

Military Injustice in Pakistan

A Briefing Paper

June 2016

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1. Introduction

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. The expansion of military jurisdiction over civilians was accomplished through the 21st Amendment to Pakistan's Constitution and amendments to the Army Act, 1952. These amendments 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". Both amendments are set to expire on 6 January 2017 pursuant to a "sunset clause", after which they will cease to be in effect (although there is always a possibility they could be renewed).

The National Action Plan envisioned military courts to be a short-term "solution" to try "terrorists", to be operational only for a two-year period during which the Government would bring about necessary "reforms in criminal courts system to strengthen the anti-terrorism institutions".¹ But as of the time of publication of this Briefing Paper, there is little sign of the promised reforms to strengthen the ordinary criminal justice system to effectively handle terrorism-related cases. As discussed below, the Criminal Laws (amendment) Act, 2016, passed by the National Assembly in May 2016, does not address the specific problems with the criminal justice system that were used as a justification for the trial of terrorism-related offences in military courts.

Meanwhile, the newly constituted 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.

In the 18 months since military courts were empowered to try terrorism-related offences, they have convicted at least 81 people, possibly including children, in opaque, secret proceedings. At least 12 people 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 their trials; the specific charges and evidence against the convicts; as well as the judgments of military courts including the essential findings, legal reasoning, and evidence on which the convictions were based.

In this Briefing Paper, the ICJ examines the performance of Pakistan's military justice system for terrorism-related offences since the 21st Amendment was passed in January 2015. It also explains how the trial of civilians in military courts violates Pakistan's obligation under international law to ensure that people charged with criminal offences are tried by independent and impartial courts in proceedings that comply with international fair trial standards.

Pakistan has a legal duty to protect its people against terrorist attacks, and where terrorist attacks occur, a duty to investigate, prosecute and bring perpetrators to justice. 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 around the world has shown that departure from ordinary legal procedures and

¹ Government of Pakistan, Ministry of Information, Broadcasting and National Heritage, accessed at: http://infopak.gov.pk/InnerPage.aspx?Page_ID=46

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safeguards in the name of fighting terrorism is counterproductive, as it feeds and fuels the very violence it is meant to curtail.²

Pakistan must not sacrifice core rule of law principles and deny the rights of accused persons in the name of “speedy trials” through secret proceedings before military courts. Instead, Pakistan should bolster the fair and effective administration of justice by strengthening the police’s capacity of investigation; improve the training of prosecutors for terrorism-related cases; 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 judiciary too should as a matter of urgency consider addressing endemic issues of prolonged delays in trials and allegations that judgments of civilian courts are influenced by external factors.

The ICJ 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 and move towards its abolition.

2. Overview

Since the amendments to the Constitution and the Pakistan Army Act in January 2015, the Government has constituted 11 military courts to hear “terrorism” cases.

These 11 military courts have thus far concluded the trials of at least 105 people, finding the defendants guilty in at least 81 cases. Seventy-seven people have been sentenced to death and four have been given life sentences. Twelve out of the 77 people sentenced to death have been hanged. Families of at least 17 people convicted by military courts have challenged their convictions and sentences. Their petitions are currently pending before the Supreme Court.

Table 1: Cases decided by military courts

Number of trials concluded	105
Convictions	81
Death sentences	77
Life imprisonment	04
No information	24
Number of convicts executed	12

It is important to note that the military has disclosed no information about the fate or whereabouts 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 on other charges; or if their cases have been transferred to other courts.³

² 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>

³ Press statement by the ISPR, 12 December 2015, accessed at: http://m.ispr.gov.pk/front/main.asp?o=t-press_release&latest=1. See also, Press Conference of Lt-General Asim Saleem Bajwa, Director General of the ISPR, 15 June 2016.

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The only public source of information about the convicts, their alleged affiliation with proscribed organizations, the offences they are convicted for, and the sentences they have been given is media statements issued by the Inter Services Public Relations (ISPR). The statements contain vague references to the alleged involvement of the convicts in militancy, and do not specify the nature or extent of the convicts' purported role in the acts of terrorism ascribed to them.⁴

According to information received by the ICJ and statements by the military's media office, those convicted by military courts allegedly belong to various groups accused of carrying out armed attacks: 43 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; seven are allegedly members of Sepah-e-Sahaba; one is said to be a member of Jaish-e-Muhammad; eight are 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".⁵ The organizational affiliation, if any, of seven of the 81 people convicted has not been made public.

