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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF  
JURISTS IN ADVANCE OF THE EXAMINATION OF THE INITIAL  
REPORT OF PAKISTAN UNDER ARTICLE 40 OF THE  
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Submitted in June 2017

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## **ICJ's submission to the UN Human Rights Committee in advance of the Human Rights Committee's examination of Pakistan's initial report**

### **INTRODUCTION**

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the UN Human Rights Committee's ("the Committee") examination of Pakistan's initial periodic report on the implementation of the International Covenant on Civil and Political Rights ("the Covenant").
2. In this submission, the ICJ draws the Committee's attention to the following issues:
  - The compliance of Pakistan's counter-terrorism laws with the State's obligations under Articles 6, 9 and 14 of the Covenant, particularly in the context of its "military justice" system (section A. below);
  - Shortcomings in the legal framework relevant to torture and other ill-treatment (section B. below);
  - The continuing practice of enforced disappearances and, in this context, the ongoing impunity of law enforcement and military agencies (section C. below);
  - The compliance of Pakistan's blasphemy laws with Articles 14, 18, and 19 of the Covenant (section D. below); and
  - The compatibility of Pakistan's "International Non-Governmental Organizations Policy" with the State's obligations under Article 22 of the Covenant (section E. below).

### **A. THE TRIAL OF CIVILIANS IN MILITARY COURTS**

#### Overview

3. Pakistan faces a real and serious threat of terrorist attacks. Consistent with its obligations under the Covenant, Pakistan has a legal duty to do its utmost to prevent terrorist attacks and protect people within its jurisdiction against them, and where terrorist attacks occur, a duty to investigate, prosecute and bring perpetrators to justice. However, counter-terrorism measures, including security legislation, must respect Pakistan's international human rights obligations, including those under the Covenant.

4. In January 2015, Pakistan empowered military courts to try civilians for terrorism-related offences as part of its 20-point "National Action Plan", adopted by the Government following the horrific attack on the Army Public School in Peshawar in December 2014, which killed nearly 150 people, most of them children. The expansion of military jurisdiction over civilians was put in place through the 21<sup>st</sup> Amendment to Pakistan's Constitution and amendments to the Army Act, 1952. These amendments allowed military courts to try civilians charged with offences related to "terrorism" allegedly committed by those who claim to, or are known to, belong to a terrorist organization "using the name of religion or a sect". Both sets of amendments expired on 6 January 2017 pursuant to a two-year "sunset clause", but were renewed for an additional two-year period in March 2017 through the enactment of the 23<sup>rd</sup> Amendment to Pakistan's Constitution and further amendments to the Army Act.<sup>1</sup>

5. Pakistan's system of "military justice" has placed the country in clear violation of its legal obligations and political commitments to respect the right to life, the right to a fair trial, and the independence and impartiality of the judiciary.<sup>2</sup>

6. In the two years since military courts were initially empowered to try civilians in connection with purported terrorism-related offences, they have convicted at least 274 civilians, including,

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<sup>1</sup> International Commission of Jurists, "Pakistan: ICJ denounces the revival of military trials of civilians", 28 March 2017, accessed at: <https://www.icj.org/pakistan-icj-denounces-the-revival-of-military-trials-of-civilians/>

<sup>2</sup> See *International Commission of Jurists*, "Military Injustice in Pakistan", 23 June 2016, accessed at: <http://www.icj.org/pakistan-military-justice-system-unjust-and-ineffective-new-icj-paper/>

possibly, children, in opaque, secret proceedings. They have sentenced 161 civilians to death and at least 48 civilians have been hanged after trials that are grossly unfair. In all these cases, the government and military authorities have failed to make public information about the time and place of the trials; the specific charges and evidence against the defendants; as well as the judgments of military courts, including the essential findings, legal reasoning, and evidence on which the convictions were based.

#### Applicable international standards

7. International standards clarify that the jurisdiction of military tribunals should be restricted solely to specifically military offences committed by military personnel. Courts Martial should not, in general, be used to try civilians, or to try people charged with offences disclosing evidence of gross human rights violations.

8. Article 14 of the ICCPR states "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The UN Human Rights Committee has made clear that the right to a fair trial before an independent and impartial court under Article 14 applies to all tribunals, whether ordinary or specialized, civilian or military.<sup>3</sup> The Human Rights Committee has also stated that, "the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned."<sup>4</sup> It has also repeatedly called on countries to prohibit trials of civilians before military courts.<sup>5</sup>

9. The *Draft Principles Governing the Administration of Justice Through Military Tribunals*,<sup>6</sup> which were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006, affirm that the jurisdiction of military courts should be restricted to military personnel in relation to military offences. The principles also emphasize the right to a fair trial, including the right to appeal to civilian courts, and also that civilians accused of a criminal offence – whatever its nature – shall be tried by civilian courts.

10. Similarly, Principle 29 of the UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity states that: "The jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel."<sup>7</sup>

11. International standards require that military courts, like all other courts, must be independent, impartial and competent, and must respect minimum guarantees of fairness, including those set out in Article 14 of the ICCPR.<sup>8</sup>

12. Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards.<sup>9</sup> Military court judges are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy. They are not required to have judicial or legal training, or even a

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<sup>3</sup> Human Rights Committee General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial," (General Comment 32) UN Doc. CCPR/C/GC/32, para. 22.

<sup>4</sup> *Ibid.*

<sup>5</sup> For example, Human Rights Committee, Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997) para 20; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) para. 14; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) para 12; Tajikistan, UN Doc. CCPR/CO/84/ TJK (2004) para. 18.

<sup>6</sup> *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

<sup>7</sup> *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>8</sup> For more details on international standards on the trial of civilians before military courts, see *International Commission of Jurists*, "The trial of civilians by military courts", Section 5, accessed at: <http://www.icj.org/pakistan-military-justice-system-an-affront-to-human-rights-new-analysis-brief/>

<sup>9</sup> For more information about the operation of military courts, see also Katharine Houreld, "Worries grow as new courts hand Pakistan army more power", *Reuters*, 25 March 2015, accessed at: <http://www.reuters.com/article/us-pakistan-military-courts-insight-idUSKBN0ML2PD20150325>

law degree,<sup>10</sup> and do not enjoy any security of tenure,<sup>11</sup> which are prerequisites of judicial competence and independence.<sup>12</sup>

13. Pakistani military courts do not give detailed, reasoned judgments.<sup>13</sup> A duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is an essential component of a fair trial. Even in cases in which the public may be excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except in the interest of juveniles, or proceedings concerning matrimonial disputes or the guardianship of children.<sup>14</sup>

14. In May 2017, the UN Committee against Torture in its Concluding Observations on Pakistan's first periodic report expressed serious concern about the fact that Pakistan has authorized military courts to try civilians for terrorism-related offences in view of "the lack of independence of military court judges, which are within the military hierarchy, and practices of such courts including holding closed trials." The CAT Committee urged Pakistan to "end the resort to military courts for terrorism-related prosecutions, transfer criminal cases against civilians from military courts to civilian courts and provide the opportunity for appeal in civilian courts of cases involving civilians already adjudicated under military jurisdiction."<sup>15</sup>

#### High rate of "confessions"

15. At least 159 out of 168 civilians (95 per cent) whose convictions have been publicly acknowledged by the military have allegedly "confessed" to the charges. In the absence of adequate safeguards and independent review mechanisms in military proceedings, this very high rate of "confessions" raises serious questions about their voluntariness, including with respect to the infliction of torture and other ill treatment to extract confessions.

