



## **International Commission of Jurists**

### **Pakistan: The trial of civilians by military courts**

#### **Briefing Paper**

**January 2016**

**Pakistan:  
The trial of civilians by military courts**

One year into the establishment of military courts to try civilians for terrorism-related offences, Pakistan's system of "military justice" has placed Pakistan 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. Military courts have convicted at least 40 people, possibly including children, in opaque, secret proceedings; and eight people have been hanged after grossly unfair trials. The Supreme Court of Pakistan has upheld the legality of military courts and thus failed in its role as the guardian of human rights of the Pakistani people.

In this briefing paper, the ICJ examines the performance of Pakistan's military courts in the first year of their operation. It also explains how the trial of civilians in military courts violates Pakistan's obligation under international law to ensure people charged with criminal offences are tried by independent and impartial courts in proceedings that comply with international fair trial standards.

The decision to empower military courts to try terrorism-related cases came in the wake of the horrific massacre of nearly 140 school children at an Army Public School (APS) in Peshawar in December 2014. The ICJ unequivocally condemns this appalling criminal act and expresses its solidarity with the victims and survivors of the APS attack as well as other terrorist attacks in the country.

Pakistan has a legal duty to protect its people against terrorist attacks, and where terrorist attacks occur, a duty to investigate, prosecute and punish the perpetrators. However, for counter-terrorism measures to be effective in the long term, they must be lawful and also be seen to be legitimate. The experience from Asia and around the world has shown that departure from accepted legal procedures and safeguards in the name of fighting terrorism is counterproductive, as it feeds and fuels the very violence it is meant to curtail.<sup>1</sup>

Rather than compromising on the rights of accused persons in the name of "speedy trials" in military courts, Pakistan should strengthen the police's capacity of investigation; improve the training of prosecutors; and ensure protection of judges, prosecutors and witnesses, which are among the key reasons why certain perpetrators of terrorist attacks have been able to evade accountability in civilian courts in Pakistan.

The ICJ also urges Pakistan to roll back the system of "military justice"; undertake a comprehensive review of its counter terrorism laws, policies and practices to ensure they are compatible with Pakistan's national and international legal obligations; and reinstate a moratorium on the death penalty.

## **1. Overview**

Since the amendments a year ago, the Pakistan Government has constituted 11 military courts to hear "terrorism" cases under the 21<sup>st</sup> amendment to the Constitution and the amended Army Act, 1952.

These 11 military courts have thus far concluded the trials of 64 people, finding the defendants guilty in 40 cases. 36 people have been sentenced to death and

---

<sup>1</sup> See International Commission of Jurists, "Report of the eminent jurists panel on terrorism, counter-terrorism and human rights", July 2009, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf>

## Pakistan: The trial of civilians by military courts

four have been given life sentences. The military has disclosed no information about the fate of the 24 people not found guilty by military courts, and it remains unknown whether they have been acquitted and set at liberty; if they are still being detained for other charges; or if their cases have been transferred to other courts.<sup>2</sup> Around a hundred cases are still pending before the various military courts in the country.

According to information received by the ICJ and press statements by the military's media office, those convicted by military courts allegedly belong to various groups accused of carrying out armed attacks: 11 of the men convicted are said to belong to the Tehreek-e-Taliban Pakistan, one is allegedly from the Tehreek-e-Taliban (Swat), four are said to be from Harkat ul Jihad-e-Islami, five are allegedly members of Sepah-e-Sahaba, one is said to be a member of Jaish-e-Muhammad, one is allegedly from Al-Qaeda, six are said to be from the Toheedwal Jihad Group, and four are allegedly "active members" of other undisclosed "proscribed organizations".<sup>3</sup> The organizational affiliation, if any, of seven of the 40 people convicted has not been made public.

Some of the incidents they were tried for include the attack on the army public school in Peshawar; an attack on a bus carrying members of the Muslim Ismaili community near Safoora Chowk in Karachi;<sup>4</sup> an attack on a bus carry Shiite Muslim Hazara pilgrims in Mastung;<sup>5</sup> and other violent attacks against law enforcement agencies (see Annex 1 for more details).

Eight civilians convicted and sentenced to death by military courts have been hanged since January 2015.

On 2 December 2015, four civilians convicted by military courts, namely Maulvi Abdus Salam, Hazrat Ali, Mujeebur Rehman and Sabeel alias Yahya, were hanged in Kohat Jail.<sup>6</sup> They were convicted for their involvement in "terrorist activities", including harboring, funding and transporting "suicide bombers" who attacked the Army Public School in December last year. According to an ISPR statement, they were all "active members" of the "Toheedwal Jihad Group".<sup>7</sup>

Four more civilians sentenced to death by military courts were hanged on 29 December 2015. They include Noor Saeed, Murad Khan, Inayatullah and Israruddin, who were convicted for their involvement in "involvement in hineous (sic) offences relating to terrorism". The ISPR had announced their death sentences in a press statement issued on 2 April 2015.<sup>8</sup>

According to information received by the ICJ, the families of at least five out of the 40 individuals convicted by military courts have challenged the convictions

---

<sup>2</sup> Press statement by the ISPR, 12 December 2015, accessed at: [http://m.ispr.gov.pk/front/main.asp?o=t-press\\_release&latest=1](http://m.ispr.gov.pk/front/main.asp?o=t-press_release&latest=1)

<sup>3</sup> Under section 11B of the Anti-terrorism Act, 1997, the Federal Government has the power to proscribe an organization if it has "reason to believe that an organization is concerned in terrorism."