Table 1: Alleged organizational affiliation of 81 civilians convicted by military courts

Alleged affiliation	Number of people convicted
Tehreek-e-Taliban	43
Al Qaeda	8
Sepah-e-Sahaba	7
Toheedwal Jihad Group	6
Harkat Ul Jihad-e-Islami	4
Tehreek-e-Taliban (Swat):	1
Jaish-e-Muhammad	1
"active members" of proscribed organizations	4
Not disclosed	7

Some of the incidents these civilians 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;⁶ an attack on a bus carrying Shiite Muslim Hazara pilgrims in Mastung;⁷ the killing of activist Sabeen Mahmood; an attack on Saidu Sharif Airport; and other violent attacks against law enforcement agencies (see Annex 1 for more details). The precise charges for which they have been convicted are not possible to identify because of the opacity of the procedures and the failure of the military authorities to disclose information related to the cases, including judgments. This in itself is a violation of the right to a fair trial (see section 7.2.4).

Twelve civilians convicted and sentenced to death by military courts have been hanged since January 2015:

⁴ See, for example, 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 and press statement by the ISPR, 21 September 2015, accessed at : https://www.ispr.gov.pk/front/main.asp?o=t-press_release&date=2015/9/21

⁵ 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."

⁶ 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>

⁷ 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>

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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.⁸ 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".⁹

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 heinous (sic) offences relating to terrorism, men slaughtering, suicide bombing, abduction for ransom, colossal damage to life and property." The ISPR had announced their death sentences in a press statement issued on 2 April 2015.¹⁰

Two civilians, Obaid Ullah and Muhammad Sohail, were hanged in Sahiwal on 24 March 2016. According to an ISPR statement, Obaid Ullah was convicted and sentenced to death by a military court for his involvement in attacking armed forces personnel in Khyber Pakhtunkhwa, "which resulted in death of 2 soldiers and injuries to 18 Soldiers", and Muhammad Sohail was convicted for "abetting attack on Bannu jail" and his involvement in attacking armed forced personnel.¹¹

On 30 March, two more civilians, Mehmood and Rab Nawaz, were hanged in Kohat. They were both allegedly members of the Tehreek-e-Taliban Pakistan, and were convicted and sentenced to death by military courts on 21 September 2015 for their involvement in killing members of law enforcement agencies and civilians.¹²

3. Offences for which military courts can try civilians

After the 21st Amendment and amendments to the Army Act, 1952, military courts have authority to try persons who claim to, or are known to, belong to "any terrorist group or organization using the name of religion or a sect" and carrying out acts of violence and terrorism, including:

- Attacking military officers or installations;
- Kidnapping for ransom;
- Possessing, storing or transporting explosives, firearms, suicide jackets or other articles;
- Using or designing vehicles for terrorist attacks;
- Causing death or injury;
- Possessing firearms designed for terrorist acts;
- Acting in any way to "over-awe the state" or the general public;
- Creating terror or insecurity in Pakistan;
- Attempting to commit any of the above listed acts within or outside of Pakistan;

⁸ 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/>

⁹ 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.

¹⁰ 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

¹¹ Press statement by the ISPR, 21 September 2015, accessed at : https://www.ispr.gov.pk/front/main.asp?o=t-press_release&date=2015/9/21

¹² *Ibid.*

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- Providing or receiving funding for any of the above-listed acts; and
- Waging war against the state.

In addition, the amendments bring certain offences included in Protection of Pakistan Act, 2014, within the jurisdiction of military courts, when the offences are alleged to have been committed by those claiming to, or known to, belong to "any terrorist group or organization using the name of religion or a sect". These offences include:

- Crimes against minorities;
- Killing, kidnapping, extortion, attacks or assaults on government officials, members of the judiciary, foreign officials, tourists, media personnel, social workers or "other important personalities";
- Destruction of or attacks on energy facilities, gas or oil pipelines, aircrafts and airports, national defense materials and institutions, and educational institutions; and
- Illegally crossing national boundaries "in connection with" any of the above-mentioned offences.

It should be emphasized that the amendments extend the jurisdiction of military courts only to those who claim to or are alleged to both belong to organizations that use the name of "religion or a sect" and to have carried out the above listed offences.

Those charged with committing acts of violence and terrorism, including those listed above, who are accused of being members of separatist or nationalist groups, for example, do not come under the ambit of the amendments.

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 2015.¹³

4. Rationale for establishing military courts and the proposed amendments to the criminal justice system

According to their preambles, the 21st Amendment and amendments to the Army Act, 1952, granted military courts jurisdiction over civilians for offences related to terrorism for the purposes of "expedience" and "speedy trials".

4.1. Alleged failure of civilian courts

Following the attack on the army public school in Peshawar, government officials, military officials, members of Parliament, and media personnel severely criticized the civilian judiciary for its failure to convict terrorism suspects.

¹³ The Pakistan Army (Amendment) Act, 2015, November 2015, accessed at : http://www.na.gov.pk/uploads/documents/1449574923_658.pdf

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Proponents of the use of military courts highlighted the high percentage of acquittals, long periods of trial, overcrowded dockets and the slow progress of proceedings in civilian courts, including special courts such as the Anti-terrorism courts established to try offences related to terrorism under the Anti-terrorism Act, 1997.

They claimed that civilian courts lacked the will to convict those responsible for terrorist attacks and only the military was competent to prosecute terrorism cases and deter future terrorist attacks.

