Id.*

145. Waseem Ahmad Shah, *Case of 'Missing' Adiala Prisoners Far From Over*, DAWN (Aug. 13, 2012, 2:45 AM), available at <http://dawn.com/news/741861/case-of-missing-adiala-prisoners-far-from-over> (last visited May 10, 2015). "The prisoners are wanted by intelligence agencies in connection with different acts of terrorism, including an attack on the GHQ, a rocket attack on the Pakistan Aeronautical Complex Kamra, bomb blasts at the Rawalpindi Parade Lane mosque, shots fired from anti-aircraft guns on a plane carrying former President Pervez Musharraf, suicide attacks on a bus of an intelligence agency in Rawalpindi and other attacks on different military installations and killing of a number of senior army personnel." *Bring 'Missing' Detainees to Court, Agencies Ordered*, DAWN (Feb. 11, 2012, 5:35 AM), available at <http://dawn.com/news/694709/bring-missing-detainees-to-court-agencies-ordered> (last visited May 10, 2015).

146. Shah, *supra* note 145.

147. *Id.*

148. *Id.*

humanely. The human rights obligations most relevant to the conflict in the FATA (which are covered by an array of international laws) are the rights to life, fair trial, water, food, housing, education and the highest attainable standards of healthcare. There are also significant prohibitions on torture, arbitrary detention, enforced disappearance and discrimination against women. Pakistan is a party to many international agreements that cover this broad range of human rights issues and ratifying¹⁴⁹ or acceding¹⁵⁰ these agreements were notable steps towards human rights and an acknowledgment of responsibility towards its citizenry of a certain standard of living and treatment. Though, it is certainly not enough unless Pakistan takes serious steps towards compliance with these agreements through governmental reform.

The International Court of Justice ("ICJ") and the UN Human Rights Committee have confirmed that international human rights law applies both in peacetime and during times of armed conflict.¹⁵¹ While some of these rights can be modified or limited during times of armed conflict, this can only be done as absolutely necessary depending upon the circumstances of the situation.¹⁵² Therefore the current conflict in the FATA does not give the Pakistani government or military legal justification under international law for the abuses it carries out.

A. International Obligation to Children

In 1990 Pakistan ratified the Convention on the Rights of the Child ("CRC").¹⁵³ The CRC requires that states make every available effort to ensure children have access to the highest attainable standards of healthcare, compulsory primary education with an effort to develop adequate general and vocational secondary education and access to adequate food, water and housing.¹⁵⁴ The CRC also prohibits torture,

149. Ratification is the act where a state indicates its consent to be bound to a treaty. *Glossary of Terms Relating to Treaty Actions*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#ratification (last visited May 10, 2015).

150. "Accession" is the act where a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. *Glossary*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession (last visited May 10, 2015).

151. AMNESTY INT'L, *supra* note 29, at 93.

152. *Id.*

153. See Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Sept. 2, 1990).

154. *Id.* arts. 3, 24, 27, & 28.

cruelty, lengthy imprisonment and capital punishment against children and seeks to ensure that no child is deprived of life or liberty “unlawfully or arbitrarily.”¹⁵⁵ Further specifying that all “arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹⁵⁶

B. International Obligation for the Equal Treatment of Women

In March 1996, Pakistan acceded to the International Convention on the Elimination of all forms of Discrimination Against Women (“CEDAW”), a major treaty advocating the equal treatment of women.¹⁵⁷ In addition to contradicting the constitution, the FCR’s treatment of women also violates the CEDAW, which requires Pakistan “accord to women equality with men before the law.”¹⁵⁸ CEDAW goes so far as to require states parties take the appropriate measures

[T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁵⁹

Under CEDAW Pakistan is obligated to rectify the unequal treatment women in the tribal areas face as a result of tribal culture, the *Jirgas* and the Taliban.