<sup>4</sup> Imtiaz Ali, "43 killed in attack on bus carrying Ismailis in Karachi", *Dawn News*, 14 May 2015, accessed at: <http://www.dawn.com/news/1181698>

<sup>5</sup> Syed Ali Shah, "Blast on bus kills 22 Shia pilgrims in Mastung", *Dawn News*, 21 January 2014, accessed at: <http://www.dawn.com/news/1081751>

<sup>6</sup> International Commission of Jurists, "Pakistan: ICJ denounces hangings following secret trials by military courts", 2 December 2015, accessed at: <http://www.icj.org/pakistan-icj-denounces-hangings-following-secret-trials-by-military-courts/>

<sup>7</sup> Three others were also convicted for their involvement in the attack on the army public school in Peshawar. Two were given death sentences (so far unexecuted) and one convict was given a sentence of life imprisonment.

<sup>8</sup> Press statement by the ISPR, 2 April 2015, accessed at: [http://m.ispr.gov.pk/front/main.asp?o=t-press\\_release&date=2015/4/2](http://m.ispr.gov.pk/front/main.asp?o=t-press_release&date=2015/4/2)

before the high courts on the grounds that suspects were denied the right to a fair trial, including the right to engage counsel, the right to cross-examine witnesses, the right to be free from torture or other ill-treatment, and the right to a public trial. In at least two cases, families claim the convicts were children when they were arrested by the law enforcement agencies. Their petitions are pending in various high courts or the Supreme Court of Pakistan.

## **2. Background**

On 6 January 2015, less than a month after a terrorist attack on the army public school in Peshawar, Parliament voted to amend the Constitution of Pakistan, 1973, and the Army Act, 1952, to allow military courts to try offences related to terrorism committed by those who claim to, or are known to, belong to a terrorist organization "using the name of religion or a sect". The amendments have a sunset clause of two years, after which they will cease to be in effect, although there is always a possibility they could be reintroduced.

The law was further amended in February 2015 through a presidential ordinance that expressly gives military courts retrospective powers, i.e. they may try persons for conduct that occurred prior to the amendments. The Ordinance also provides all those associated with military courts complete indemnity from prosecution for actions taken in "good faith" and gives military courts broad powers to take measures such as like holding *in camera* proceedings and keeping the identities of individuals associated with the cases secret, "for the protection of witnesses, President, members, prosecutors, defending officers and other persons concerned in court proceedings". The Ordinance was enacted as law in November 2015.<sup>9</sup>

## **3. Procedures followed by military courts in Pakistan**

The ICJ notes with concern that the procedures adopted by military courts in Pakistan, including the referral of cases to military courts, lack transparency and adequate information about the operation of military courts is not publicly available. This secrecy is in itself contravenes the rule of law.

### *3.1. Procedure for referral of a case to the military court*

According to government sources, provincial apex committees comprising civilian and military officials are responsible for selecting the cases of individuals charged with terrorism related offences to be referred to the military courts for trial and forwarding them to the Ministry of the Interior for final approval. The ICJ is unaware of any particular criteria being used by these committees for the selection of such cases. The Ministry of the Interior vets the list submitted by the provincial committees, and sends a final list of cases to the military for trial.

### *3.2. Composition of military courts*

According to newspaper reports, which quote military officers, and information received by the ICJ from Government and military officials, the procedure for trial of alleged acts of terrorism follows the procedures of courts martial in cases under the Army Act, 1952.<sup>10</sup>

---

<sup>9</sup> The Pakistan Army (Amendment) Act, 2015, November 2015, accessed at : [http://www.na.gov.pk/uploads/documents/1449574923\\_658.pdf](http://www.na.gov.pk/uploads/documents/1449574923_658.pdf)

<sup>10</sup> See, for example, "The new martial powers", *Dawn News*, 8 January 2015, accessed at: <http://www.dawn.com/news/1155411/the-new-martial-powers>

## **Pakistan: The trial of civilians by military courts**

Under the Army Act, a military court is composed of three to five serving officers of the armed forces.<sup>11</sup> There is no requirement that the military officers be lawyers or have any legal training. The officers remain subjected to the military chain of command.

A law officer of the Judge Advocate General branch of the military advises the military court, but has no decision-making authority.

### *3.3. Right of appeal*

Accused persons convicted by military courts and sentenced to death, imprisonment for life, imprisonment exceeding three months, or dismissal from service have the right to appeal the verdicts and sentences to a military appellate tribunal.

A military appellate tribunal is presided over by "an officer not below the rank of Brigadier". The Chief of Army Staff, or any other officer appointed by him, also sits in the appellate tribunal.<sup>12</sup> Officers who comprise appellate tribunals are serving military officers who are not required to have any legal training and who continue to be subjected to the military chain of command.