4.2. Security of judges and witnesses

Another rationale offered for trials of terrorism-related acts before military courts was that civilian judges, as well as their families, are at greater risk of threats, intimidation and violence than military officers, including those who serve as judges on military courts. Instead of investing in improve security for the judiciary, the Government indicated that it was unable to provide security to civilian judges, prosecutors and witnesses in terrorism cases, and therefore had to rely on military courts, which is claimed enjoyed greater security.

4.3. Proposed amendments

In May 2016, the National Assembly (lower house of parliament) passed a bill to strengthen the criminal justice system and "root out the evil of terrorism with exemplary deterrence".

The bill proposes the following amendments:¹⁴

- Introduce a vaguely framed offence that makes wounding religious feelings through words (including using loudspeakers) or gestures punishable with one to three years imprisonment;
- Increase the minimum sentence for "forced marriage" from three to five years imprisonment if the victim is a minor or a non-Muslim;
- Increase the sentence for police officers guilty of "neglect/violation of duty" from three months to three years imprisonment;
- Make convictions on the basis of "modern techniques" lawful (previously the law gave the court discretion to allow evidence based on modern techniques to be produced);
- Introduce a new crime of "lynching" in the Anti-terrorism Act, 1997, punishable with three years imprisonment; and
- Introduce long imprisonment sentences (five to seven years) for people who provide "false information" in criminal cases where the prescribed penalty is life imprisonment or death sentence, and one fourth of the sentence in other cases.

These amendments fail to respond to the specific weaknesses of the criminal justice system that were used as the justification for establishing military courts to try terrorism-related cases. For example, they do not respond to the issue of prolonged delays in trials before anti-terrorism and regular criminal courts; lack

¹⁴ Criminal Laws (amendmnet) Act, 2016, accessed at : http://www.na.gov.pk/uploads/documents/1463738605_158.pdf

of adequate witness protection; and allegations that judgments of civilian courts are influenced by external factors.

5. Challenges before the Supreme Court

5.1. Petitions challenging military courts' verdicts

Under Pakistani law, judgments passed by military courts cannot be appealed in civilian courts. However, petitioners can invoke the writ jurisdiction of high courts and the Supreme Court to challenge military courts' proceedings, verdicts and sentences on the grounds of jurisdiction and bad faith (see section 7.2.3).

Families of at least 17 convicts sentenced to death by military courts have petitioned the Supreme Court, challenging the convictions and death sentences given to their sons, brothers and husbands on the ground that military court proceedings were conducted in violation of their right to a fair trial. Specific violations alleged by the petitioners include: denial of the right to counsel of choice; failure to disclose the charges against the accused; and failure to give convicts copies of a judgment with reasons for the verdict and sentence.¹⁵ In some cases, the petitioners have alleged the convicts were subjected to enforced disappearance and torture and other ill-treatment, and in at least two cases, the petitioners have also alleged that the convicts were children under the age of 18 at the time they were arrested by law enforcement agencies.

The Chief Justice of Pakistan constituted a five-member larger bench of the Supreme Court to hear the petitions in February 2016. The Supreme Court has stayed the executions of the convicts in all 17 cases. At the time of publication of this Briefing Paper, the final judgment in all cases is pending.

5.2. Petitions challenging the 21st Amendment and amendments to the Army Act, 1952

Soon after the 21st 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 incompatible with the independence of the judiciary; the right to a fair trial; and the principle of separation of powers recognized by Pakistan's Constitution.

A full-bench of the Supreme Court delivered its judgment in August 2015.¹⁶ 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

¹⁵ See, for example, Nasir Iqbal, "Asma asks SC to order retrial in all cases heard by military courts", 20 June 2016, accessed at : <http://www.dawn.com/news/1266242>

¹⁶ The judgment can be accessed here : http://www.supremecourt.gov.pk/web/user_files/File/Const.P.12of2010.pdf

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.”

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 issued 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.¹⁷

6. 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 in itself contravenes the rule of law.

6.1. 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.

6.2. 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, 1952.¹⁸

¹⁷ 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/>

¹⁸ See, for example, “The new martial powers”, *Dawn News*, 8 January 2015, accessed at: <http://www.dawn.com/news/1155411/the-new-martial-powers>

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Under the Army Act, a military court is composed of three to five serving officers of the armed forces.¹⁹ 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.

6.3. 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.²⁰ 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."²¹

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 7.2.3).

6.4. 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.²²

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.

¹⁹ 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.

²⁰ Section 133-B, Pakistan Army Act, 1952.

²¹ *Ibid.*

²² Section 112, Pakistan Army Act, 1952.

6.5. Secret hearings

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.

6.6. 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.

7. Compatibility with international law

7.1. Trial of civilians by military courts under international law

International standards clarify that the jurisdiction of military tribunals should be restricted solely to specifically military offences committed by military personnel: They should not, in general, be used to try civilians, or to try people for gross human rights violations.