For women in general, CEDAW requires state parties to give women, in equality with men, the right to vote and to be elected in all publicly elected bodies and also to participate in the formulation of government.¹⁶⁰ CEDAW also has specific provisions when dealing with the plight of rural women that can be applied to the FATA.¹⁶¹ It requires states parties to take all appropriate measures to ensure rural women the right to participate in development planning, to have access to healthcare (including family planning), to be able to attain formal and

155. *Id.* art. 37, para. b.

156. *Id.*

157. Convention on the Elimination of all forms of Discrimination Against Women, 1249 U.N.T.S. 13, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW].

158. *Id.* art. 15(1).

159. *Id.* art. 5(a).

160. *Id.* art. 7.

161. *Id.* art. 14.

informal education, to participate in their communities and to have adequate housing, electricity, water and transportation.¹⁶²

C. International Obligation to Provide Humane Living Conditions

On April 17, 2008 Pakistan ratified the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).¹⁶³ The ICESCR requires state parties to recognize the right of everyone to an adequate standard of living, which includes adequate food, clothing and housing, and to the continuous improvement of living conditions.¹⁶⁴ The ICESCR also requires that the “development of a system of schools at all levels shall be actively pursued” and that all people have access to the highest attainable standards of physical and mental health.¹⁶⁵ The ICESCR also deals with the equal treatment of all individuals regardless of race, color, sex or other affiliation and with labor rights.¹⁶⁶

On June 23, 2010 Pakistan ratified the International Covenant on Civil and Political Rights (“ICCPR”) and the UN Convention against Torture (“UNCAT”), two of the most notable international agreements dealing with equality and human rights.¹⁶⁷ Many of the rights and prohibitions expressed in these two treaties are also represented in the ICESCR, CEDAW and the CRC, as well as a host of other international agreements and customary international law. The ICCPR and UNCAT, as two of the more influential human rights agreements, further reinforce Pakistan’s awareness of the standards it should be applying to *all* of its citizenry. They also further cement Pakistan’s international legal obligation to abide by human rights guidelines and reform the structure of the FATA to meet them.

The ICCPR deals with individuals’ civil and political rights, addressing the issues of freedom of speech, religion, assembly, voting rights and due process concerns.¹⁶⁸ Specifically the ICCPR provides for those whose rights have been violated to be able to seek effective remedy and that those who claim such remedy “have [their] right[s] thereto determined by competent judicial, administrative or legislative

162. CEDAW, *supra* note 141, art. 14.

163. International Covenant on Economic, Social and Cultural Rights, Apr. 17, 2008, 993 U.N.T.S. 3 [hereinafter ICESCR].

164. *Id.* art. 11.

165. *Id.* arts. 12-13.

166. *Id.* arts. 2, 8.

167. International Covenant on Civil and Political Rights, June 23, 2010, 999 U.N.T.S. 171 [hereinafter ICCPR].

168. *See id.*

authorities . . . and to develop the possibilities of judicial remedy” where they do not already exist.¹⁶⁹ The UNCAT seeks to prevent the state use of torture and cruel and inhuman treatment and punishment. The UNCAT defines torture as

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁷⁰

By June 2011, Pakistan had withdrawn most of its reservations to the ICCPR and the UNCAT.¹⁷¹

In the last few years, since Pakistan has shifted its focus from large-scale military operations to search and intelligence gathering initiatives, the military has arrested and detained thousands of people. Human rights groups have expressed concern over the treatment of these detainees since reports of mistreatment and torture have come to light.¹⁷² Torture and cruel and inhumane treatment are prohibited by multiple international agreements, including the ICCPR, the Geneva Conventions, customary international law, and the UNCAT.¹⁷³

169. *Id.* art. 2.

170. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1., U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

171. *Pakistan Decides to Withdraw Most of Reservations on ICCPR, UNCAT*, NATION (June 23, 2011), available at <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/23-Jun-2011/Pakistan-decides-to-withdraw-most-of-reservations-on-ICCPR-UNCAT> (last visited May 10, 2015). With respect to the ICCPR, Pakistan still has reservations regarding Article 3 and Article 25, which deal with gender equality and voting rights respectively, making these articles subject to the provisions in Pakistan’s constitution. ICCPR, *supra* note 167 (Pakistan should withdraw its remaining reservations so that the ICCPR and UNCAT are more effective).