The law provides that every appellate court hearing "may be attended by a judge advocate who shall be an officer belonging to the Judge Advocate General's Department, Pakistan Army, or if no such officer is available, a person appointed by the Chief of the Army Staff."<sup>13</sup>

The military appellate tribunal has the power to "reduce or enhance the punishment" awarded by the military courts of first instance.

The verdict of a military court that is upheld by a military appellate court is final and cannot be appealed before a civilian court, even the High Court or the Supreme Court of Pakistan. High Courts and the Supreme Court, however, may review decisions of military courts (see Section 5.2.3).

### *3.4. Evidence*

According to the Army Act, the rules of evidence in proceedings before courts martial are the same as those observed by regular civilian criminal courts.<sup>14</sup>

The amendments to the Army Act allow the Federal Government to transfer proceedings pending in any other court against any person accused of committing prescribed offences under the amended law to a military court. Where cases are transferred from other courts, military courts may admit as evidence and base a verdict on previously recorded statements – which means that witnesses who have already testified before a civilian court are not required to testify again before the military court after the case has been transferred.

### *3.5. Secret hearings*

---

<sup>11</sup> Section 85 of the Army Act, 1952: A general Court martial shall consist of not less than five officers each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of captain. Section 87 of the Army Act: A field general Court martial shall consist of not less than three officers.

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

<sup>13</sup> *Ibid.*

<sup>14</sup> Section 112, Pakistan Army Act, 1952.

## Pakistan: The trial of civilians by military courts

The Army Act does not require that trials in courts martial or court martial appeals take place in public.

An Ordinance passed on 25 February 2015, further amending the Army Act, allows judges of military courts to hold *in camera* trials, and keep the identities of individuals associated with the cases secret. The Ordinance was enacted as law in November 2015.

### 3.6. Location

According to the Army Act, an accused person may be tried and punished for offences under the Act "in any place whatever".

The army has set up 11 military courts thus far, including three in Khyber Pakhtunkhwa, three in Punjab, two in Sindh and one in Balochistan.

## 4. Challenge before the Supreme Court

Soon after the 21<sup>st</sup> amendment was passed and changes to the Army Act of 1952 enacted, more than a dozen petitioners, including the Pakistan Bar Council, the Supreme Court Bar Association, and the Lahore High Court Bar Association, challenged before the Supreme Court the lawfulness of courts martial trying civilians. The petitioners argued that the amendments were non-compliant with and would lead to violations of the rights to a fair trial and the independence of the judiciary and are inconsistent with the principle of separation of powers recognized by Pakistan's Constitution.

A full-bench of the Supreme Court delivered its judgment in August 2015.<sup>15</sup> By a 13-4 majority, the Court confirmed its power to strike down constitutional amendments. However, a majority of nine of the 17 judges of the Supreme Court held that the trial by military courts of individuals accused of terrorism-related offences who are known to, or claim to be, members of terrorist groups was compatible with the Constitution, particularly fundamental rights and the independence of the judiciary.

Justice Azmat Saeed authored the majority opinion, endorsed by seven other judges, and reasoned that (1) trials before military courts meet principles of criminal justice; (2) the constitutional scheme allows deviation from standard procedure in exceptional cases; and (3) the amendments only authorized military trials for "terrorists", which was a valid classification allowing for differential treatment. Justice Saqib Nisar too endorsed the majority's opinion on this particular issue in his individual opinion.

A minority of six judges dissented from this judgment. For them, the trial of civilians by military courts violated principles of justice, fair trial and independence of the judiciary as military officers were a part of the executive and did not meet the requirements of independent and impartial courts. Justice Faez Isa also pointed out the many flaws in the existing anti-terrorism courts and practices, including the Government's failure to ban known terrorist organizations and weak prosecution and delays in terrorism cases, which if corrected would allow the Government to lawfully combat the impunity for offences related to terrorism. Justice Khosa stated: "A suicidal measure on the part of the society to counter suicide bombers may not be the most rational legislative step to take."

---

<sup>15</sup> The judgment can be accessed here : [http://www.supremecourt.gov.pk/web/user\\_files/File/Const.P.12of2010.pdf](http://www.supremecourt.gov.pk/web/user_files/File/Const.P.12of2010.pdf)

Two judges did not give an opinion on this issue, as they concluded that the Supreme Court did not have jurisdiction to review constitutional amendments.

In a statement on 7 August 2015, the ICJ pointed out that the Supreme Court judgment did not comply with Pakistan's human rights obligations, and underlined that the Court had missed an important opportunity to reverse the militarization of justice in progress under the guise of combatting terrorism and to reinforce independence of the judiciary in the country.<sup>16</sup>

On 28 August 2015, the Lahore High Court Bar Association petitioned the Supreme Court to review its judgment on the 21<sup>st</sup> amendment, claiming that the Court failed to consider the incompatibility of trials before military courts with the right to a fair trial and independence of the judiciary.<sup>17</sup> As of the time of publication of this briefing paper, the petition is pending before the Supreme Court.

## **5. Compatibility with international law**

### *5.1. The trial of civilians by military courts under international law*

Laws authorizing the trial of civilians in military courts for terrorism-related offences in Pakistan are incompatible with international standards, which require that those accused of any criminal offence- no matter how heinous- are guaranteed a fair trial by an independent, impartial and competent tribunal.