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.²³

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."²⁴ It has also repeatedly called on countries to prohibit trials of civilians before military courts.²⁵

Another source is the *Draft Principles Governing the Administration of Justice Through Military Tribunals*,²⁶ which were adopted by the former UN Sub-

²³ 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.

²⁴ *Ibid.*

²⁵ 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.

²⁶ *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

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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".²⁷

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.²⁸ 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."²⁹

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."³⁰

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

²⁷ *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.

²⁸ *Palamara-Iribarne v Chile*, Judgment of the Inter-American Court of Human Rights, 22 November 2005, paras. 124, 139, 269(14).

²⁹ *Castillo Petruzzi et al. v. Peru* (1999), paras. 127 and 128.

³⁰ *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>

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.³¹

7.2. 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.³²

Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards.³³

7.2.1. Lack of 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,³⁴ and do not enjoy any security of tenure,³⁵ 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.³⁶

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.³⁷

³¹ See, *Fair Trial Manual* (second edition), Amnesty International, 2014, pp. 224- 226.

³² 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/>

³³ 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>

³⁴ 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.'

³⁵ *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.'

³⁶ Section 103, Pakistan Army Act, 1952.

³⁷ *Basic Principles on Independence of the Judiciary*, *supra* fn. 34. 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'.

7.2.2. Absence of public hearings

Fairness requires that trials should be public except for in certain prescribed circumstance,³⁸ 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.³⁹

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.

7.2.3. Unavailability of appeals to civilian courts

The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of courts martial.⁴⁰

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*,⁴¹ *mala fide*,⁴² or without jurisdiction."⁴³ The Supreme Court, responding to petitions challenging the 21st Amendment, reiterated this power of judicial review in cases decided by military courts.⁴⁴

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"⁴⁵ and "controversial questions of facts...cannot be looked into in this limited extraordinary writ jurisdiction."⁴⁶

³⁸ 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.

³⁹ "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>

⁴⁰ Section 133, Pakistan Army Act, 1952.

⁴¹ If the case is referred to or decided by a court lacking the authority to hear and decide the case in question.

⁴² If the decision is made in bad faith.

⁴³ 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."

⁴⁴ Const.P.12 of 2010, page 362.

⁴⁵ 2014 SCMR 849, Supreme Court, para 6.

⁴⁶ 2010 YLR 2895, Lahore High Court, para 14.

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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.⁴⁷

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 violate 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?"

7.2.4. Opacity of judgment

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.⁴⁸

Military courts in Pakistan often do not make detailed reasoned judgments.⁴⁹ 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.⁵⁰ The Court's directions, however, are yet to be implemented.

It should be noted that in the 81 cases already decided by the military courts, the judgments have not at all been made public. Family members of the convicts sentenced to death by military courts claim their requests for written judgments of military courts have been denied.⁵¹

The failure to give reasoned judgments also raises questions about the proportionality of sentences given to those convicted by military courts. Where regular courts sentence a convict to death, for example, they give detailed reasons for why the death sentence was a proportionate sentence than a sentence of life imprisonment. No such reasoning is available for the 77 death sentences given by military courts thus far.

⁴⁷ Principle 17 of the draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

⁴⁸ 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.

⁴⁹ See Babar Sattar, 'Militarized Justice', *The News*, 5 December 2015, accessed at: <http://www.thenews.com.pk/Todays-News-9-355146-Militarised-justice>

⁵⁰ '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-prosecutorshttp://www.dawn.com/news/765116/focus-on-inconsistencies-in-%20army-act>

⁵¹ See, for example, Lahore High Court, Writ Petition No. 5 of 2016 and Peshawar High Court, Writ Petition No. 2979 of 2015. See also Hasnaat Malik, "Top court stays execution of three military court convicts", *Express Tribune*, 10 May 2016, accessed at: <http://tribune.com.pk/story/1100489/top-court-stays-execution-of-three-military-court-convicts/> and "SC to take up appeals against military courts' verdicts", *Dawn News*, 25 February 2016, accessed at: <http://www.dawn.com/news/1241804>

7.2.5. Imposition of the death penalty

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.

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 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.

In December 2014, the UN General Assembly adopted a resolution, for the fifth time since 2007, emphasizing that the use of the death penalty undermines human dignity and calling on those countries that maintain the death penalty to establish a moratorium on its use with a view towards its abolition. 117 UN Member States, a clear majority, voted in favor of a worldwide moratorium on executions as a step towards abolition of the death penalty.⁵²

7.2.6. Improper 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 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.

In its compliance report to Committee on the Rights of the Child (CRC), which oversees implementation of the UN Convention on the Rights of the Child, Pakistan claimed that the JJSO supersedes the Army Act, 1952 and military courts do not have the jurisdiction over children. However, the Attorney General's office has argued the converse in the courts, as is highlighted in the case below.