172. Amnesty International has documented the situation of detainees who are kept malnourished and received daily beatings, causing them to suffer major bodily injury and disfigurement. The military has also been accused of resorting to torture in the detention facilities as a method of interrogation. *Hands of Cruelty*, *supra* note 1, at 19.

173. Torture is a crime under international law and information obtained through torture or inhumane treatment should not be admitted as evidence in judicial proceedings. *Id.* at 21; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES (Cambridge University Press, 2009), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (last visited May 10, 2015).

For example, article 6 of the ICCPR provides that “[e]very human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of his life,” yet Pakistan continues to detain individuals without cause, detention that often eventually leads to their uninvestigated deaths.¹⁷⁴ Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” a general assertion that is supported more extensively by the UNCAT.¹⁷⁵ Pakistan has agreed to these provisions and almost all others in these treaties yet continues to allow its military to exact cruel treatment justified through its own laws, such as the AACPR.

In part, these human rights violations continue because there is neither any real consequence levied against the state nor any opportunity for FATA residents to seek redress. Pakistan’s constitution explicitly excludes the tribal lands from judicial jurisdiction, leaving no way for the courts to rule on issues of fundamental rights and impunity within the FATA. Legislation like the AACPR makes redress for human rights violations especially difficult because it leaves much military action discretionary and therefore above reproach.¹⁷⁶ This sets up a series of legal and practical barriers that prevent the people of the tribal lands from bringing suit against the military in Pakistan’s courts. Despite these obstacles, some cases had made it through, and the military has even conceded to unlawful action.¹⁷⁷

While these concessions are an important step in developing a judicial mechanism of redress, they have not translated into justice for the victims, consequences for the perpetrators or legislative reform.¹⁷⁸ Failing to take steps toward reform or at least investigating these occurrences of human rights violations puts Pakistan in violation of its international human rights agreements and its international legal obligations. Specifically Article 2 Section 3 of the ICCPR each state that is a party to the agreement has the responsibility to ensure effective remedies for those whose rights and freedoms are considered violated.¹⁷⁹ The violation of rights and the determination of remedy is to be made

174. ICCPR, *supra* note 167, art. 6 § 1.

175. *Id.* art. 7.

176. *Hands of Cruelty*, *supra* note 1, at 9.

177. Cyril Almeida, *The Adiala 11*, DAWN (Feb. 19, 2012), available at <http://dawn.com/news/696615/> (last visited May 10, 2015).

178. *Hands of Cruelty*, *supra* note 1, at 9.

179. ICCPR, *supra* note 167, art. 2 § 3.

by "competent judicial, administrative or legislative authorities" which "shall enforce such remedies when granted."¹⁸⁰

In addition to violations of international human rights law, Pakistan is also in violation of international humanitarian law. Pakistan's conflict in the FATA is a non-international armed conflict, and as such, Pakistan is obligated to at least abide by Article 3 of the 1949 Geneva Conventions.¹⁸¹ Article 3 provides that prohibited conduct applies to any person not actively involved in hostilities for any reason.¹⁸² On November 11, 2009, UN Security Council Resolution 1894 dealt with the protection of civilians in armed conflict and it emphasized that "states bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law."¹⁸³ Therefore, it is important to note that while Taliban insurgents are not adhering to the rules of international law, that does not give Pakistan valid reason to also violate international law nor does it deprive in any way the civilian population from the protections of international law to which they are entitled to from their government and the international legal framework.¹⁸⁴

VII. PAKISTAN CAN REMEDY HUMAN RIGHTS ABUSES BY GOVERNING THE FATA IN ACCORDANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Human rights organizations like Amnesty International have been calling on Pakistan to reform or repeal the FCR for years and this is certainly important. However, another important step towards reform is earning the people's trust, establishing a consistent message and following through on it. So far the only thing Pakistan has been consistent about in the FATA is its neglect of it. When Pakistan has peace talks with the Taliban,¹⁸⁵ begins reconstruction efforts or