These standards emanate from several sources. The first is international treaties, including the International Covenant on Civil and Political Rights (ICCPR), to which Pakistan is a party and thus bound to comply, and the authoritative interpretations of the ICCPR by the UN Human Rights Committee, the body of independent experts established by the treaty and mandated to monitor the implementation of its provisions.

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 of the ICCPR applies to all courts, whether ordinary or specialized, civilian or military.<sup>18</sup>

The UN Human Rights Committee has also stated that "the trial of civilians in military or special courts raise serious problems as far as the equitable, impartial and independent administration of justice is concerned."<sup>19</sup> It has also repeated called on countries to prohibit trials of civilians before military courts.<sup>20</sup>

---

<sup>16</sup> International Commission of Jurists, "Pakistan: Supreme Court decision upholding 21st Amendment a blow to human rights and judicial independence", 7 August 2015, accessed at: <http://www.icj.org/pakistan-supreme-court-decision-upholding-21st-amendment-is-a-blow-to-human-rights-and-judicial-independence/>

<sup>17</sup> Nasir Iqbal, "LBA seeks review of SC decision in favour of military courts", *Dawn News*, 28 August 2015, accessed at: "<http://www.dawn.com/news/1203601/lba-seeks-review-of-sc-decision-in-favour-of-military-courts>

<sup>18</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>19</sup> *Ibid.*

<sup>20</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.

## Pakistan: The trial of civilians by military courts

Another source is the *Draft Principles Governing the Administration of Justice Through Military Tribunals*,<sup>21</sup> which were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006. The Draft Principles, which focus exclusively on military courts, 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, at all times, and also that civilians accused of a criminal offence of any nature shall be tried by civilian courts.

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>22</sup>

Other relevant sources which provide guidance are regional human rights treaties and standards such as the European Convention for the Protection of Human Rights and Fundamental Freedoms; the American Convention on Human Rights; the African Charter on Human and Peoples' Rights; the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the bodies of law developed by the regional human rights courts and other bodies mandated to monitor state parties' compliance with treaties, such as the European Court of Human Rights; the Inter-American Court of Human Rights; and the African Commission on Human and Peoples' Rights.

The case law of the Inter-American Court of Human Rights has clarified that under no circumstances should civilians be tried before military courts.<sup>23</sup> The Inter-American Court of Human Rights has held that where "a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated."<sup>24</sup>

The 2003 case before the African Commission of Human Rights, *Law Office of Ghazi Suleiman v. Sudan*, concerned the trial of a civilian before a military court established by Presidential Decree and composed primarily of military officers, including three in active service. The ACHPR stated:

*Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial.*

In addition, the ACHPR found that "selection of active military officers to play the role of judges violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary."

The Commission stated that "military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts."<sup>25</sup>

---

<sup>21</sup> *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

<sup>22</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>23</sup> *Palamara-Iribarne v Chile*, Judgment of the Inter-American Court of Human Rights, 22 November 2005, paras. 124, 139, 269(14).

<sup>24</sup> *Castillo Petruzzi et al. v. Peru* (1999), paras. 127 and 128.

<sup>25</sup> *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 and 229/99, para. 64, African Commission on Human and Peoples' Rights, 2003, available at: <http://www1.umn.edu/humanrts/africa/comcases/222-98.html>

## Pakistan: The trial of civilians by military courts

While the European Court of Human Rights has not yet held that trials of civilians before military courts are prohibited in all circumstances, it has said that such trials must be exceptional. In such exceptional circumstances the courts must be independent, impartial and competent, and must respect minimum guarantees of fairness. It has required states permitting such trials to show that in each case the trial before a military court was necessary and justified and that the regular civilian courts were unable to undertake such a trial. It has also stated that laws allocating trials of certain categories of offences to military courts were not sufficient justification.<sup>26</sup>

### *5.2. The incompatibility of Pakistani military courts' proceedings with the right to a fair trial*

International standards require that military courts, like all other courts, must be independent, impartial and competent, and in criminal cases must respect minimum guarantees of fairness, including those set out in Article 14 of the ICCPR.

Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards.<sup>27</sup>

#### 5.2.1. Competence, independence and impartiality

Military courts in Pakistan are not independent or impartial. Judges of military courts 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 law degree,<sup>28</sup> and do not enjoy any security of tenure,<sup>29</sup> which are prerequisites of judicial competence and independence.

Members of the office of the Judge Advocate General (the branch of the military comprised of senior officers, lawyers and judges who provide legal services to the military), may supervise the operation of military courts, but do not sit on the bench hearing cases.<sup>30</sup>

Critical decisions with respect to the constitution of courts martial, place of hearing, and final sentences are currently left in the hands of military officers (not judges), which further violates the fundamental requirements of independence of the judiciary.<sup>31</sup>

#### 5.2.2. Public hearings

---

<sup>26</sup> See, *Fair Trial Manual* (second edition), Amnesty International, 2014, pp. 224- 226.

<sup>27</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>

<sup>28</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>29</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>30</sup> Section 103, Pakistan Army Act, 1952.