16. States must ensure that no one is held secretly in detention, whether in officially recognized detention facilities or elsewhere.<sup>16</sup> The Human Rights Committee has made it clear that secret detention under the Covenant is itself prohibited and "detainees should be held only in facilities officially acknowledged as places of detention."<sup>17</sup> The UN Committee against Torture has repeatedly stated that people accused of a crime must be detained and interrogated in officially recognized places of detention, and provision should also be made against incommunicado detention where suspects are deprived of communication with the outside world. In its Concluding Observations on Pakistan, the CAT Committee urged Pakistan to "ensure that no one is held in secret or incommunicado detention anywhere in the territory

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<sup>10</sup> See, for example, *UN Basic Principles on Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (UN Basic Principles on Independence of the Judiciary). Principle 10: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives."

<sup>11</sup> *Ibid.*, principle 12: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

<sup>12</sup> Section 133, Pakistan Army Act, 1952.

<sup>13</sup> See Babar Sattar, "Militarized Justice", *The News*, 5 December 2015, accessed at: <http://www.thenews.com.pk/Todays-News-9-355146-Militarised-justice>

<sup>14</sup> Human Rights Committee General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial," (General Comment 32) UN Doc. CCPR/C/GC/32, para. 22.

<sup>15</sup> UN Committee against Torture, *Concluding Observations on the initial report of Pakistan*, May 2017, accessed at: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT\\_CAT\\_COC\\_PAK\\_27467\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT_CAT_COC_PAK_27467_E.pdf), paras 12-13.

<sup>16</sup> See, for example, Article 17(1) of the International Convention for the Protection of All Persons from Enforced Disappearance and Guideline 23 of the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa".

<sup>17</sup> UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at: <http://www.refworld.org/docid/553e0f984.html>, para 58.

of the State party as detaining individuals in such conditions constitutes, per se, a violation of the Convention."<sup>18</sup>

17. However, suspects tried by military courts were often kept in secret detention and family members, lawyers and NGOs did not have access to them; military proceedings were completely secret and closed to the public; and the right to appeal to civilian courts was not available. Without any access to the outside world, the detainees were at high risk of torture and ill treatment.

18. Family members of some of the people convicted by military courts petitioned the Supreme Court of Pakistan challenging, among other things, the lawfulness and voluntariness of the defendants' "confessions". In August 2016, however, the Supreme Court dismissed all petitions without considering the allegations of torture and other ill-treatment in any detail. The Court reiterated the limitations of its review jurisdiction, and noted that since the "confessions" were recorded by a magistrate and were not retracted, they stood "proved".<sup>19</sup>

19. The ICJ notes that the Supreme Court's treatment of questions regarding the veracity and voluntariness of "confessions" in military trials is markedly different from its treatment of the same issues in the context of cases before civilian courts. Pakistani law and jurisprudence spanning decades clarify that in recording confessions, the magistrate has to observe a number of mandatory precautions. The fundamental logic of these precautions, in the words of the Supreme Court, is to shed "all signs of fear inculcated by the Investigating Agency in the mind of the accused"<sup>20</sup> and provide "complete assurance" to the accused that in case they are not making a confession voluntarily, they will not be handed over back to the police.<sup>21</sup> The Supreme Court has also held that the confessions will have no legal or evidentiary worth if these directions are not followed.

20. Civilian courts have also affirmed, for example, that confession statements recorded "after long detention in police custody are viewed with a great deal of suspicion",<sup>22</sup> and in some cases, have discarded confessions made as little as three days after arrest. In addition, magistrates are required to provide suspects the guarantee that even if they decide not to "confess", they will be remanded in custody but "at no occasion shall be handed over to any police official...because such careless dispensation would considerably diminish the voluntary nature of the confession made by the accused."<sup>23</sup>

21. Procedures of "military justice", however, made a complete mockery of these safeguards. Suspects were at all times in military custody, even after the magistrate recorded their "confessions". They also had no access to the outside world, further compounding their vulnerability to external pressure and coercion. And reportedly, some of them were subjected to enforced disappearance by military authorities as far back as 2010 and kept in secret detention in internment centres in the Federally Administered Tribal Areas (FATA) for many years before their military trials. In such circumstances, the "confessions" of suspects before military courts raise serious questions about their voluntariness and over the legitimacy of the manner in which they were obtained, including concerns of torture and other ill treatment.

22. In its response to UN Human Rights Committee's List of Issues in relation to the initial report of Pakistan (List of Issues), Pakistan claimed it was committed to preventing torture or ill-treatment perpetrated by State officials and "whenever complaints have been received of

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<sup>18</sup> UN Committee against Torture, *Concluding Observations on the initial report of Pakistan*, May 2017, accessed at: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT\\_CAT\\_COC\\_PAK\\_27467\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT_CAT_COC_PAK_27467_E.pdf), para 13.

<sup>19</sup> Supreme Court of Pakistan, Civil petitions no. 842 of 2016 and others, June 2016, accessed at: [http://www.supremecourt.gov.pk/web/user\\_files/File/C.P.\\_842\\_2016.pdf](http://www.supremecourt.gov.pk/web/user_files/File/C.P._842_2016.pdf).

<sup>20</sup> Supreme Court of Pakistan, Criminal Appeal No.497/2009 and Criminal Appeal No.496/2009, October 2015, accessed at: [http://www.supremecourt.gov.pk/web/user\\_files/File/Crl.A.\\_496\\_2009.pdf](http://www.supremecourt.gov.pk/web/user_files/File/Crl.A._496_2009.pdf), para 15.

<sup>21</sup> *Ibid.*

<sup>22</sup> PLD 1999 Karachi 151, para 12.

<sup>23</sup> 2016 SCMR 274, para 15.

allegations of torture, they have been duly investigated by the competent authorities and disciplinary action taken against those responsible.”<sup>24</sup> However, Pakistan failed to provide any information on proceedings against military or intelligence personnel accused of human rights violations, including torture and other ill-treatment, to the CAT Committee during its initial review in April 2017. In its Concluding Observations, the CAT Committee regretted that “Pakistan provided no information suggesting that members of the military, intelligence services, or paramilitary forces have been prosecuted and punished for acts amounting to torture as defined by the Convention.”<sup>25</sup>

#### No right of appeal

23. In its reply to the List of Issues issued by the Human Rights Committee, Pakistan claimed that “while the proceedings of military courts have not been made public, it has been ensured that all convicted persons have a right to appeal”, including before the Supreme Court.

24. This claim is incorrect. The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of courts martial.<sup>26</sup> Civilian courts in Pakistan have held they may use their extraordinary writ jurisdiction to hear cases related to military courts where “any action or order of any authority relating to the Armed Forces of Pakistan is...either *coram non judice*,<sup>27</sup> *mala fide*,<sup>28</sup> or without jurisdiction.”<sup>29</sup> The Supreme Court, responding to petitions challenging the 21<sup>st</sup> amendment, reiterated this power of judicial review in cases decided by military courts.<sup>30</sup>

25. It should be noted that under Pakistani law, the scope of judicial review is severely limited. Courts have also interpreted their review jurisdiction narrowly, and have held that “the High Court in its constitutional jurisdiction is not a Court of Appeal and hence is not empowered to analyze each and every piece of evidence in order to return a verdict”<sup>31</sup> and “controversial questions of facts...cannot be looked into in this limited extraordinary writ jurisdiction.”<sup>32</sup>

26. In the context of review petitions filed by family members of civilians convicted by military courts, the Supreme Court held that the circumstances in which people were arrested, even if they were forcibly disappeared and kept in secret detention for years, was not relevant to its review jurisdiction.<sup>33</sup> Similarly, the Peshawar High Court recently held “the mode, manner and the time of the confessions made by the accused, under the ordinary criminal jurisprudence would seriously diminish the evidentiary value” but in view of the limited scope available to the high courts, they could not interfere in the convictions handed down by military courts on this basis.<sup>34</sup>

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<sup>24</sup> List of issues in relation to the initial report of Pakistan, Addendum: Replies of Pakistan to the List of Issues, March 2017, para 39.

