



# **International Commission of Jurists**

## **Military Injustice in Pakistan**

### **Briefing Paper**

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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 21<sup>st</sup> Amendment to Pakistan's Constitution and amendments to the Army Act, 1952. These amendments allowed 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 lapsed on 6 January 2017 pursuant to a "sunset clause".

Despite earlier promises that the use of military courts to try civilians was only a "temporary" and "exceptional" measure, after the expiration of the 21<sup>st</sup> Amendment Parliament enacted additional amendments in the law to renew military courts' jurisdiction over civilians. On 30 March 2017, Parliament passed the 23<sup>rd</sup> constitutional amendment and amendments to the Army Act, 1952, with retrospective effect from 7 January 2017 (when the previous amendments to the law had lapsed). Once again, these amendments were enacted for a two-year period from the day of their commencement, and are due to expire on 30 March 2019. The preambles of the amendments asserted that military courts "have yielded positive results in combating terrorism" and that it was in "national interest" to extend them for an additional term.

The National Action Plan had envisioned the use military courts in this manner to be a short-term "solution" for the purpose of effectively prosecuting "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".<sup>1</sup> Now, more than four years have passed since military courts were first empowered to try civilians and there is little sign of the promised reforms to strengthen the ordinary criminal justice system to effectively handle terrorism-related cases.

Meanwhile, the 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 four years since military courts were empowered to try terrorism-related offences, they have convicted at least 641 people, possibly including children, in opaque, secret proceedings. Only five people have been acquitted.<sup>2</sup> At least 56 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 21<sup>st</sup> and later the 23<sup>rd</sup> amendments came into force. 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.

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<sup>1</sup> Government of Pakistan, Ministry of Information, Broadcasting and National Heritage, accessed at: [http://infopak.gov.pk/InnerPage.aspx?Page\\_ID=46](http://infopak.gov.pk/InnerPage.aspx?Page_ID=46)

<sup>2</sup> Interview of DG ISPR, Asif Ghafoor, Power Play, ARY News, 2 January 2019, accessed at: <https://www.youtube.com/watch?v=YdzzcuBii8c>

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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 safeguards in the name of fighting terrorism is counterproductive, as it feeds and fuels the very violence it is meant to curtail.<sup>3</sup>

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**

Like the 21<sup>st</sup> Amendment, the 23<sup>rd</sup> Amendment to the Constitution inserts the Pakistan Army Act, 1952, and certain provisions of the Anti-Terrorism Act, 1997, into the first schedule of the Constitution. Laws in the first schedule are exempt from the operation of Article 8 (1) and (2) of the Constitution, which stipulate that the State shall not pass any law that violates fundamental rights, and that any law that violates the fundamental rights provisions of the Constitution shall be void.

The 23<sup>rd</sup> Amendment also provides that for offences related to terrorism committed by those who claim to, or are known to, belong to "any terrorist group or organization misusing the name of religion or a sect", Article 175 (3) of the Constitution, which enshrines the principle of the separation of the judiciary from the executive, will not be applicable.

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.

Military courts have thus far concluded the trials of at least 646 people, finding the defendants guilty in at least 641 cases (a rate of 99.2 percent). Some 345

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<sup>3</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>

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people have been sentenced to death and 296 people have been given imprisonment sentences. At least 56 out of the 345 people sentenced to death have been hanged.

### Cases decided by military courts

Number of trials concluded	646
Convictions	641
Death sentences	345
Imprisonment sentences	296
Acquittals	05
Number of convicts executed	56

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.<sup>4</sup> Where convicts are given imprisonment sentences, even this information is not disclosed.

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;<sup>5</sup> an attack on a bus carrying Shiite Muslim Hazara pilgrims in Mastung;<sup>6</sup> the killing of activist Sabeen Mahmood; an attack on Saidu Sharif Airport; and other violent attacks against law enforcement agencies. 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 6.2.4).

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<sup>4</sup> 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](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](https://www.ispr.gov.pk/front/main.asp?o=t-press_release&date=2015/9/21)

<sup>5</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>6</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>

### **3. Offences for which military courts can try civilians**

After the 23<sup>rd</sup> Amendment to the Constitution and amendments to the Army Act, 1952, military courts have jurisdiction to try people who claim to, or are known to, belong to "any terrorist group or organization misusing the name of religion or a sect" and are accused of carrying out acts of violence and terrorism, including:

- Raising arms or waging war against Pakistan;
- Attacking the armed forces or law enforcement agencies of Pakistan, or attacking any civil or military 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;
- Acting in any way to "over-awe the state" or the general public or "sect or religious minority";
- Creating terror or insecurity in Pakistan or attempting to commit any of the "said acts within or outside of Pakistan"; and
- Providing or receiving funding for any of the above-listed acts.