<sup>31</sup> *Basic Principles on Independence of the Judiciary*, *supra* fn. 20. Principle 14 : 'The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration' and Principle 3: 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.

Fairness requires that trials should be public except for in certain prescribed circumstance,<sup>32</sup> in which good cause exists for conducting parts or all of a hearing *in camera*.

The reasons for any closure of the hearing must be consistent with international standards and should be fully stated on the record and any such closure should be kept to the bare minimum to ensure fairness.

The Pakistani Army Act does not guarantee either public trials in courts martial, or public hearings in courts martial appeals. In an Ordinance passed on 25 February 2015, the government further amended the Army Act to allow judges of military courts to hold *in camera* trials and made a provision for proceedings through video link.<sup>33</sup>

Human rights organizations, trial monitors, journalists and even family members of the accused persons tried by military courts have been denied access to military courts' proceedings.

### 5.2.3. Appeals

The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of courts martial.<sup>34</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>35</sup> *mala fide*,<sup>36</sup> or without jurisdiction."<sup>37</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>38</sup>

It should be noted that under Pakistani law, the scope of judicial review is highly restrictive. 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>39</sup> and "controversial questions of facts...cannot be looked into in this limited extraordinary writ jurisdiction."<sup>40</sup>

---

<sup>32</sup> These include: morals; public order, which relates primarily to order within the courtroom; national security in a democratic society; when the interests of the private lives of the parties so require (for example, to protect identity of victims of sexual violence); and to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interest of justice. See *supra* fn. 18, p. 123.

<sup>33</sup> 'Security for military court judges and prosecutors', *Dawn News*, 25 February 2015, accessed at: <http://www.dawn.com/news/1165793/security-for-military-%20court-judges-and-prosecutors>

<sup>34</sup> Section 133, Pakistan Army Act, 1952.

<sup>35</sup> If the case is referred to or decided by a court lacking the authority to hear and decide the case in question.

<sup>36</sup> If the decision is made in bad faith.

<sup>37</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>38</sup> Const.P.12 of 2010, page 362.

<sup>39</sup> 2014 SCMR 849, Supreme Court, para 6.

<sup>40</sup> 2010 YLR 2895, Lahore High Court, para 14.

## **Pakistan: The trial of civilians by military courts**

According to international standards, where military tribunals exist, their authority should be limited to ruling in the first instance. Consequently, recourse procedures, particularly appeals, should be brought before civilian courts.<sup>41</sup>

Furthermore, the fact that military appellate courts are composed of individuals who are not judges, are not required to have any legal training, and continue to be subjected to the military chain of command violates the right of an appeal before an independent and impartial tribunal, guaranteed under international standards.

Speaking to the ICJ, a former Assistant Advocate General of the Pakistan Army expressed his concern about the appellate procedure in military courts: "The Pakistan Army Act provides that only after confirmation by the Chief of Army Staff (COAS) can the convict file an appeal before Court of Appeals consisting of COAS or officers designated by him. What officer in the chain of command would reverse a decision...confirmed by the COAS?"

### 5.2.4. Judgment

A duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is an essential component of a fair trial.<sup>42</sup> The judgment must also be made public, with the only exceptions being the interest of juvenile persons, or in proceedings concerning matrimonial disputes or the guardianship of children.

Military courts in Pakistan often do not make detailed reasoned judgments.<sup>43</sup> In the course of considering a petition raising fair trial concerns, including access to judgments of military courts and reasons for conviction, the Supreme Court in 2012 directed the Government to make necessary amendments to the Army Act.<sup>44</sup> The Court's directions, however, are yet to be implemented.

It should be noted that judgments in the forty cases already decided by the military courts have not been made public. Family members of at least five people sentenced to death by military courts claim their requests for written judgments of military courts have been denied.

### 5.2.5. Death penalty

Military courts in Pakistan have the power to impose death sentences. 36 out of 40 people convicted by military courts thus far have been sentenced to death. 8 out of the 36 people sentenced to death have been executed (see Section 1 and Annex 1).

Where permissible under international standards, the death penalty may only be imposed pursuant to a final judgment rendered by a competent court after a legal process which affords all possible safeguards to ensure a fair trial, including those set out in Article 14 of the ICCPR. The UN Human Rights Committee has stressed that in cases where the death penalty is imposed, scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a death

---

<sup>41</sup> Principle 17 of the draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

<sup>42</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>43</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>44</sup> 'Focus on inconsistencies in the Army Act', *Dawn News*, 18 November 2012, accessed at: <http://www.dawn.com/news/1165793/security-for-military-%20court-judges-and-prosecutors><http://www.dawn.com/news/765116/focus-on-inconsistencies-in-%20army-act>

## Pakistan: The trial of civilians by military courts

sentence following a trial that does not meet the minimum requirements of fairness under Articles 9 and 14 of the ICCPR is a violation of the right to life guaranteed under Article 6 of the ICCPR.

As noted above, military courts in Pakistan are not independent and the proceedings before them are not consistent with the minimum requirements of fairness set out in Article 14 of the ICCPR. The imposition of death sentences by military courts in Pakistan, therefore, is incompatible with Pakistan's obligations to respect and protect the right to a fair trial and the right to life.