<sup>25</sup> UN Committee against Torture, *Concluding Observations on the initial report of Pakistan*, May 2017, accessed at [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT\\_CAT\\_COC\\_PAK\\_27467\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT_CAT_COC_PAK_27467_E.pdf), para 10.

<sup>26</sup> Section 133, Pakistan Army Act, 1952.

<sup>27</sup> If the case is referred to or decided by a court lacking the authority to hear and decide the case in question.

<sup>28</sup> If the decision is made in bad faith.

<sup>29</sup> 2014 SCMR 1530: “When any action of the army authorities regarding a serving officer of the armed forces or any other person subject to the Pakistan army act, 1952, was established to be either *mala fide*, *quorum non judice* or without jurisdiction then the same could be assailed through a constitutional petition by the aggrieved person, and the bar of jurisdiction under Art.199(3) of the Constitution would have no applicability.”

<sup>30</sup> Const.P.12 of 2010, page 362.

<sup>31</sup> 2014 SCMR 849, Supreme Court, para 6.

<sup>32</sup> 2010 YLR 2895, Lahore High Court, para 14.

<sup>33</sup> Supreme Court of Pakistan, Civil petitions no. 842 of 2016 and others, June 2016, accessed at: [http://www.supremecourt.gov.pk/web/user\\_files/File/C.P.\\_842\\_2016.pdf](http://www.supremecourt.gov.pk/web/user_files/File/C.P._842_2016.pdf).

<sup>34</sup> Peshawar High Court, Writ Petition No.1706-Pof 2016, May 2017, para 22.

27. According to international standards, where military tribunals exist, their authority should be limited to ruling in the first instance and recourse procedures, particularly appeals, should be brought before civilian courts.<sup>35</sup>

#### Death Penalty

28. Since January 2017, at least 161 people were given the death penalty after being convicted on the basis of “confession” evidence by military courts (see section above for concerns about the high rate of “confessions” and the circumstances in which such “confessions” are likely to have been obtained). Out of the 161 people given the death penalty, at least 48 civilians have already been executed from January 2015 to May 2017. Under international law, including under Article 6 of the Covenant, the death penalty can only be carried out pursuant to a final judgment of a competent court. The safeguards to be afforded throughout the legal proceedings to ensure a fair trial in cases in which the death penalty may be imposed should be at least equal to those contained in Article 14 of the Covenant.

29. Instead, the ICJ has documented how proceedings before Pakistani military courts fall far short of national and international standards requiring a fair trial before independent and impartial courts: Judges are part of the executive branch of the State and continue to be subjected to military command; the right to appeal to civilian courts is not available; the right to a public hearing is not guaranteed; a duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is denied; and the procedures of military courts, the selection of cases to be referred to them, the location and timing of trial, and details about the alleged offences are kept secret.<sup>36</sup> The imposition of the death penalty after clearly unfair trials is a violation not just of the right to life, but also the right to be free from torture and other ill-treatment.

#### **B. TORTURE AND OTHER ILL-TREATMENT**

30. Article 7 of the Covenant prohibits torture or cruel, inhuman or degrading treatment or punishment. Seven years after Pakistan ratified the ICCPR, torture and other ill-treatment are still not specifically criminalized in Pakistan, and the legal framework applicable to ill-treatment perpetrated by public officials, including members of security and intelligence agencies, clearly falls short of the requirements under the Covenant.

31. In 2015, a bill passed by the Senate (upper house of parliament) lapsed because the National Assembly (lower house of parliament) did not consider it within the constitutionally stipulated time period. Another bill, the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill, 2014, tabled by a member of the ruling party too remained a low priority for the Government, and was only passed by the relevant standing committee of the National Assembly in January 2017. The Bill, however, still has to be passed by a majority vote in the National Assembly and the Senate to become law.

32. The Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill contains some key improvements to the law: it prohibits the use of statements obtained through torture as evidence and it expressly removes the “sanction” provision for public servants, provided under Section 197 of the Code of Criminal Procedure, 1898 (CrPC), which is an important step to ensure accountability. Section 197 of the CrPC provides that public servants may only be prosecuted for offences “alleged to have been committed...while acting or purporting to act in the discharge of...official duty” only after prior “sanction” or permission of the President or Pakistan or the principal governors.

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<sup>35</sup> Principle 17 of the draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

<sup>36</sup> For a detailed analysis of the incompatibility of military trials with international standards, see International Commission of Jurists, “Military Injustice in Pakistan”, June 2016, accessed at: <https://www.icj.org/pakistan-military-justice-system-unjust-and-ineffective-new-icj-paper/>

33. However, the Bill also has many deficiencies, which make some of its provisions incompatible with the Covenant. Of particular concern are the lack of adequate provisions for compensation, including by the State, for victims of torture and other ill-treatment; the failure to criminalize all acts of torture as defined by international standards; the failure to criminalize acts that amount to cruel, inhuman or degrading treatment; the failure to provide for preventative measures, including express prohibition of incommunicado or secret detention; and the introduction of a punishment, that may extend to one year's imprisonment or a fine of up to Rs. 100,000 (1000 US Dollars) for so-called *mala fide* complaints.<sup>37</sup> The fear of prosecution under this provision could deter victims from lodging complaints of torture.

34. Additionally, the ICJ is particularly alarmed by the proposed requirement for a special procedure for complaints against the security and intelligence agencies, which, in turn, would risk making the proposed law futile and ineffective. Section 15 of the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill provides that where a complaint of torture is made against members of the armed forces or intelligence agencies, the Federal Investigating Agency must first "seek directions" from the federal government before launching an investigation. This proposed provision is the latest in a series of attempts by Pakistani lawmakers to further shield security agencies from criminal accountability and impede victims' right to a remedy when the security forces are accused of perpetrating human rights violations.

35. For example, the National Commission for Human Rights Act, 2012, establishing a commission for the promotion and protection of human rights, provides that where there is a complaint of human rights violations against members of the armed forces, the Commission may only seek a report from the government and make recommendations if it sees fit. The law also states that the Commission's functions "do not include inquiring into the act or practices of the intelligence agencies". Similarly, the 21<sup>st</sup> and then the 23<sup>rd</sup> amendment to the Constitution and subsequent amendments to the Army Act, 1952, which allowed military courts to try civilians, also grant all personnel associated with military courts complete retrospective immunity from prosecution for actions taken in "good faith", which could possibly also include subjecting suspects to enforced disappearance or secret detention.

36. Legal immunities and other measures that shield the security apparatus from accountability lie at the core of the crisis of impunity for human rights violations in Pakistan. In 2014 alone, the Human Rights Commission of Pakistan, a domestic human rights non-governmental organization, documented dozens of cases of torture and other ill-treatment in military-run detention centers across the country. "Missing persons" who are released from detention frequently report having been tortured and ill-treated in custody, and dead bodies of "disappeared" persons are often found bearing torture marks. In all these cases, it is members of the military and intelligence agencies who are suspected of being responsible.<sup>38</sup>

37. However, the authorities have not independently investigated the allegations, let alone brought perpetrators to justice. This has enabled, and perpetuated, impunity for human rights violations in Pakistan. Without effective mechanisms to determine the truth behind allegations of gross human rights violations and to ensure accountability of all public officials responsible, public trust and confidence in the security agencies, including with respect to their counterterrorism efforts, will continue to be eroded. It is, therefore, imperative that any legislation on torture and other ill-treatment must not shield the security agencies from criminal proceedings.

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<sup>37</sup> The Bill defines "mala fide complaint" to mean "a complaint filed against any public servant or any person acting in an official capacity, with malafide intentions or other ulterior motives or to harass such person or public servant".