In addition, military courts have jurisdiction to try certain offences under the Anti-Terrorism Act, 1997, including the "use or threat of action" involving and of the following:

- Grievous violence against a person or grievous bodily injury or harm to a person
- Grievous damage to property
- Acts that are likely to cause death or endangers a person's life
- Firing on religious congregations or places of worship
- Burning of vehicles or any other serious form of arson
- "Serious coercion or intimidation" of a public servant to force them to discharge or to refrain from discharging their lawful duties
- "Acts as part of armed resistance by groups or individuals against law enforcement agencies"

It should be emphasized that the amendments extend the jurisdiction of military courts only to those who claim to or are alleged to belong both to organizations that misuse 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 (see section 6.2.7).

The amended Army Act, 1952, also gives military courts retrospective powers, meaning that they are competent to try persons for conduct that occurred prior to the amendments. The law also provides all those associated with military courts complete indemnity from prosecution or other legal proceedings for actions taken in "good faith" or "intended to be done" under the law.

The revised system of military courts include three "safeguards" that were not a part of the previous set of amendments passed in 2015: The Army Act (as amended) now provides that the Qanoon-e-Shahadat Order, 1984 (the Evidence Act) will be applicable to military trials; that the accused will have the right to

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counsel of their choice; and the suspects detained under the new law will be informed of the charges against them within 24 hours of arrest.

These purported safeguards have failed to solve the existing deficiencies in due process and fair trial guarantees. For example, the laws by which civilians are tried by military courts (i.e. the Army Act, 1952 and the Army Act Rules, 1954) already recognized the fundamental rights of defense, including the right to engage counsel of choice. They also provided that rules of evidence in military courts' proceedings "shall be the same as those which are followed in criminal courts."

However, these safeguards are routinely violated in practice during military courts' proceedings. These violations are made possible by the opacity and secrecy with which military courts operate and the complete lack of oversight or possibility of appeal to civilian courts (see section 6.2.2).

## **4. Challenges before the high courts and the Supreme Court**

### **4.1 Petitions challenging decisions of military courts**

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 *coram non iudice* (decided by a court that lacks authority), lack of jurisdiction and bad faith (see section 6.2.3).

#### **4.1.1. Peshawar High Court (2018)**

In October 2018, the Peshawar High Court set aside the convictions of more than 70 people who were tried by military courts on various terrorism-related charges.<sup>7</sup> The Court ordered their release after finding the proceedings had been conducted in bad faith and that there was effectively no evidence against the accused persons.

The PHC's judgment confirms concerns raised by human rights groups, including the ICJ, that proceedings of military courts violate basic fair trial standards under the Constitution as well as international law. The Court's findings also demonstrate how "speedy justice" has come at the cost of basic principles of fairness, and how the State has not only failed to prove the guilt of the accused before independent and impartial tribunals, it has perpetrated gross human rights violations in the process.

First, the PHC questioned the competence of the defence counsel of the accused. Under the Army Act, accused persons have the right to engage private civilian defence counsel at their expense. The Court found it suspicious that only one lawyer from Punjab was engaged by all accused persons, and that even though families of a number of convicts had engaged "costly and senior counsel"<sup>8</sup> to challenge their convictions in review before the high court, during their military trials they had allegedly "consented" to be represented by the same defence counsel with only five or six years experience. The Court also expressed concern that it was not clear what language the counsel communicated with the accused, and whether they were allowed to consult with him confidentially.

The Court characterized the defence counsel as a "dummy",<sup>9</sup> and held that the trials were a "complete prosecution show", where the accused were "denied of their legal and fundamental right" to engage defence counsel of their choice and present a defence.<sup>10</sup>

Second, the Court questioned how in all cases, the primary source of evidence was "confessional statements" by the accused. The Court then described in detail the unlawful way in which the "confessions" of the accused were recorded: Confessional statements of all defendants were in the same handwriting and in the same "tone and style"; accused persons were handed back to military authorities after their statements were recorded; a number of "confessions" were recorded years after the accused were first arrested; and the accused were detained in internment centers before and after their "confessions" where they

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<sup>7</sup> Peshawar High Court, Writ Petition 536-P of 2018, 18 October 2018.

<sup>8</sup> Ibid., p. 166.

<sup>9</sup> Ibid..

<sup>10</sup> Ibid.

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had no access to their families, lawyers, or the outside world. This raised concern that the “confessions” were obtained after torture or other ill treatment.<sup>11</sup>

The Court observed that Pakistani law and jurisprudence spanning decades clarifies that in recording confessions, the magistrate has to observe a number of mandatory precautions to ensure they are voluntary, and that a confession would have no legal or evidentiary worth if these directions were not followed.

Applying the law on confessions to the facts of the case, the Court held that all such safeguards had been flouted in proceedings before military courts, and as a result, the statements could not be relied on as evidence to secure convictions.

Third, the Court highlighted the link between enforced disappearances and proceedings before military courts. It described how a number of accused were picked up by military authorities as far back as 2008 and kept in secret detention for many years before their military trials. Even when questioned by the courts, State agencies kept denying any knowledge of their whereabouts, until their names appeared in the military’s press statement about people convicted and sentenced to death by military courts. The Court indicated that in many cases, military courts’ proceedings appeared to have been a ploy to give legal cover to the practice of enforced disappearances and secret detentions in internment centers.