180. *Id.*

181. AMNESTY INT'L, *supra* note 29, at 101.

182. *Id.*

183. S.C. Res. 1894, U.N. Doc S/RES/1894 (Nov. 11, 2009).

184. AMNESTY INT'L, *supra* note 29, at 101.

185. The Pakistani Taliban leadership has demonstrated its ability to negotiate, conclude, and implement agreements. The decisions of the Pakistani Taliban leadership, for example when declaring ceasefires, are implemented and enforced by local fighters. A central hierarchy seems to command and control the escalation and the de-escalation of military tactics, including serious violations of IHL, such as the use of suicide bombings to target civilians, attacks on local tribal leaders, and restrictions on the operation of

implements new government initiatives it needs to make its commitments clear, it must lay out effective and specific plans with realistic targets that alleviate the human rights abuses and move the population forward. This means Pakistan needs a clear strategy for integrating the FATA and for the creation of necessary infrastructure like roads, an education system and adequate health care. Pakistan should incorporate civilian needs into its military strategy by offering access and protection to civilian necessities like health care and education, especially the education of women and girls, which the Taliban severely limited.

Pakistan must also take care of its weighty Taliban problem. This is obviously a difficult feat because after decades of insurgency, the Taliban have proved to be a challenging and well-structured enemy. The Taliban have been reduced in numbers, and while they are certainly still an active threat, they are no longer as large a presence in terms of militant force. Because the Taliban still have an influential presence in the FATA through maintenance of control of the local governments, the people of the region, even when they disagree, cannot voice their dissent for fear of lethal retribution.¹⁸⁶

In order to remedy the egregious human rights situation Pakistan and the Taliban have created in the FATA Pakistan must first, enact legislative reform by integrating the FATA into the parliamentary system and extending to the FATA the same rights and amenities afforded to the rest of the country. Second, Pakistan must implement these reforms by creating mechanisms for adequate representation, healthcare, education and equal rights for women. It is important for Pakistan to realize that any remedy in the region cannot be achieved through a completely top-down approach. The central government cannot simply mandate or legislate its way to reform. In a region very much used to a high level of independence, grass roots initiatives and local involvement are not just a good idea, but they are absolutely necessary. Incorporating the tribes and tribal elders into the process will ensure a much smoother transition. Each area of the FATA is different, with different needs and traditions. Success is dependent upon these needs being met and these traditions being accounted for. Another necessary method of local involvement is incorporating women into these reforms.

humanitarian aid workers. In short, the Taliban leadership clearly has the ability to respect IHL and should be held to account for a failure to do so. *Id.* at 30.

186. *Id.* at 39.

A. Previous Attempts at Reforming FATA Governing Mechanisms

While Pakistan's executive leadership has made some halfhearted attempts over the last two decades to remedy the extreme inequality the FCR legalizes, these minimal steps have been fruitless because they have lacked the requisite legislative support. In 1996, Pakistan finally extended voting rights to adults in the FATA and also proposed several reforms to the FCR but they never got very far. Then in 2005, Musharraf acknowledged the need for reforms and the NWFP (as Kyber Pakhtunkhwa was then called) governor created the FCR Reform Committee, but the committee did not accomplish much at all.¹⁸⁷ In 2008, the Pakistani Peoples Party (PPP) promised to repeal the FCR and incorporate the FATA into Pakistan's constitutional framework. Also in 2008, Prime Minister Gilani announced the FCR had been revoked, but there has been no legislation or judicial ruling to substantiate that claim or to put it into practical effect.