<sup>38</sup> See, for example, "[HRCP's alarm at missing men in Sindh turning up dead](http://hrcp-web.org/hrpweb/hrcps-alarm-at-missing-men-in-sindh-turning-up-dead/)", *Human Rights Commission of Pakistan*, 5 December 2014, accessed at: <http://hrcp-web.org/hrpweb/hrcps-alarm-at-missing-men-in-sindh-turning-up-dead/> and "[HRCP fact-finding mission to Balochistan issues observations](http://hrcp-web.org/hrpweb/hrcp-fact-finding-mission-to-balochistan-issues-observations/)", *Human Rights Commission of Pakistan*, June 2013, accessed at: <http://hrcp-web.org/hrpweb/hrcp-fact-finding-mission-to-balochistan-issues-observations/>



38. In its Concluding Observations, the CAT Committee also expressed concern at the impunity for acts of torture by the military and intelligence agencies and encouraged Pakistan to "review the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill to ensure its full compatibility with the Convention and encourage its adoption or propose new legislation to accomplish this."<sup>39</sup>

### **C. THE PREVALENCE AND IMPUNITY FOR ENFORCED DISAPPEARANCES**

39. While there are reports of enforced disappearances in Pakistan since at least the 1970s, such cases have been recorded in significant numbers after Pakistan became a key ally in the US-led "war on terror". Since then, hundreds of people, many of whom are said to be suspected in connection with terrorism-related offences, have reportedly been "disappeared" and have been detained in secret facilities. Cases of "disappearances" are also reported in large numbers in Balochistan, where the practice is used against political activists, students and journalists - particularly those who are perceived to be sympathetic to separatist movements in the province.<sup>40</sup> In recent years, there has been a rise in cases of enforced disappearances in Sindh, where political activists have largely been targeted.<sup>41</sup> Enforced disappearances have now become a truly national phenomenon: in August 2015, Zeenat Shahzadi became one of the first women victims of the practice,<sup>42</sup> and earlier this year, a number of bloggers and activists have been "disappeared" from major cities in Punjab.<sup>43</sup>

40. There is a wide range in estimates of the overall number of cases. Defence of Human Rights, a non-governmental organization working to trace the whereabouts of "disappeared" persons, has reported that more than 5,000 cases of disappearances have still not been accounted for.

41. The officially constituted Commission of Inquiry on Enforced Disappearances on the other hand, reports nearly 1247 unresolved cases of alleged enforced disappearance from 2010 to April 2017. The Human Rights Commission of Pakistan, which has documented human rights violations in 60 selected districts in the country, has reported nearly 400 cases of enforced disappearance since 2014. Thus, even taking the most conservative estimates, a significant number of enforced disappearances remain unresolved in the country.

42. The Supreme Court of Pakistan too has acknowledged and condemned the practice of enforced disappearances in the country. In October 2012, the Supreme Court issued an interim order in what is known as the "Balochistan Law and Order case". The Court held that there was "overwhelming evidence" implicating the Frontier Corps (a paramilitary force) in cases of "missing persons" and acknowledged that at least a 100 people were still "missing" from Balochistan.<sup>44</sup> The Court also noted that the issue of enforced disappearances has "become a dilemma as their nears and dears are running from pillar to post spending their

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<sup>39</sup> UN Committee against Torture, *Concluding Observations on the initial report of Pakistan*, May 2017, accessed at: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT\\_CAT\\_COC\\_PAK\\_27467\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT_CAT_COC_PAK_27467_E.pdf), para 15.

<sup>40</sup> *International Commission of Jurists*, "Authority without Accountability: the search for justice in Pakistan", December 2013, accessed at: <https://www.icj.org/wp-content/uploads/2013/12/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-PAKISTAN-FINAL-.pdf>, pp. 63-70.

<sup>41</sup> See, for example, *Human Rights Commission of Pakistan*, "HRCP's alarm at missing men in Sindh turning up dead", 5 December 2014, accessed at: <http://hrcp-web.org/hrpweb/hrcps-alarm-at-missing-men-in-sindh-turning-up-dead/>

<sup>42</sup> "What Happened to Zeenat Shahzadi", 30 August 2016, accessed at: <http://hrcp-web.org/hrpweb/what-happened-to-zeenat-shahzadi/>

<sup>43</sup> See "Pakistan: UN expert calls for return of four disappeared human rights and social media activists", 11 January 2017, accessed at: <http://www.un.org/apps/news/story.asp?NewsID=55943#.WM8JHIUmQ5U> and "Pakistan activist Waqass Goraya: The state tortured me", *BBC News*, 9 March 2017, accessed at: <http://www.bbc.co.uk/news/world-asia-39219307>

<sup>44</sup> Constitution petition no.77 of 2010, para 14.

energy despite poverty and helplessness but without any success, which aggravated the mistrust not only on law enforcing agencies but also on civil administration.”<sup>45</sup>

43. A year later, the Supreme Court delivered one of its strongest judgments yet on the practice of enforced disappearances in the case of *Muhabat Shah*.<sup>46</sup> Muhabat Shah petitioned the Supreme Court to trace the whereabouts of his brother, Yaseen Shah, who had been “missing” since a joint operation was conducted by the army and police in Mardan in 2010. According to a letter of the superintendent of the Malakand internment center submitted to the Supreme Court, 66 detainees were brought to Malakand internment center in November 2011. Out of the 66 detainees, 31 were declared as “internees” by the “internment authority” and kept at Malakand internment center. The other 35 were removed from the Malakand internment center by the army. A list of the 35 people who were removed from the Malakand internment center was submitted to the Supreme Court. Yaseen Shah was one of them. Despite multiple orders of the Supreme Court, the army authorities only produced seven persons before the Court and the remaining 28 persons, including Yaseen Shah, remained unaccounted for. In December 2013, the Supreme Court ruled that the unauthorized and unacknowledged removal of detainees from an internment center amounted to an enforced disappearance. The Court also held that “no law enforcing agency can forcibly detain a person without showing his whereabouts to his relatives for a long period”<sup>47</sup> and that currently, there was no law in force in Pakistan that allowed the armed forces to “unauthorizedly detain undeclared detainees”.<sup>48</sup> Finally, the Court condemned the “Kafkaesque working” of the military, and held that armed forces personnel responsible for the enforced disappearances should be dealt with “strictly in accordance with law”.<sup>49</sup>

44. The Government responded by filing a review of the judgment, asking the court to delete remarks implicating the security agencies in enforced disappearances as such findings could “demoralize the troops”. In March 2014, after repeated court orders, the defense minister lodged criminal complaints for wrongful confinement against army officers allegedly responsible for the “disappearances”. A few days later, however, reportedly on the request of military authorities, the Khyber Pakhtunkhwa administration referred the matter to the military for further investigation and possible trial under the Army Act, 1952. Since procedures of “military justice” are secret and trials are not open to the public, what became of the case is not known.<sup>50</sup>

45. In its response to the UN Human Rights Committee’s List of Issues in relation to the initial report of Pakistan, Pakistan claimed, “the government pursues action against perpetrators who have been involved in enforced disappearances.”<sup>51</sup> However, Pakistan is yet to make public even a single case where perpetrators have been brought to justice. The Government’s failure to bring to account perpetrators of enforced disappearances has led the UN Working Group on Enforced and Involuntary Disappearances to conclude that, “there is a climate of impunity in Pakistan with regard to enforced disappearances, and the authorities are not sufficiently dedicated to investigate cases of enforced disappearance and hold the perpetrators accountable”.<sup>52</sup> Pakistan has still not ratified the International Convention for the Protection of All Persons from Enforced Disappearance and “enforced disappearance” is still not recognized as a distinct crime in the country.

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<sup>45</sup> *Ibid*, para 10.

<sup>46</sup> HRC No.29388-K/13, 10 December 2013.

<sup>47</sup> *Ibid*, p. 12.