### 5.2.6. Jurisdiction over children

The amendments to the Army Act provide that the Government may transfer a case related to the enumerated offences under the Army Act from *any* court (which *prima facie* includes juvenile courts) to a military tribunal for trial. The amended law also stipulates that in case of inconsistency with other laws, provisions of the Army Act would prevail. The amendments do not expressly exclude juveniles from their ambit.

These over-broad provisions create the possibility that in certain counter terrorism-related cases, the Army Act could override the provisions of the Juvenile Justice System Ordinance (JJSO), 2000, which give juvenile courts exclusive jurisdiction to try individuals below 18 years of age and prohibit the death sentence where juvenile offenders are found guilty.

Families of individuals convicted and sentenced to death by military courts have filed a number of review petitions before various high courts in the country alleging that their sons or brothers were below the age of the 18 at the time of arrest or detention.

In one case, the mother of the convict claims her son, Haider Ali, was arrested in 2009 by military authorities. At the time of arrest, he was only 14 years old and a student of class ten. His whereabouts remained unknown to the family for six years and they finally heard about him in a statement by the military's inter-services public relations announcing that a military court had found Haider Ali guilty of his involvement in "committing heinous (*sic*) offences relating to terrorism" and had sentenced him to death.<sup>45</sup>

In August 2015, Haider Ali's mother challenged the conviction and sentence before the Peshawar High Court citing a number of fair trial concerns as well as raising the issue that he was a child at the time of arrest. In response to the question of Haider Ali's juvenility, the Additional Attorney General (AAG) argued that the amendments to the Army Act superseded all other laws –procedural and substantive- and military courts could legally try individuals suspected of committing terrorism-related offences, even if they were under the age of 18 at the time of offence or had been arrested before the 21<sup>st</sup> constitutional amendment was passed.

In October 2015, the Peshawar High Court delivered its judgment. The Court agreed with the AAG and went on to dismiss the petition, including on the ground that "overriding effect has been given to the amendments made in the Pakistan Army Act over any other law for the time being in force."

---

<sup>45</sup> Press statement by the ISPR, 2 April 2015, accessed at : [http://m.ispr.gov.pk/front/main.asp?o=t-press\\_release&date=2015/4/2](http://m.ispr.gov.pk/front/main.asp?o=t-press_release&date=2015/4/2)

## Pakistan: The trial of civilians by military courts

Under international standards, including the International Covenant on Civil and Political Rights, which Pakistan ratified in 2010, and Convention on the Rights of the Child (CRC), which Pakistan ratified in 1990, as well as the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), juveniles are entitled to all internationally recognized fair trial guarantees that apply to adults, as well as special care and additional protection.

While these standards encourage alternatives to ordinary judicial procedures, they are alternatives that must be more, not less, protective of their needs as children. Under the CRC, the best interests of the child must be taken into account in any encounter that he or she has with State, including in respect of the criminal justice system. The Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) provide that in line with these standards, "in no case...should minors be placed under the jurisdiction of military tribunals."<sup>46</sup>

Far from ensuring special care and additional protection for juveniles, proceedings before Pakistani military courts fall well short of national and international standards requiring fair trials before independent and impartial courts: judges are part of the executive branch of the State and continue to be subjected to military command; judges are not legally trained, let alone specially trained on protecting the rights of the child and the principles related to juvenile justice; the right to appeal to civilian courts is not available; the right to a public hearing is not guaranteed; and a duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is denied. In addition, the procedures of military courts, the selection of cases to be referred to them, the location and timing of trial, and detailed about the alleged offences are kept secret.

Military courts also have the power to pass death sentences, which is expressly and absolutely prohibited under Pakistani and international law for individuals under the age of 18 at the time of the offence.

### 5.2.7. "Confessions" and concerns about torture and ill-treatment

According to the ISPR, all 40 people convicted by military courts have allegedly admitted to their involvement in terrorism before a magistrate during their trials. The secrecy that surrounds military courts' proceedings raises questions about these "confessions" and "admissions" made by the convicts, especially in light of the widespread torture and ill-treatment in detention in Pakistan, particularly those in custody of the military.<sup>47</sup> The ICJ has also received information about torture and ill-treatment of other detainees in military custody, including reports that those being tried by military courts were subjected to enforced disappearance by military authorities. These concerns are exacerbated by the military's refusal to give family members and civil society monitors access to detention centers.

Whether individuals convicted by military courts "confessed" to their guilt out of free will is also highly questionable. For example, family members of Qari Zahir, a man convicted and sentenced to death by a military court, claimed before the Peshawar High Court that Qari Zahir did not have assistance of a defense counsel

---

<sup>46</sup> Principle 7, Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

<sup>47</sup> See, for example, for Taha Siddiqui and Declan Walsh, "In Pakistan, Detainees Are Vanishing in Covert Jails", *New York Times*, accessed at: [http://www.nytimes.com/2015/07/26/world/asia/detainees-vanish-in-secretive-facilities-as-pakistan-fights-taliban.html?\\_r=0](http://www.nytimes.com/2015/07/26/world/asia/detainees-vanish-in-secretive-facilities-as-pakistan-fights-taliban.html?_r=0) and "Torture in 2014: 30 Years of Broken Promises", *Amnesty International*, May 2014, accessed at: <https://www.amnestyusa.org/sites/default/files/act400042014en.pdf>

### **Pakistan: The trial of civilians by military courts**

during trial and was made to give his thumb impression on a piece of paper he could not understand (the alleged confession). The Peshawar High Court dismissed the petition without adequately responding to their concerns.<sup>48</sup> They subsequently appealed to the Supreme Court, where the appeal is still pending.