In August 2009, former President Asif Ali Zardari announced a reform package for the FATA, which included placing limitations on the powers of the PA, right to bail for detainees, protection for women and children from the collective responsibility provisions, access for political parties and the setting up of an appeals process. While these reforms would have limited some of the scope of the FCR, the FCR is still in place. In 2010, Zardari again promised to reform the FCR but there has been little movement to actually do so.¹⁸⁸

B. The FATA Must be Integrated into the Central Government

Though Pakistan has made some attempts to reform the way it governs the FATA it needs to take a more radical step and totally repeal the AACPR and the FCR in order to manage the FATA in accordance with international human rights standards. The FATA must be brought under constitutional protection so that the people living within it have their fundamental rights enforced just like the rest of Pakistan's citizenry. Under the ICCPR every citizen is supposed to have the right and opportunity to take part in public affairs directly or through chosen

187. *Govt Failed to Implement Recent Reforms in FATA, Amendments in FCR After Passage of Six Months*, ONE PAKISTAN, available at <http://pakistan.onepakistan.com.pk/news/city/islamabad/68847-govt-failed-to-implement-recent-reforms-in-fata-amendments-in-fcr-after-passage-of-six-months.html> (last visited May 10, 2015).

188. Raja Asghar, *Zardari Eyeing History, Wants Bill Passed Soon*, DAWN (Apr. 6, 2010), available at <http://www.dawn.com/news/529098/zardari-eyeing-history-wants-bill-passed-soon> (last visited May 10, 2015).

representatives.¹⁸⁹ Citizens should also be able to vote in periodic elections through equal suffrage in a way guarantees “the free expression of the will of the electors.”¹⁹⁰ For the most part, Pakistan abides by these internationally accepted rights, except for when dealing with the FATA. Except for the FATA, all the other provinces in Pakistan are represented through elected legislators in the bicameral parliament¹⁹¹ and the Prime Minister appoints a Chief Minister, as his representative, to oversee the provincial governments. Though the FATA elects representatives to Parliament, no act of Parliament applies unless the President so directs.¹⁹² As a result, the Political Agent, an executive that answers only to the President, is the only true official governing the FATA.

The FATA must be integrated into the central government as much as any other province of Pakistan. This means treating it in equality with other provinces, providing it with representation in Parliament and with a Chief Minister. It means establishing free and fair elections and enfranchising the entire adult population of the FATA. The role of the PA should be abolished and the constitution should be amended through removal of Article 247 so that jurisdiction and control of the judicial system and parliament extend there. Doing so will make the central government and the entire electorate accountable for the issues in the region.

Until the Political Parties Act of 2002¹⁹³ was extended in 2011, political parties were banned in the FATA. Lack of political parties made it difficult to have participatory political culture because without the financial backing of such organizations people could not afford to contest and win elections.¹⁹⁴ And even if they managed to win an election without the backing of a political party, that elected individual would remain insignificant in the parliamentary politics in Islamabad without the backing of any particular faction and because acts of parliament have no effect in the FATA.¹⁹⁵ This is not an effective way

189. ICCPR, *supra* note 167, art. 25(a).

190. *Id.* art. 25(b).

191. Pakistan's Parliament is made up of the lower house, known as the National Assembly, and the upper house, known as the Senate. The National Assembly is comprised of directly elected representatives from the four provinces. The Senate is comprised of indirectly elected representatives.

192. PAKISTAN CONST. arts. 54, 59, 247(3).

193. Pakistan Chief Exec. Order 18 (2002), available at <http://www.refworld.org/pd/47567a432.pdf> (last visited May 10, 2015).

194. *Impoverished Northwest*, *supra* note 11.

195. *Id.*

to build up the region. Regardless of whom they elect, even if they have a free and fair choice in the matter, that representative will be further proof of the incompetency of the federal government's reach. What would be the point of investing in an election when you know your vote is meaningless.

Though the Political Parties Act has limited the PA's authority to some extent, until 2011 the PA enjoyed absolute control over matters of law and administration. The people of the FATA had no say in local or national decision making because the PA was not, and still is not, under any obligation to take them into account. So although the FATA can technically elect representatives to the National Assembly, voter turnout in the FATA is low. This is likely because despite the extension of the Political Parties Act and the limitation of the PA's power, people know the elections lack any real legitimacy and that there is no effective representation at the national level. The FCR's allocation of power to the Political Agent leaves the political power of the FATA electorate negligible at best. And since the FCR doesn't allow judicial decisions or parliamentary legislation to extend to the FATA, these governmental bodies can go on just ignoring the crises that exists there.