<sup>48</sup> *Ibid*. p. 20

<sup>49</sup> See *International Commission of Jurists*, “ICJ urges Senate to reject “Protection of Pakistan’ Bill”, 14 May 2014, accessed at: <http://www.icj.org/icj-urges-senate-to-reject-protection-of-pakistan-bill/>, p.5.

<sup>50</sup> See, for example, Reema Omer, “Crisis of Impunity”, *Dawn News*, 31 January 2017, accessed at: <https://www.dawn.com/news/1311707>

<sup>51</sup> List of issues in relation to the initial report of Pakistan, Addendum: Replies of Pakistan to the List of Issues, March 2017, para 33.

<sup>52</sup> Report of the Working Group on Enforced or Involuntary Disappearances, Follow-up report to the recommendations made by the Working Group, Missions to Congo and Pakistan, 13 September 2016, UN Doc. A/HRC/33/51/Add.7, para 25, p. 35.

46. Instead of combatting the practice of enforced disappearance and bringing perpetrators to account, the Government enacted new legislation, such as the Actions in Aid of Civil Power Regulations, 2011 (see also below) and the 21<sup>st</sup> and 23<sup>rd</sup> amendments to the Constitution that facilitate the perpetration of enforced disappearances, including by explicitly legalizing forms of secret, unacknowledged, and incommunicado detention. As discussed earlier, families of people convicted by military courts have raised concern that some of the people tried by military courts were subjected to enforced disappearance by military authorities.<sup>53</sup>

47. The ICJ has also received information about other “missing persons” who are allegedly detained in internment centers in the Federally Administered Tribal Areas but their detention is not acknowledged. The organization’s concern about such reports is exacerbated by the military’s refusal to give family members and civil society monitors, including the ICRC, access to these internment centers.

#### Actions (in aid of Civil Power) Regulations, 2011

48. In 2011, the President of Pakistan promulgated regulations, the Actions (in aid of Civil Power) Regulations, 2011, for the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA). These regulations give the army excessively broad powers to detain a wide range of people without charge and judicial supervision. The armed forces may detain any person in the notified area on grounds as vague as obstructing actions in aid of civil power “in any manner whatsoever”; strengthening the “miscreants” ability to resist the armed forces or “any law enforcement agency”; undertaking “any action or attempt” that “may cause a threat to the solidarity, integrity or security of Pakistan”; and committing or being “likely to commit any offence under the regulation”. They also provide the federal and provincial governments or “any person” authorized by them with sweeping powers of indefinite detention. Section 19 of the Regulations allows any information collected by the internment authority, including “confessions” made by the detainees, to be “admissible in evidence” and be “deemed sufficient to prove the facts in issue or the relevant facts”. Retroactively applicable to 1 February 2008, they provide legal cover to the military in connection with the perpetration of gross human rights violations and other abuses, including illegal detention of hundreds of suspects.<sup>54</sup> The ICJ has received information that a large number of people tried by military courts for terrorism-related offences pursuant to the 21<sup>st</sup> amendment had been “disappeared” and secretly detained in the internment centers established under the Regulations.

49. The UN Working Group on Enforced or Involuntary Disappearances noted in its country report on Pakistan in February 2013 that the “compatibility of...ACP Regulations with international standards should be carefully examined, given that they would appear to allow forms of arbitrary deprivation of liberty, which may create themselves the conditions for the occurrence of enforced disappearances.”<sup>55</sup> The Regulations have been challenged before the Supreme Court of Pakistan in multiple petitions. At the time of the submission, the cases were still pending.

#### **D. BLASPHEMY LAWS**

50. Pakistan’s “blasphemy laws” consist of a variety of “crimes” including “misusing” religious epithets, “defiling” the Holy Quran (section 295-B), “deliberately outraging religious sentiment” (section 295-A), and using derogatory remarks in respect of the

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<sup>53</sup> See *International Commission of Jurists*, “Military Injustice in Pakistan”, June 2016, accessed at : <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>. See also, Reema Omer, “Forgotten Justice”, *Dawn News*, 25 September 2016, accessed at: <https://www.dawn.com/news/1285903>

<sup>54</sup> See, for example, *International Commission of Jurists*, “Authority without Accountability: the search for justice in Pakistan”, December 2013, accessed at: <https://www.icj.org/wp-content/uploads/2013/12/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-PAKISTAN-FINAL-.pdf>, pp. 71-72.

<sup>55</sup> Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, Addendum, Mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2, para 29.

Prophet Muhammad. Sentences for these offences range from fines to long terms of imprisonment, and in the case of defamation of the Prophet Muhammad (section 295-C), a mandatory death sentence.

51. Since their promulgation, these oppressive and frequently misused blasphemy laws have been denounced by Pakistani civil society activists and human rights groups; academics; and members of the judiciary and government. Concern about these laws has also been raised during the review by UN Member States of Pakistan's human rights record at the UN Human Rights Council,<sup>56</sup> as well as by UN human rights mechanisms<sup>57</sup> and international human rights organizations,<sup>58</sup> who have all observed that Pakistan's "offences against religion" violate its obligations under international human rights law and have urged that Pakistan repeal or radically amend them.

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<sup>56</sup> During Pakistan's second Universal Periodic Review in 2012, Pakistan received seven recommendations related to its blasphemy laws. Pakistan rejected recommendations 122.30, which called for the derogation of the law on blasphemy to guarantee in practice the right to freedom of religion. Pakistan noted a number of recommendations including recommendation 122.28, which asked the Government to ensure that blasphemy laws and their implementation are in line with international law (Switzerland); enact legislation ensuring freedom of religion and belief for all religious groups and consider abolishing the so-called blasphemy laws; repeal or reform thoroughly the so-called blasphemy law; recommendation 122.31, which asked Pakistan to modify or repeal the blasphemy laws in order to bring them in line with the principles related to freedom of thought, conscience and religion, and in particular with its obligations under the International Covenant on Civil and Political Rights (ICCPR); recommendation 122.32, which called for repealing the discriminatory blasphemy laws against religious minorities and ensure that there is no impunity for those who commit hate crimes; repealing the blasphemy law and respect and guarantee freedoms of religion or belief and of expression and opinion for all, including Ahmadis, Hindus and Christians; and recommendation 122.33, which called for repealing the blasphemy law, or at least amend it to protect persons from eventual abuses or false accusations and lighten corresponding penalties, that are currently disproportional. Pakistan accepted recommendation 122.121, which called on the Government to continue its efforts to enhance legislation and measures to further address the situation of religious minorities, including blasphemy laws, forced conversion and discrimination against non-Muslim minorities, and recommendation 122.156, which asked the Government to adopt measures to ensure the protection of religious minorities, including Ahmadis, Christians, Hindus and Sikhs, prevent the abuse of blasphemy legislation, halt forced conversions, and take necessary steps to prevent violence against members of religious minority communities. The list of recommendations and Pakistan's responses can be accessed here:

[http://www.upr-info.org/sites/default/files/document/pakistan/session\\_14\\_-\\_october\\_2012/recommendationsandpledgespakistan2012.pdf](http://www.upr-info.org/sites/default/files/document/pakistan/session_14_-_october_2012/recommendationsandpledgespakistan2012.pdf)