The absolute right of all persons to be free from torture and other ill-treatment in any circumstances is affirmed in a number of international human rights instruments, including two treaties to which Pakistan is a party: the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 15 of the CAT and Article 14 of Pakistan's Constitution expressly prohibit statements made as a result of torture to be invoked as evidence in any proceedings.

---

<sup>48</sup> *Mst Anwar Bibi v. Federation of Pakistan*, Writ Petition no. 2979-P of 2015, delivered on 14 October 2015.

**Pakistan: The trial of civilians by military courts**

**Annex 1: Details about the 40 civilians convicted by military courts**

	<b>Name</b>	<b>Alleged Organization</b>	<b>Offence charged</b>	<b>Sentence</b>	<b>Date</b>
1.	Noor Saeed	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Death (Executed on 29 Dec 2015)	2 Apr 2015
2.	Haider Ali	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Death	2 Apr 2015
3.	Murad Khan	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Death (Executed on 29 Dec 2015)	2 Apr 2015
4.	Inayatullah	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Death (Executed on 29 Dec 2015)	2 Apr 2015
5.	Israruddin	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Death (Executed on 29 Dec 2015)	2 Apr 2015
6.	Qari Zahir	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Death	2 Apr 2015
7.	Abbas	Not disclosed	"Involvement in heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property"	Life imprisonment	2 Apr 2015
8.	Hazrat Ali	Toheedwal Jihad Group	Attacking Law enforcement agencies, abetting kidnapping/ killing of levies soldiers and collecting funds for attack on Army Public School Peshawar	Death (Executed on 2 Dec 2015)	13 Aug 2015
9.	Mujeeb ur Rehman	Toheedwal Jihad Group	Transporting 10 Suicide Bombers for attack on Pakistan Air Force Base Peshawar/ Law Enforcement Agencies and abetment in attack on Army Public School Peshawar	Death (Executed on 2 Dec 2015)	13 Aug 2015
10.	Sabeel	Toheedwal	Involvement in attack on	Death	13 Aug

**Pakistan: The trial of civilians by military courts**

		Jihad Group	Pakistan Air Force Base Peshawar and a Police Check Post. Transporting 10 suicide bombers and abetment in attack on Army Public School Peshawar	(Executed on 2 Dec 2015)	2015
11.	Molvi Abdus Salam	Toheedwal Jihad Group	Harboring Suicide Bombers, later used in attack on Army Public School Peshawar. Abetting deaths of 2 Colonels and a civilian Director of National Development Complex (NDC)	Death (Executed on 2 Dec 2015)	13 Aug 2015
12.	Taj Muhammad	Tehreek-e-Taliban	Attacking armed forces and harboring Suicide Bombers used in APS attack. Abetting the death of a civilian Director of National Development Complex (NDC)	Death	13 Aug 2015
13.	Ateeq ur Rehman	Toheedwal Jihad Group	Attacking a crime investigation department's police station; providing funds for illegal activities; abetting the deaths of 2 Colonels and a civilian Director of National Development Complex (NDC); abetting the attack on Army Public School Peshawar	Death	13 Aug 2015
14.	Kifayat Ullah	Toheedwal Jihad Group	Using an improvised explosive devices at the residence of 2 civilians and transporting arms and ammunition. Being in league with the accused persons involved in attack on Army Public School Peshawar.	Life imprisonment	13 Aug 2015
15.	Sabir Shah	"An active member of proscribed organization"	Abetting the murder of Advocate Syed Arshad Ali in Lahore	Death	2 Sept 2015
16.	Hafiz Muhammad Usman	"An active member of proscribed organization"	Involvement in sectarian killings in Quetta and attack on the police. Killing and abetting the killing of Hassan Ali Yousafi, Advocate Waliat Hussain and others civilians. He also abetted the killing of two industrialists namely Syed Talib Agha and Syed Jawad Agha "belonging to a particular sect". He was also convicted for attacking and killing four police officers	Death	2 Sept 2015
17.	Asad Ali	Tehreek-e-Taliban Pakistan	Possessing fire arms/ explosives and attacking officials of the Sindh Police, in Qaidabad	Death	2 Sept 2015