Haider Ali's mother claims her son 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 press (ISPR) announcing that a military

⁵² Resolution adopted by the General Assembly, U.N. Doc. A/RES/69/186, accessed at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/186. See also, Principle 19, Principle 7, Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

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court had found Haider Ali guilty of his involvement in “committing heinous (*sic*) offences relating to terrorism” and had sentenced him to death.⁵³

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, 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.

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.”⁵⁴

Families of other individuals convicted and sentenced to death by military courts have also filed 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.

Under international standards, including the International Covenant on Civil and Political Rights, which Pakistan ratified in 2010, and the 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.

Under the CRC, the best interests of the child must be taken into account in any encounter that he or she has with State authorities, including in respect of the criminal justice system. While these standards encourage alternatives to ordinary judicial procedures, they are alternatives that must be more, not less, protective of their needs as children, and include: trial without delay and final judgment within six months from the date of charge; the presence of parents during the trial if it is in the best interest of the child; and independent scrutiny of the methods of interrogation including the presence of a lawyer and parent.⁵⁵ The CRC has repeatedly affirmed in respect of a number of countries, that the use of military tribunals to try civilians is incompatible with the Convention on the Rights of the Child.⁵⁶

The UN draft 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.”⁵⁷

⁵³ 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

⁵⁴ Peshawar High Court, Writ Petition No. 2979 of 2015, announced on 14 October 2015.

⁵⁵ Committee on the Rights of the Child, General Comment 10, 25 April 2007, accessed at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

⁵⁶ See, for example, Committee on the Rights of the Child, Concluding observations on Egypt, UN Doc. CRC/C/OPAC/EGY/CO/1 (2011); Committee on the Rights of the Child, Concluding observations on Israel, UN Doc. CRC/C/ISR/CO/2-4 (2013); and UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Concluding Observations: United States of America*, 25 June 2008, CRC/C/OPAC/USA/CO/1, available at: <http://www.refworld.org/docid/4885cfb0a.html>

⁵⁷ Principle 7, Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

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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.

In addition, military courts also have the power to pass death sentences, which is expressly and absolutely prohibited under Pakistani law and international law, including Article 37(a) of the CRC and Article 6(5) of ICCPR, for individuals under the age of 18 at the time of the offence.

7.2.7. Concerns about torture and ill-treatment and enforced disappearance

According to the ISPR, at least 78 out of the 81 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.⁵⁸ The ICJ has also received information about torture and ill-treatment of other detainees in military custody. These concerns are exacerbated by the military’s refusal to give family members and civil society monitors access to these internment centers, which are located in the Federally Administered Tribal Areas (FATA).

Families of convicts have also raised concerns that some of some of the people tried by military courts were subjected to enforced disappearance by military authorities.

An enforced disappearance is “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”⁵⁹

Muhammad Ghauri, one of the convicts sentenced to death by a military court on 1 January 2016, is one such example of an alleged enforced disappearance. In his petition to the Lahore High Court, Muhammad Ghauri’s father, Javed Iqbal Ghauri, claimed his son was a student of the Islamic International University Islamabad, and went “missing” on 7 January 2010. The Supreme Court took notice of the case and directed the Inspector General of Police, Islamabad, to locate Muhammad Ghauri. The Commission of Inquiry on Enforced Disappearances also took up Muhammad Ghauri’s case. The Inspector General of

⁵⁸ 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 and “Torture in 2014: 30 Years of Broken Promises”, *Amnesty International*, May 2014, accessed at: <https://www.amnestyusa.org/sites/default/files/act400042014en.pdf>

⁵⁹ UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 2, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html>

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Police and the intelligence agencies denied that Muhammad Ghauri was in their custody for three years, but finally in 2013 admitted he was detained at an internment center in FATA. According to Javed Iqbal Ghauri, he was not informed of any charges or cases against his son. In January 2016, however, he read in the newspaper that Muhammad Ghauri had been convicted and sentenced to death by a military court.⁶⁰

Javed Iqbal Ghauri challenged his son's conviction and sentence on grounds of violation of the right to a fair trial. On 27 January 2016, the Lahore High Court dismissed his petition. The three-page order of the Court did not address the specific concerns raised by the petitioner, including allegations of enforced disappearance.⁶¹ His appeal is currently pending before the Supreme Court.

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 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.⁶² 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.

8. Conclusion and Recommendations

As discussed above, the operation of military courts in Pakistan has come at great cost to human rights and the judiciary's independence. The promised "quick results", however, are yet to be seen. This is not surprising, as the very rationale of "exceptionalism" behind the establishment of military courts was flawed and deceptive.

The ICJ's 2009 global study "Assessing Damage, Urging Action" on State responses to security threats examined in detail the dangers of the "exceptionalism doctrine", which justifies a departure from the normal legal processes and human rights protections on the basis of the "exceptional" character of the threat.⁶³ In time, many of these measures became permanently incorporated into ordinary law, blinding governments to the actual reasons behind the lack of accountability for terrorism and serious crime.