<sup>57</sup> See, for example, Report of the Special Rapporteur on Freedom of Religion or Belief, 2012, Heiner Bielefeldt: "States should repeal any criminal law provisions that penalize apostasy, blasphemy and proselytism as they may prevent persons belonging to religious or belief minorities from fully enjoying their freedom of religion or belief", UN Doc. A/HRC/22/51 accessed at: [http://www.ohchr.org/Documents/Issues/Religion/A.HRC.22.51\\_English.pdf](http://www.ohchr.org/Documents/Issues/Religion/A.HRC.22.51_English.pdf); Abdelfattah Amor, following his visit to Pakistan in 1995: "Generally speaking, blasphemy as an offence against belief may be subject to special legislation. However, such legislation should not be discriminatory and should not give rise to abuse. Nor should it be so vague as to jeopardize human rights, especially those of minorities. If offences against belief are made punishable under ordinary law, then procedural guarantees must be introduced and a balanced attitude must be maintained. While protecting freedom of conscience and freedom of worship is clearly a necessity, applying the death penalty for blasphemy appears disproportionate and even unacceptable, especially in view of the fact that blasphemy is very often the reflection of a very low standard of education and culture, for which the blasphemer is never solely to blame." UN Doc. E/CN.4/1996/95/Add.1; and Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knul, following her mission to Pakistan in 2012, UN Doc. A/HRC/23/43/Add.2 (2013) para 117: "Blasphemy laws, Hudood Ordinances, and anti-Ahmadi laws, as well as any other discriminatory legal provisions, should be repealed and replaced with provisions in conformity with Pakistan's Constitution and the international human rights law instruments to which Pakistan is a party", accessed at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/126/79/PDF/G1312679.pdf?OpenElement>

<sup>58</sup> See, for example, *Amnesty International, Pakistan: Use and Abuse of the Blasphemy Laws*, July 1994; Freedom House, *Policing Belief: the impact of blasphemy laws on human rights*, October 2010, accessed at: [https://freedomhouse.org/sites/default/files/Policing\\_Belief\\_Full.pdf](https://freedomhouse.org/sites/default/files/Policing_Belief_Full.pdf), pp. 69-89; and "UN rights experts call for urgent measures to protect Pakistan's religious minorities", 2 June 2014, accessed at: <http://www.un.org/apps/news/story.asp?NewsID=47938#.VdIjSEUeXVY>

52. The UN Special Rapporteur on the Independence of Judges and Lawyers, for example, following a mission to Pakistan in 2012, found that

*These laws serve the vested interests of extremist religious groups and are not only contrary to the Constitution of Pakistan, but also to international human rights norms, in particular those relating to non-discrimination and freedom of expression and opinion.*<sup>59</sup>

The Special Rapporteur went on to recommend that Pakistan should repeal or amend the blasphemy laws in accordance with its human rights obligations.

53. Moreover, human rights bodies and mechanisms have clarified that the mandatory imposition of the death penalty, which is prescribed under section 295-C, is prohibited under international human rights law.<sup>60</sup>

54. The criminalization of the exercise of the rights to freedom of expression and religion or belief in Pakistan in the shape of the blasphemy laws is a flagrant violation of Pakistan's international human rights obligations, including its obligations to respect the rights to freedom of thought, conscience and religion and freedom of expression.

55. Contrary to Pakistan's claim in its response to the UN Human Rights Committee's List of Issues that blasphemy laws in Pakistan are not discriminatory as they deal with "offences against all religions" and apply to "Muslims and non-Muslims alike",<sup>61</sup> two of the provisions, namely sections 295-B (which carries a life imprisonment sentence) and 295-C (which carries mandatory death sentence), specifically criminalize defamation of the Prophet Muhammad and "defiling" of the Quran, which also makes Pakistan's blasphemy laws discriminatory and a violation of equal treatment before the law.

56. Furthermore, the retention of the mandatory death sentence as a penalty upon conviction for a crime, including under 295-C of the Penal Code, violates Pakistan's obligations under the Covenant, including to respect the rights to life, to a fair trial, and to prohibit torture and other cruel, inhuman or degrading treatment or punishment.

57. While Article 6 of the ICCPR does not expressly obligate States Parties to abolish the death penalty completely, they are obliged to limit its use and, in particular, to abolish it for all but the "most serious crimes". The UN Special Rapporteur on extrajudicial, summary or arbitrary executions and other authorities have interpreted "most serious crimes" in Article 6 of the ICCPR very restrictively, limited to those cases where there was an intention to kill which resulted in the loss of life.<sup>62</sup>

58. In its response to the UN Human Rights Committee's List of Issues, Pakistan claimed, "an independent judiciary, free media and vibrant civil society also provide effective safeguards

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<sup>59</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2012, UN Doc. A/HRC/23/43/Add.2, para 57, p. 13.

<sup>60</sup> See, for example, Special Rapporteur on extrajudicial, summary or arbitrary executions: UN Doc. A/HRC/14/24 (2010), para. 51(d) and UN Doc. A/HRC/4/20 (2007) paras 55-66; Human Rights Committee: *Thompson v Saint Vincent*, UN Doc. CCPR/C/70/D/806/1998 (2000) para. 8.2, *Kennedy v Trinidad and Tobago*, UN Doc. CCPR/C/74/D/845/1998 (2002) para. 7.3, *Carpo et al v The Philippines*, UN Doc. CCPR/C/77/D/1077/2002 (2003) §8.3, *Larrañaga v The Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) para 7.2, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) para 6.3 and Human Rights Committee Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) para 13.

<sup>61</sup>List of issues in relation to the initial report of Pakistan, Addendum: Replies of Pakistan to the List of Issues, March 2017, para 69.

<sup>62</sup> See for example, Para 3 and more generally, Part C, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/4/20, 29 January 2007. See also: "Death penalty, if retained, only permissible for "most serious crimes" – UN rapporteur on arbitrary executions" 25 October 2012 available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12698&LangID=E>

against misuse of the Blasphemy Law. Courts have also ensured free and impartial trials”.<sup>63</sup> However, the ICJ’s detailed study of the implementation of blasphemy laws in Pakistan shows that the laws are widely misused and defendants in blasphemy cases are systematically denied their right to a fair trial.<sup>64</sup>

59. A key precondition to a fair trial recognized globally is that criminal offences must be prescribed by law and must conform to the principle of legality. This means that the laws proscribing acts or omissions as criminal must be formulated clearly and precisely to ensure individuals can regulate their conduct accordingly.

60. Various provisions related to offences against religion are framed in overly broad and vague terms, and, therefore, breach the principle of legality. Section 295-C of the Pakistan Penal Code, for example, criminalizes words, representations, imputations, innuendos, or insinuations, which directly or indirectly, defile “the sacred name of the Holy Prophet”. If proven, the offence carries a mandatory death penalty. The elements of the offence set out in this provision are vague and overbroad, are open to subjective interpretations, and give virtually no instruction to the people or to law enforcement officials and the judiciary regarding what behavior is prohibited.

61. The UN Special Rapporteur on the Independence of Judges and Lawyers, in a report following a mission to Pakistan in 2012, made a similar observation

*The vague language of the blasphemy laws make[s] no reference to a potential offender’s psychological state or intention and represents an open door for abuse and the persecution of minorities, in particular by religious or sectarian groups.*<sup>65</sup>

62. In practice, the vague and broad wording of the provision has allowed a wide range of acts and expression to be prosecuted under section 295-C, including, for example: using language resembling the Prophet’s name on fabric; placing the Prophet’s name in an allegedly insulting place on an advertisement; disputing Islamic beliefs and rituals; failing to remove an allegedly blasphemous post from a Facebook page, and even calling for reform or even critiquing provisions of offences against religion in the Pakistan Penal Code.

63. The right to be tried by independent and impartial tribunals is at the heart of a judicial system that guarantees human rights. Judicial independence also encompasses protection of judges, in law and in practice, from threats, harassment, reprisals or attacks, both from State and non-State actors.