**Pakistan: The trial of civilians by military courts**

			Area, Karachi which resulted in death of three individuals		
18.	Tahir Khan	Tehreek-e-Taliban Pakistan	Attacking /breaking of Bannu Jail owing to which number of terrorists managed to escape from the jail. He was also found involved in attacks on Law Enforcement Agencies which resulted in death of one soldier and injuries to another soldier	Death	2 Sept 2015
19.	Fateh Khan	"An active member of proscribed organization"	Slaughtering of a civilian, attacking polio workers team, individuals of Law Enforcement Agency and armed force personnel which resulted in death of a child, eleven Khasadars, two army officers, twenty two soldiers and injuries to one civilian, nine Khasadars and twenty five soldiers	Death	2 Sept 2015
20.	Qari Ameen Shah	Tehreek-e-Taliban Pakistan	Involvement in attacking a Girls Primary School in Khyber Agency, providing funds for terrorists activities, exploding an Improvised Explosive Device and possessing explosives	Life imprisonment	2 Sept 2015
21.	Muhammad Farhan	Jaish-e-Muhammad	Involvement in the attack on the soldiers of Pakistan Rangers, Sindh, at Safoora Chowk, Karachi by an Improvised Explosive Device	Death	21 Sept 2015
22.	Said Zaman Khan	Harkat Ul Jihad-e-Islami	Attacking the Armed Forces in Khyber Pakhtunkhwa, which resulted in death of 6 soldiers, injuries to 5 soldiers and damage to Govt. property	Death	21 Sept 2015
23.	Obaid Ullah	Harkat Ul Jihad-e-Islami	Attacking the Armed Forces in Khyber Pakhtunkhwa, which resulted in death of 2 Soldiers and injuries to 18 Soldiers, possessing a suicide jacket, fire arms / explosives and fabricating huge quantity of explosives	Death	21 Sept 2015
24.	Mehmood	Tehreek-e- Taliban	Attacking Law Enforcement Agencies using improvised Explosive Devices and Rocket Launchers in Kyber Pakhtunkhwa which resulted in death of 2 soldiers and injuries to 13 soldiers	Death	21 Sept 2015
25.	Qari Zubair Muhammad	Tehreek-e- Taliban	Abetting a suicidal attack on a mosque in	Death	21 Sept 2015

**Pakistan: The trial of civilians by military courts**

			Nowshera, which resulted in death 2 soldiers, 3 civilians and injuries to 81 persons as well as possessing firearms/ explosives		
26.	Rab Nawaz	Tehreek-e- Taliban Pakistan	Killing two civilians, processing firearms and abetting attack on Armed Forces at Peshawar which resulted in death of 2 soldiers and severe injuries to another	Death	21 Sept 2015
27.	Muhammad Sohail	Tehreek-e- Taliban Pakistan	Attacking the Armed forces of Pakistan in KPK which resulted in injuries to soldiers. He was also involved in abetting attack on Bannu jail, owing to which, large number of terrorists managed to escape from the jail and also resulted in injuries to 2 police constables and a soldier of frontier constabulary	Death	21 Sept 2015
28.	Muhammad Imran	"Active member of proscribed organization"	Involvement in sectarian killings at Mastung, which resulted in death of 27 persons. He was also found involved in attacking the Law Enforcement Agencies, possessing fir-arms and explosives	Death	21 Sept 2015
29.	Aslam Khan	Tehreek-e-Taliban Pakistan	Attacking Law Enforcement Agencies and civilians, which resulted in death of 4 persons including 1 soldier and injuries to 9 persons including 5 soldiers.	Death	21 Sept 2015
30.	Jameel ur Rehman	Tehreek-e-Taliban (Swat)	Attacking a military convoy which caused death of Maj General Sana Ullah, Lieutenant Colonel Tauseef Ahmed and Lance Naik Muhammad Irfan Sattar. Involvement in kidnapping and slaughtering the employees of Armed Forces and Frontier Constabulary, killing and injuring civilians and planting Improvised Explosive Devices to cause damage to Govt. property.	Death	21 Sept 2015
31.	Jamshed Raza	Harkat ul Jihad-e-Islami	Attacking the Armed Forces of Pakistan including killing of 2 soldiers, possessing fire arms and explosives	Life imprisonment	21 Sept 2015
32.	Muhammad Ghauri	Tehreek-e-Taliban Pakistan	Involvement in an attack on Parade Lane Mosque, Rawalpindi	Death	1 Jan 2016
33.	Abdul Qayyum	Harkat ul Jihad-e-	Attacking the Inter	Death	1 Jan

**Pakistan: The trial of civilians by military courts**

		Islami	Services Intelligence Headquarters, Multan		2016
34.	Muhammad Imran	Tehreek-e-Taliban Pakistan	Involvement in "terrorists acts" and "attacking Law Enforcement Agencies"	Death	1 Jan 2016
35.	Aksan Mehboob	Al-Qaeda	Involvement in "attacking the Law Enforcement Agencies"	Death	1 Jan 2016
36.	Adbul Rauf Gujjar	Sepah-e-Sahaba	Involvement in killing of civilians in Lahore	Death	1 Jan 2016
37.	Muhammad Hashim	Sepah-e-Sahaba	Involvement in killing of civilians in Lahore	Death	1 Jan 2016
38.	Sulaman	Sepah-e-Sahaba	Involvement in killing of civilians in Lahore	Death	1 Jan 2016
39.	Shafqat Farooqi	Sepah-e-Sahaba	Involvement in killing of civilians in Lahore	Death	1 Jan 2016
40.	Muhammad Farhan	Sepah-e-Sahaba	Involvement in killing of civilians in Lahore	Death	1 Jan 2016