⁶⁰ Copy of the petition available with the ICJ. See also, Malik Asad, "Curious case of the 'missing' terror convict", *Dawn News*, 29 January 2016, accessed at: <http://www.dawn.com/news/1236109>

⁶¹ Lahore High Court, Rawalpindi bench, Writ Petition No. 197 of 2016.

⁶² *Mst Anwar Bibi v. Federation of Pakistan*, Writ Petition no. 2979-P of 2015, delivered on 14 October 2015.

⁶³ 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>

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Military courts exist to provide for a means to try military personnel for military offences. They are not appropriate, neither in principle nor practice, for terrorism cases, which belong in ordinary courts.

The rationale for empowering military courts to try terrorism related cases was stated to be an “extraordinary situation” that demanded “special measures for speedy trial”. The same justification was given for the Protection of Pakistan Act, passed in July 2014 (just six months before the 21st Amendment), as well as the Anti-Terrorism Act (ATA) in 1997.

The ATA, which promised “speedy justice” at the cost of some basic fair trial rights, progressively displaced the regular criminal justice system, with cases of ordinary murder, robbery, kidnapping and sexual violence regularly being tried by special anti-terrorism courts constituted under the act. Slowly, the “exception” became the norm, and the weaknesses in the operation of the regular criminal justice system remained unresolved.

The same pattern is being repeated with the use of military tribunals: While military courts are convicting and executing people for their involvement in terrorism-related offences in secret trials with widespread denial of fair trial guarantees, there are no signs of the promised reforms in the criminal justice system to strengthen its capacity to try terrorism-related cases. The public’s trust and confidence in the criminal justice system remains low, and some politicians, analysts and activists are now calling for an expansion of military courts’ jurisdiction to try offences such as corruption,⁶⁴ excessive use of force by the police,⁶⁵ and sexual violence.⁶⁶

The frustration of many Pakistanis with what is seen as impunity for terrorism and serious crimes in Pakistan is unmistakable, but there are no overnight solutions to a crisis caused by decades of neglect. Ensuring justice — as opposed to securing a large number of convictions without the fair and impartial adjudication of responsibility — will require major rethinking and reform of the criminal justice system. It will require learning from the successes and failures of other jurisdictions that face similar security threats; ensuring that minimum guarantees of the right to a fair trial are at all times protected; and drawing from the actual everyday experiences of judges, lawyers and investigators, not hasty, ill-conceived measures motivated by the desire for revenge at the cost of the fundamental principles of fairness. In this respect, it is important to bear in mind that protecting people through counter terrorism procedures and protecting fair trial and other human rights are not contradictory, but are rather complimentary and mutually reinforcing objectives.

The continuing operation of military courts to try terrorism-related offences does not help counter the very real terrorist threat facing Pakistan, but it has and will further continue to erode the effectiveness of the country’s administration of justice and the rule of law.

The ICJ, therefore, calls on the Pakistani authorities to:

⁶⁴ “Awan wants military courts to probe offshore investments”, *Dawn News*, 22 April 2016, accessed at: <http://www.dawn.com/news/1253665>

⁶⁵ “Model Town killings: Qadri’s ‘veiled threat’ to govt”, *Dawn News*, 4 January 2016, accessed at: <http://www.dawn.com/news/1230609>

⁶⁶ “Retributive Justice : Try gang rape cases in military courts”, *Express Tribune*, 17 January 2016, accessed at: <http://tribune.com.pk/story/1028811/retributive-justice-try-gang-rape-cases-in-military-courts/>

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- Reverse the system of “military justice”, repeal the 21st Amendment, and transfer all cases of civilians being tried by military tribunals to civilian courts; and
- Amend the Army Act, 1952, to ensure that military courts can only try military personnel for military offences and in no manner have jurisdiction over civilians.

While the 21st Amendment is in force:

- Ensure that the 21st Amendment is not extended at the expiration of the sunset clause in January 2017;
- Ensure procedures of military courts meet fair trial standards in accordance with article 14 of the ICCPR. At the minimum, these include: trial by independent and impartial judges free from the military chain of command; full protection of the right to defense, including the right to confront witnesses and representation by a lawyer of one’s choosing; judgments including the essential findings, evidence and legal reasoning; and the right to appeal before civilian courts;
- Ensure that under no circumstances should cases of children who were under the age of 18 at the time of the alleged offence are transferred to military courts for trial;
- Engage in a process of stakeholder consultations with a view to elaborating concrete and specific recommendations for legislation and other measures aimed at addressing serious flaws in the criminal justice system, including in terrorism cases;
- Set up protection procedures for judges, lawyers, and witnesses in cases of terrorism and other serious crimes;
- Examine and assess the compatibility of Pakistan’s counter-terrorism legislation, in particular the Anti-Terrorism Act, 1997; the Actions (in Aid of Civil power) Regulations, 2011; and the Protection of Pakistan Act, 2014 with domestic and international human rights law and standards, particularly those addressed to the administration of justice, and revise the laws to bring them in conformity with Pakistan’s human rights obligations;
- Provide for access to effective remedies and reparation, including compensation, for people unlawfully arrested, detained, and convicted under Pakistan’s anti-terrorism laws; and
- Reinstate a moratorium on executions with a view to abolishing the death penalty in law and practice.