64. Judges who hear blasphemy cases have reported being harassed, intimidated, and threatened to pressure them into convicting individuals accused of committing blasphemy. Some judges have reported receiving letters and phone calls warning them of attacks against themselves and their families if defendants in blasphemy cases are acquitted.<sup>66</sup>

65. Where hearings are public, courtrooms are often packed with hostile crowds, chanting slogans against the accused. Often, these crowds belong to, or are affiliated with, organized religious groups. Such conduct impedes the fairness of proceedings, which requires “the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.” The UN Human Rights Committee has noted, for example, that the hearing is not fair if “the defendant in criminal proceedings is faced with the expression of

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<sup>63</sup> List of issues in relation to the initial report of Pakistan, Addendum: Replies of Pakistan to the List of Issues, March 2017, para 72.

<sup>64</sup> *International Commission of Jurists*, “On Trial: the implementation of Pakistan’s blasphemy laws”, 4 November 2015, accessed at: <http://www.icj.org/pakistan-trials-for-blasphemy-fundamentally-unfair-icj-new-report/>

<sup>65</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2012, UN Doc. A/HRC/23/43/Add.2 (Report of the Special Rapporteur on the independence of judges and lawyers).

<sup>66</sup> Consultation of lawyers and judges on offences related to religion, September 2014, Lahore.

a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court...<sup>67</sup>

66. Following her visit to Pakistan in 2012, the UN Special Rapporteur on the independence of the judges and lawyers also expressed concern that judicial independence was under threat in cases of blasphemy as judges were “coerced or pressured to decide against the accused, even without supporting evidence”, and that

*The judiciary too has grown very afraid of public sentiment regarding blasphemy cases. Such sentiment, coupled with intimidation and violence, as well as the lack of protection measures from authorities, seriously encroaches on the independence of the judiciary and results in a biased delivery of justice.*<sup>68</sup>

67. Another fundamental aspect of the right to a fair trial that is particularly relevant in proceedings involving blasphemy allegations, is the right to trial before an impartial tribunal or judge.

68. The impartiality of a judge can be defined as the absence of bias, animosity or sympathy towards either of the parties. Under international standards, courts must be impartial, and also appear to be impartial. Thus, judges have a duty to recuse themselves in cases in which there are sufficient grounds to question their impartiality.

69. The vague and overbroad wording of section 295-C of the Pakistan Penal Code, which criminalizes words, representations, imputations, innuendos, or insinuations, which directly or indirectly, defile “the sacred name of the Holy Prophet”, has allowed prejudices, religious leanings and personal predilections of judges to shadow their judgments, calling into question their impartiality. This bias is apparent in the conduct of judges during blasphemy proceedings, and also in their judgments.<sup>69</sup>

70. These concerns are magnified further by the requirement under Pakistani law that judges presiding over first instance trials in 295-C cases be Muslim. The provision, when coupled with the vagueness of the law, all but invites the types of partiality noted above in the judgments of the first instance court, and is inconsistent with the rights to trial before an independent and impartial court.

71. Under Article 14(1) of the ICCPR, holding oral hearings on the merits of a case determining a criminal charge, which the parties and members of the public, including the media, can attend, is the general rule. The Human Rights Committee has clarified that the publicity of hearings ensures transparency, and thus provides an important safeguard for the interest of the individual and of society at large. While Article 14 acknowledges that courts have the power to exclude all or part of the public from the proceedings, this must only be done in exceptional circumstances, specifically for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.<sup>70</sup> However, closing part or all of the proceedings must nonetheless be compatible with the right of the accused to a fair trial in the context of adversarial proceedings.

72. For reasons of security, blasphemy-related trials often take place in jail. Access to the proceedings that take place in jails is usually only permitted to the accused; prosecution and defense lawyers; and witnesses. Members of the defendants’ family or media are barred from the proceedings in jail trials. This impedes the right to a public hearing, which generally

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<sup>67</sup> Human Rights Committee, General Comment 32, *supra* fn. 48, para 25.

<sup>68</sup> Report of the Special Rapporteur on the independence of judges and lawyers, *supra* fn. Page 13.

<sup>69</sup> *International Commission of Jurists*, “On Trial: the implementation of Pakistan’s blasphemy laws”, 4 November 2015, accessed at: <http://www.icj.org/pakistan-trials-for-blasphemy-fundamentally-unfair-icj-new-report/>, pp. 34-36.

<sup>70</sup> Human Rights Committee, General Comment 32, *supra* fn. paras 28 and 29.

requires oral hearings of the case, which the parties and members of the public, including the media can attend.

73. These measures are not only incompatible with the right to a public hearing, at times, they also do not work: in one case, for example, individuals hostile to the defendant were allowed access to the proceedings being carried out in jail. The trial court had authorized jail trial after the accused and his lawyer received threats to their lives during proceedings in the Sessions Court. Even during proceedings in jail, however, individuals hostile to the accused falsely claimed to be lawyers and attended the hearings. The prison authorities, however, failed to prevent that from happening.

74. Additionally, in jail trials, defendants and their lawyers cannot communicate confidentially as prison officials are at all times present during their meetings. This is inconsistent with the right of the accused to adequate time and facilities to prepare one's defense and communicate with one's counsel, and to defend oneself with assistance of counsel. This contravenes the accused's right to counsel under international standards, which require governments to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.<sup>71</sup>

75. Article 10(1) of the ICCPR requires that States guarantee that, "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

76. Overcrowded prisons, torture and other ill-treatment, and inadequate health and hygiene facilities generally plague detention and prison facilities for all crimes. The predicament of individuals accused of blasphemy, who are detained pending trial or appeal or serving sentences for blasphemy, is compounded by the security and safety risks they face as the offence with which they are accused or of which they have been convicted also makes them vulnerable to attacks. Special measures taken by prison authorities, ostensibly for the protection and security of those awaiting trial or serving sentences for blasphemy, have further undermined individuals' right to humane treatment in detention.

77. Ostensibly, as a measure to protect those awaiting trial on blasphemy charges and those serving sentences following conviction for blasphemy, individuals have been held in individual cells separate from other detainees. Usually, the block of cells in which they are held (referred to as "high security barracks") is at a distance from other prison cells, and the inmates held in those cells are barred from speaking or interacting with other detainees. In many cases, they have also been prohibited from leaving their cells for exercise or fresh air, recreation or exercise.

78. In cases that are "high-profile", cells of such individuals have been monitored at all times by CCTV cameras. In addition, facilities such as the provision to cook one's own food, which are available to other detainees,<sup>72</sup> are denied to many blasphemy accused, purportedly for their own security. In some cases, detainees accused of blasphemy are discouraged from keeping their own books, especially their respective holy books.

79. Individuals accused of blasphemy kept in solitary confinement recounted to the ICJ some elements of their daily struggle to maintain their sanity. A 28-year old man, charged under section 295-C, in pre-trial detention for over two years spoke to the ICJ about the suffering faced by him and others

*There are terrorists, serial killers and rapists in the same prison who have more rights than us – they have friends, they can chat over a game of cards or a cup of tea, they can feel the sun and breathe fresh air. Is a mere allegation of blasphemy so much worse than we have been stripped of all our rights? I don't know how long*

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<sup>71</sup> Article 14(3) (b) and (d) and Principle 22, *UN Basic Principles on the Role of Lawyers*, supra fn.60.

<sup>72</sup> Rule 259, Pakistan Prison Rules.



*before our minds start rotting in this environment*<sup>73</sup>

80. The practice of prison authorities to detain individuals accused of, or convicted for, blasphemy-related offences for extended periods of time in solitary confinement is in violation of Pakistani law as well as international standards. In its Concluding Observations on Pakistan, the CAT Committee expressed "serious concern that individuals imprisoned on charges of blasphemy are frequently placed in solitary confinement for extended periods of time" and recommended that Pakistan should refrain from "holding individuals in solitary confinement for a prolonged period of time on grounds that doing so is necessary to ensure their safety."<sup>74</sup>

#### **E. ARBITRARY "INGO POLICY"**

81. On 1 October 2015, the Ministry of Interior issued a notification laying down a policy governing "the registration, working, funding, monitoring and other related aspects pertaining to all types of International Non-Governmental Organizations (INGOs) functioning in Pakistan" ("INGO policy").<sup>75</sup> According to the Government, the INGO policy will "enable the INGOs to receive legitimate foreign contributions or foreign economic assistance through legal channels and appropriately utilize these financial resources on the agreed areas of public welfare, simultaneously ensuring due monitoring, accountability and transparency of their governance, management and funding streams."