Fully integrating the FATA means not only repealing counterproductive legislation like the FCR and AACPR, but also creating better mechanisms of governing. Knowing that voter turnout is low because voting has very little tangible effect in the FATA means Pakistan needs to get rid of those apparatuses that prevent the FATA from moving forward. That means establishing a new system of governing.

The PA continues to be a repressive force, unaccountable to anyone but the President. Replacing the PA with a Chief Minister, an appointee of an elected representative with far more limited power, would foster better results. Every province in Pakistan has a provincial assembly, analogous to state legislatures in the U.S., which deals with provincial matters.¹⁹⁶ Every province except the FATA. The Taliban corrupted the FATA's Jirga system, but it was hardly a fair system of governing to begin with. Instead of allowing the tribal lands to continue with the *Jirgas*, the government should establish a provincial assembly in the FATA as well. A more direct line of governing is likely to build faith among the tribal lands because they are more likely to see the results that they need, rather than waiting for the federal government to step in as they have been.

196. PAKISTAN CONST. art. 106.

C. *Women Must be Treated Equally with Men Before the Law*

Another change that should be made in FATA governing is better treatment of women. While the rest of the constitution enfranchises women by mandating seats for them in Parliament, it conspicuously fails to do so for women in the FATA by not allocating seats for them.¹⁹⁷ Women in the FATA also do not have the right to vote. This right should be extended in the FATA since it already exists throughout the other provinces. The ICCPR talks about universal suffrage¹⁹⁸ and CEDAW specifies that women should be afforded equality with men before the law.¹⁹⁹

Another way to better the situation of women in the FATA would be to involve them in all reconstruction efforts going forth. It is imperative that a more inclusive public sphere be created for women. That means women must be guaranteed fair and equal voting rights as well as the ability to participate in conflict resolution and reconstruction. Pakistan must find a way to enfranchise women in a way that does not force them to break with their tribal traditions. They will have a voice in the reconstruction of their communities without being forced to value their traditions against a new governmental order. The current state of women in the FATA violates the terms of the ICCPR and CEDAW and is also contradictory to the majority of the constitution. Pakistan must remedy this in order to comply with its international obligations and also to maintain consistency in governing.

D. *Perpetrators of Human Rights Violations Must be Held Accountable*

Pakistan needs to send a clear message that the violence and inhumane treatment the FATA has dealt with is completely unacceptable. It needs to earn the confidence of the tribal people and eventually their support. That means not only extending rights and protections to the tribal lands but also holding both state and non-state actors accountable for their human rights transgressions. So far Pakistan has failed in its responsibility to protect the people of the FATA from Taliban insurgents, as well as misconduct by the armed forces.

At the hands of the Taliban the FATA has been riddled with unlawful killing, unlawful detention, torture, ill treatment, deprivation of equality, inadequate healthcare, no freedom of association, no

197. *Id.* arts. 54, 59.

198. ICCPR, *supra* note 167, art. 25(b).

199. CEDAW, *supra* note 157, art. 15.

freedom of movement and dwindling education for girls and women.²⁰⁰ They have suffered the destruction of civilian residences, farms and businesses.²⁰¹ All of these serious human rights violations are already considered criminal offenses under Pakistan's law, but such law has never been enforced due to neglect and the cover given to the central government under the FCR.

While the central government and even the military are not completely responsible²⁰² for the actions of the Taliban, they are responsible for failing to exact adequate measures to stop these abuses from happening once they are aware. This can only be done through the extension of judicial jurisdiction. Since the Pakistan's courts have no reach in the FATA, any allegations of mistreatment cannot be brought before an impartial body and therefore injured parties have no form of redress and perpetrators are not held accountable. The FATA does have its own court system, but the *Jirgas* or the will of the Political Agent often circumvents those courts' decisions. To reform this, the FATA courts should be brought under the national judicial system just as the other provincial courts are, with their apex being the Supreme Court of Pakistan.