Annex 1: Details of the 81 civilians convicted by military courts

	Name	Alleged Organization	Offence charged	Sentence	Date
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	Death (Executed on 2 Dec 2015)	13 Aug 2015

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			Peshawar		
10.	Sabeel	Toheedwal Jihad Group	Involvement in attack on Pakistan Air Force Base Peshawar and a Police Check Post. Transporting 10 suicide bombers and abetment in attack on Army Public School Peshawar	Death (Executed on 2 Dec 2015)	13 Aug 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 (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	Death	2 Sept 2015

Military Injustice in Pakistan

			officials of the Sindh Police, in Quaidabad 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 (executed on 24 March 2016)	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 (executed on 30 March 2016)	21 Sept 2015

Military Injustice in Pakistan

25.	Qari Zubair Muhammad	Tehreek-e- Taliban	Abetting a suicide attack on a mosque in Nowshera, which resulted in death 2 soldiers, 3 civilians and injuries to 81 persons as well as possessing firearms/ explosives	Death	21 Sept 2015
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 (executed on 30 March 2016)	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 (executed on 24 March 2016)	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 firearms 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,	Death	1 Jan 2016

Military Injustice in Pakistan

			Rawalpindi		
33.	Abdul Qayyum	Harkat ul Jihad-e-Islami	Attacking the Inter Services Intelligence Headquarters, Multan	Death	1 Jan 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
41.	Muhammad Arbi	Tehreek-e-Taliban Pakistan	Abetting the attack on Bannu Jail and involved in attacking LEAs which caused death and injuries to soldiers	Death	11 Feb 2016
42.	Rafi Ullah	Sepah-e-Sahaba	Abetting the murder of Syed Waqar Haider and causing injury to Abdul Sattar Tahir in Lahore	Death	11 Feb 2016
43.	Qari Asif Mehmood	Sepah-e-Sahaba	Abetting the murder of Syed Waqar Haider and causing injury to Abdul Sattar Tahir in Lahore	Death	11 Feb 2016
44.	Shawaleh	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agency which caused death and injuries to soldiers	Death	11 Feb 2016
45.	Muhammad Zeeshan	Al Qaeda	Involvement in attacking Armed Forces which resulted in death and injuries to soldiers.	Death	11 Feb 2016
46.	Nasir Khan	Al Qaeda	Involvement in attacking Armed Forces which resulted in death and injuries to soldiers.	Death	11 Feb 2016
47.	Shoukat Ali	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces which resulted in death and injuries to soldiers.	Death	11 Feb 2016
48.	Imdad Ullah	Tehreek-e-Taliban Pakistan	Involvement in destruction of an educational institution in District Buner and attacking Law Enforcement Agency which resulted in death and injuries to soldiers.	Death	11 Feb 2016
49.	Muhammad Umar	Tehreek-e-Taliban Pakistan	Involvement in destruction of an educational institution in Pakistan and attacking Armed Forces which resulted in death and injuries to soldiers.	Death	11 Feb 2016
50.	Sabir Shah	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces which resulted in death of soldiers.	Death	11 Feb 2016
51.	Khandan	Tehreek-e-Taliban	Involvement in attacking	Death	11 Feb

Military Injustice in Pakistan

		Pakistan	Armed Forces which resulted in death and injuries to soldiers.		2016
52.	Anwar Ali	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces which resulted in death and injuries to soldiers.	Death	11 Feb 2016
53.	Irfan Ullah	Tehreek-e-Taliban Pakistan	Involvement in killing 10 foreign tourists near Nanga Parbat Base Camp and possessing firearms.	Death	15 March 2016
54.	Mushtaq Ahmed	Tehreek-e-Taliban Pakistan	Involvement in attacking Saidu Sharif Airport, killing employees of Metrological Department and destruction of an educational institution which resulted in death of civilians and injuries to soldiers, and possessing firearms and explosives.	Death	15 March 2016
55.	Muhammad Nawaz	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces which resulted in death of soldiers, and possessing fire arms and explosives.	Death	15 March 2016
56.	Taj Gul	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agencies, which resulted in death of police constables and levies persons, and possessing firearms, ammunition and explosives.	Death	15 March 2016
57.	Asghar Khan	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces, Law Enforcement Agencies and destruction of an educational institution which resulted in death and injuries to soldiers and civilians, and possessing fire arms and explosives	Death	15 March 2016
58.	Ahmed Ali	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces, Law Enforcement Agencies and destruction of an educational institution which resulted in death and injuries to soldiers and civilians, and possessing fire arms and explosives	Death	15 March 2016
59.	Mian Said Usman	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces, Law Enforcement Agencies and destruction of an educational institution which resulted in death and injuries to soldiers and civilians, and possessing fire arms and explosives	Death	15 March 2016
60.	Bakht-e-Ameer	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces which resulted in death and injuries to officers and soldiers and possessing explosives	Death	15 March 2016