82. The INGO policy requires all INGOs already registered in Pakistan to reapply for registration. The "INGO committee", constituted by the Ministry of Interior, has sole authority to grant approval of registration. According to the policy, approved INGOs will only be registered exclusively for specific fields of work in specified geographical areas, which will be determined after consultation "with the relevant Federal and Provincial authorities, and in line with their needs and national priorities of Pakistan." The INGO policy also states that there will be regular and effective monitoring of INGOs' activities. It gives the Government broad powers to cancel registrations, including for reasons such as "involvement in any activity inconsistent with Pakistan's national interests, or contrary to Government policy."

83. The INGO policy provides no avenues for appeal or review where applications for registration are unsuccessful. If registrations are cancelled, INGOs may appeal to a "Special Ministerial Committee" constituted by the Government but the policy expressly states: "cancellation of registration cannot be challenged in any court of law."

84. The Special Rapporteur on the right to freedom of peaceful assembly and of association has found that "access to resources, including foreign funding, is a fundamental part of the right to freedom of association under international law, standards, and principles, and more particularly part of forming an association."<sup>76</sup> Any restriction on access to foreign funding, therefore, must meet the stringent test for allowable restrictions on the right to association developed by the international human rights bodies.

85. The Declaration on Human Rights Defenders states, "everyone has the right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means..." The Special Representative of the Secretary-General on the situation of human rights defenders has stated, "governments must allow access by NGOs to foreign funding as a

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<sup>73</sup> ICJ interview, September 2015.

<sup>74</sup> UN Committee against Torture, *Concluding Observations on the initial report of Pakistan*, May 2017, accessed at: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT\\_CAT\\_COC\\_PAK\\_27467\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT_CAT_COC_PAK_27467_E.pdf), para 28 and 29.

<sup>75</sup> The INGO policy can be accessed here: <https://ingo.interior.gov.pk/>

<sup>76</sup> See, for example, "Analysis on international law, standards and principles applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulation Rules 2011 by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai", 20 April 2016.

part of international cooperation, to which civil society is entitled to the same extent as Governments.”<sup>77</sup>

86. The Human Rights Committee has also on multiple occasions held that States should allow non-governmental organizations to “discharge their functions without impediments, which are inconsistent with the provisions of Article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution.”<sup>78</sup>

87. Article 22 of the Covenant allows restrictions on freedom of association for a limited number of grounds including protecting national security or public security, public order, public health or morals, or the protection of the rights and freedoms of others. “Involvement in any activity inconsistent with Pakistan’s national interests, or contrary to Government policy” – listed as some of the reasons for which registration of INGOs can be canceled – are clearly incompatible with the Covenant.

88. At the time of writing, at least 77 applications for registration are pending with the Government.<sup>79</sup> INGOs have expressed concern that decisions by the Ministry of Interior to grant or refuse registrations are made arbitrarily and INGOs are left with no recourse when faced with indefinitely delays in the processing of their applications. Some INGOs have reportedly been told as a condition to their registration, they will not employ individuals of Indian or Israeli nationality or origin, a restriction that is also incompatible with a number of other rights under the Covenant including Article 26.

89. The onerous and opaque procedures coupled with the vague, arbitrary and at times unlawful reasons for refusing or canceling INGO registrations have resulted in severe restriction of the rights to freedom of association for people working for INGOS.

## **RECOMMENDATIONS**

90. In light of the above concerns, the ICJ considers that the Pakistani authorities should implement the following recommendations:

- Ensure that military courts can only try military personnel for exclusively military offences and in no manner have jurisdiction over civilians, including for terrorism-related offences.
- Ensure that under no circumstances should cases of children who were under the age of 18 at the time of the alleged offence be transferred to military courts for trial.
- Ensure procedures of military courts meet fair trial standards in accordance with Article 14 of the ICCPR.
- Expressly prohibit incommunicado detention or the detention of people in secret places, including in the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA).
- Make enforced disappearance a distinct, autonomous crime in the Penal Code, consistent with its definition in the ICPPED.
- Become a party to the ICPPED, the ICRMW, the Rome Statute of the ICC, OP-CAT, OP-CRC, OP-CEDAW, OP-ICESCR, OP-CRPD, and OP-ICCPR.
- Impose a moratorium on the death penalty with the view of abolishing the death penalty in law and practice.
- Carry out prompt, thorough, independent and impartial investigations into all allegations of enforced disappearance.

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<sup>77</sup> Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. General Assembly, U.N. Doc. G.A. Res. 53/144, 9 December 1998, Article. 13.

<sup>78</sup> UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Egypt, at para. 21, U.N. Doc. CCPR/CO/76/EGY (November 28, 2002), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument). See also U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Ethiopia, at para. 25, U.N. Doc. CCPR/C/ETH/CO/1 (August 19, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/448/95/PDF/G1144895.pdf?OpenElement>.

<sup>79</sup> See [https://ingo.interior.gov.pk/List\\_of\\_Underprocess\\_INGO\\_Cases.pdf](https://ingo.interior.gov.pk/List_of_Underprocess_INGO_Cases.pdf)

- Repeal Actions (in Aid of Civil Power) Regulations, 2011, or bring them in conformity with international standards.
- Enact clear rules and dedicated institutions to ensure the oversight and accountability of law enforcement and intelligence agencies.
- Amend the National Commission for Human Rights Act, 2012, to give the Commission jurisdiction over alleged human rights violations committed by military and intelligence agencies.
- Ensure only competent civilian courts have jurisdiction over alleged human rights violations and military courts are barred from exercising jurisdiction over human rights violations allegedly perpetrated by the military.
- Make the offence of torture punishable under criminal law, in accordance, at a minimum, with the elements of torture as defined under international standards.
- Ensure the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill, 2014, meets the requirements under the ICCPR and other relevant international standards.
- Repeal all blasphemy laws, particularly sections 295-A, 295-B, 295-C, 298-A, 298-B and 298-C, or amend them substantially so that they are consistent with international standards including on freedom of expression; freedom of thought, conscience or religion; and equal protection of the law as guaranteed under the ICCPR. Abolish mandatory death penalty, including under section 295-C.
- Expressly include the requirement of proof of deliberate and malicious intent in all offences related to religion that are retained in the short or long term, particularly section 295-C of the Pakistan Penal Code.
- Amend Schedule II of the Code of Criminal Procedure, 1898, to make all blasphemy-related offences (sections 295 to 298-C) bailable.
- Amend Schedule II of the Code of Criminal Procedure, 1898, to make all blasphemy-related offences (sections 295 to 298-C) non-cognizable, to ensure judicial warrants are a prerequisite for launching investigation and making arrests.
- End the practice of holding individuals accused of, or convicted for, blasphemy-related offences in solitary confinement.
- Ensure the effective implementation of section 156-A of the Code of Criminal Procedure, which provides that for complaints under section 295-C, no officer below the rank of a Superintendent of Police shall investigate the complaint.
- Amend section 156-A to include all blasphemy-related offences, including in particular sections 295-B, 298-A, 298-B and 298-C of the Penal Code, with a view to decreasing prosecutions based on false and malicious complaints.
- Withdraw the INGO policy or amend it substantially to make it consistent with international standards including Article 22 of the ICCPR.
- Fully cooperate with the UN treaty bodies, including the Human Rights Committee, and ensure that the obligations under the treaties are implemented bona fide.