When Pakistan eventually deals with the Taliban, as it will inevitably have to do, it must refrain from giving clemency to those who are unequivocally implicated in those serious abuses of human rights and breaches of law. According to customary international humanitarian law, military commanders and civilian leaders can be held accountable for the actions of their subordinates, when and if their subordinates commit war crimes, or if they knew their subordinates were committing such actions, and they took no necessary measures to prevent such actions.²⁰³ Taliban leaders can be held accountable for the abuses they perpetrate and, under this same provision, so can armed forces personnel.

Remedying the Taliban's transgressions will be only one part of Pakistan's efforts towards solving the human rights crisis in the FATA. Pakistan must also hold its own military and political leaders

200. AMNESTY INT'L, *supra* note 29, at 100.

201. *Id.*

202. There are peace talks with the Taliban where the military or state agencies have condoned, allowed, or supported some of the Taliban's actions against FATA residents. In those instances, Pakistan is certainly more responsible, and should eventually be held accountable through investigation and judicial action. Strategic considerations should not be available as an excuse for neglecting the population or for knowingly allowing insurgents to commit human rights transgressions.

203. HENCKAERTS & DOSWALD-BECK, *supra* note 173, at Rule 152.

accountable. First, Pakistan must make sure that all military forces are aware of the correct standard of conduct that is expected of them under international law and under the hopefully reformed method of governing the FATA. They must then be required to comply with those obligations and it must be made clear that failure to do so will have appropriate consequences. Human rights transgressions that have already been made should be properly and impartially investigated according to international standards so that those who have committed illegal actions are brought to justice. The military should be required to incorporate precautionary measures for civilians in their strategy, and they should absolutely be prohibited from any sort of collective punishment, the sort that is allowed under the current FCR.

Some of Pakistan's most egregious human rights violations revolve around arbitrary detentions and enforced disappearances.²⁰⁴ Not only is this a human rights violation, but it also creates a climate of fear in the FATA that is counterproductive to any reconstructive efforts. Pakistan should investigate and reveal any information it has about the fate and location of those who have been subjected to enforced disappearances. Pakistan should also sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance ("CED"). Ratification of CED would signal that Pakistan is committed to ending this practice, which is a grave violation of human rights.

Those criminal and insurgent suspects who can be transferred out of military custody and into civilian detention centers should be transferred and then should be provided with all the safeguards available to them under the constitution,²⁰⁵ domestic and international law. Those detainees should then be afforded fair trials in front of competent and impartial courts. Pakistan may have an easier time of all this if it builds up the law enforcement mechanism of the tribal areas. Rather than having a constant military presence, a trained law enforcement agency would be able to alleviate the military presence in the region while still being a safeguard against insurgents and protecting civilians.

CONCLUSION

The problems Pakistan faces are certainly not simple ones. Any remedy that Pakistan implements, and there are many that it must, will

204. AMNESTY INT'L, *supra* note 29, at 49.

205. PAKISTAN CONST. art. 10.

take years to show practical improvement. But the longer Pakistan waits, the worse the situation in the FATA gets. More people will lose their lives, their homes and their livelihoods. Pakistan can start by taking legislative measures to equalize the FATA and its residents with the rest of the country. Pakistan must then begin holding those who have committed human rights abuses accountable for their actions and showing the FATA residents that they are not in fact second-class citizens. Pakistan must then begin to rebuild the FATA through greater infrastructure; better education, especially for women and girls; access to health care and training for law enforcement to maintain security. Pakistan has to create incentives for the FATA to support it because as of right now they risk losing their lives by expressing dissent from the Taliban and any sort of government effort towards redress does not outweigh this risk.

Pakistan has made many mistakes in dealing with the FATA. Between decades of neglect for the tribal lands and the military's gutting of the region for "national security" purposes, the inadequate judicial systems, the weak government structure and the total lack of development, the situation has only worsened. These issues have to be remedied not only because they are major transgressions against human rights, but also because they exacerbate a problem that poses a substantial threat to Pakistan's national security and internal stability. It is time for Pakistan to meet its human rights responsibilities to its people, both for morality and for practical necessity.