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61.	Aziz Khan	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces and destruction of communication system in Gulibagh which caused death and injuries to soldiers and possessing a suicide jacket	Death	15 March 2016
62.	Fazal-e-Ghaffar	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces that caused death and injuries to soldiers and possessing a suicide jacket	Death	15 March 2016
63.	Asghar Khan	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces, Law Enforcement Agencies and destruction of educational institutions which caused death and injuries to soldiers and civilians	Death	15 March 2016
64.	Ikram Ullah	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces and Law Enforcement Agencies which caused death and injuries to officers, soldiers and civilians as well as damage to helicopters	Death	15 March 2016
65.	Haider	Not disclosed	Involvement in killing civilians in Quetta	Death	15 March 2016
66.	Muhammad Umar	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces of Pakistan and Law Enforcement Agencies which resulted in death of soldiers and injuries to police officials, and "fabrication of explosives".	Death	3 May 2016
67.	Hameedullah	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agency which resulted in death of Senior Superintendent of Police Muhammad Hilal Khan, Colonel Mustafa Jamal and Captain Ishfaq and possessing firearms and explosives.	Death	3 May 2016
68.	Rehmatullah	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agency which resulted in death of Senior Superintendent of Police Muhammad Hilal Khan, Colonel Mustafa Jamal and Captain Ishfaq and possessing firearms and explosives.	Death	3 May 2016
69.	Muhammad Nabi	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agency which resulted in death of Senior Superintendent of Police Muhammad Hilal Khan, Colonel Mustafa Jamal and Captain Ishfaq and possessing firearms and explosives.	Death	3 May 2016

Military Injustice in Pakistan

70.	Moulvi Dilbar Khan	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agency which resulted in death of Senior Superintendent of Police Muhammad Hilal Khan, Colonel Mustafa Jamal and Captain Ishfaq and possessing firearms and explosives.	Death	3 May 2016
71.	Rizwan Ullah	Tehreek-e-Taliban Pakistan	Involvement in killing of a civilian, kidnapping WAPDA employee and attacking Armed Forces which resulted in injuries to an officer and a soldier, and possessing firearms and explosives.	Death	3 May 2016
72.	Gul Rehman	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces which resulted in death of a civilian and a soldier, and possessing explosives	Death	3 May 2016
73.	Muhammad Ibrahim	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces and destruction of Babu Chamtalai Bridge which resulted in death of civilians and a soldier, and possessing of explosives.	Death	3 May 2016
74.	Sardar Ali	Tehreek-e-Taliban Pakistan	Involvement in attacking Armed Forces, destruction of educational institutions that resulted in injuries and death of soldiers, and possessing explosives.	Death	3 May 2016
75.	Sher Muhammad Khan	Tehreek-e-Taliban Pakistan	Involvement in killing a civilian, attacking Armed Forces which resulted in injuries and death of soldiers, and possessing firearms and explosives.	Death	3 May 2016
76.	Muhammad Jawad	Tehreek-e-Taliban Pakistan	Involvement in attacking Law Enforcement Agencies, killing of a civilian, and possessing firearms, ammunition and explosives.	Death	3 May 2016
77.	Saad Aziz	Al Qaeda	Involvement in attack on a bus of Ismaili community at Safora Chowrangi Karachi; attack on Saleh Masjid Karachi; killing of activist Sabeen Mahmood and attack on law enforcement agencies.	Death	12 May 2016
78.	Tahir Hussain	Al Qaeda	Involvement in attack on a bus of Ismaili community at Safora Chowrangi Karachi; attack on Saleh Masjid Karachi; killing of activist Sabeen Mahmood and attack on law enforcement agencies.	Death	12 May 2016
79.	Asadur Rehman	Al Qaeda	Involvement in attack on	Death	12 May

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			a bus of Ismaili community at Safora Chowrangi Karachi; attack on Saleh Masjid Karachi; killing of activist Sabeen Mahmood and attack on law enforcement agencies.		2016
80.	Hafiz Nasir	Al Qaeda	Involvement in attack on a bus of Ismaili community at Safora Chowrangi Karachi; attack on Saleh Masjid Karachi; killing of activist Sabeen Mahmood and attack on law enforcement agencies.	Death	12 May 2016
81.	Muhammad Azhar	Al Qaeda	Involvement in attack on a bus of Ismaili community at Safora Chowrangi Karachi; attack on Saleh Masjid Karachi; killing of activist Sabeen Mahmood and attack on law enforcement agencies.	Death	12 May 2016



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