Finally, the Court questioned the rehearsed nature of military courts’ proceedings; the arbitrariness in military courts’ sentencing; and the secrecy surrounding the entire process - from registration of criminal complaints against the accused to the final judgment against them.

These findings led the PHC to conclude that these were cases of “no evidence” and were “based on malice of facts and law.”<sup>12</sup>

The Government has challenged the judgment before the Supreme Court, and the SC has suspended the operation of the judgment pending the hearing of the appeal. At the time of the publication of this briefing paper, the appeal is pending before the Supreme Court.

### **4.1.2. Supreme Court (2016)**

The Supreme Court has in the past dismissed review petitions in cases with nearly identical facts to the petitions before the PHC.

In 2016, families of at least 16 convicts sentenced to death by military courts 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 included: 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.<sup>13</sup> In some cases, the petitioners alleged that 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.

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<sup>11</sup> Ibid., p. 160.

<sup>12</sup> Ibid., p. 173.

<sup>13</sup> 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>

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In August 2016, the Supreme Court delivered its judgment and dismissed all petitions without considering the allegations in any detail. It reiterated the limitations of its review jurisdiction; ruled that military courts had jurisdiction to try the accused in all cases; stated that there was no evidence of bad faith in the selection of cases for trial before military courts or the proceedings; and held there was no apparent illegality or deficiency in evidence or reasoning by the military courts.

The SC did not question why all accused had “confessed” to their alleged crimes, or why the safeguards guaranteed under Pakistani law to ensure confessions are voluntary were not adhered to in military courts’ proceedings. Disturbingly, in a sweeping judgment, the Court held that since the statements purported to admit guilt were recorded by a magistrate and were not retracted, they stood “proved”.

The Court also did not question why all accused voluntarily agreed to be defended by officers belonging to the armed forces instead of civilian defense lawyers – a right guaranteed to them under the law.

Furthermore, while in the past, the Supreme Court has acknowledged the unlawfulness of keeping people in secret detention, in this case, the Court held that the circumstances in which people were arrested, even if they were forcibly disappeared and kept in secret detention for years, was not relevant to its review jurisdiction.

It should be recalled that in August 2015, 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.<sup>14</sup> 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.<sup>15</sup>

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<sup>14</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)

<sup>15</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/>

## **5. 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.

### **5.1. 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.

### **5.2. Composition of military courts**

The procedure for trial of alleged acts of terrorism follows the procedures of courts martial in cases under the Army Act, 1952.<sup>16</sup>

Under the Army Act, a military court is composed of three to five serving officers of the armed forces.<sup>17</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.

### **5.3. 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>18</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>19</sup>

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<sup>16</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>

<sup>17</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>18</sup> Section 133-B, Pakistan Army Act, 1952.

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

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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 6.2.3).

### **5.4. 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>20</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.

### **5.5. 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.

### **5.6. Location**

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

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<sup>20</sup> Section 112, Pakistan Army Act, 1952.

## **6. Applicable international law and standards**

### **6.1. 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.<sup>21</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>22</sup> It has also repeatedly called on countries to prohibit trials of civilians before military courts.<sup>23</sup>

Another source is the *Draft Principles Governing the Administration of Justice Through Military Tribunals*,<sup>24</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>25</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

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<sup>21</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>22</sup> Ibid.

<sup>23</sup> For example, Human Rights Committee, Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997) para 20; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) para 14; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) para 12; Tajikistan, UN Doc. CCPR/CO/84/ TJK (2004) para 18.

<sup>24</sup> *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

<sup>25</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.

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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>26</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>27</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>28</sup>

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>29</sup>

## 6.2. 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.<sup>30</sup>

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<sup>26</sup> *Palamara-Iribarne v Chile*, Judgment of the Inter-American Court of Human Rights, 22 November 2005, paras. 124, 139, 269(14).

<sup>27</sup> Castillo Petruzzi et al. v. Peru (1999), paras. 127 and 128.

<sup>28</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>

<sup>29</sup> See, *Fair Trial Manual* (second edition), Amnesty International, 2014, pp. 224- 226.

<sup>30</sup> For more details on international standards on the trial of civilians before military courts, see *International Commission of Jurists*, "The trial of civilians by military courts", Section 5, accessed at : <http://www.icj.org/pakistan-military-justice-system-an-affront-to-human-rights-new-analysis-brief/>

## Military Injustice in Pakistan

Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards.<sup>31</sup>

### 6.2.1. 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,<sup>32</sup> and do not enjoy any security of tenure,<sup>33</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>34</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>35</sup>

### 6.2.2. Absence of public hearings

Fairness requires that trials should be public except for in certain prescribed circumstance,<sup>36</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. 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.

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<sup>31</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>32</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>33</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>34</sup> Section 103, Pakistan Army Act, 1952.

<sup>35</sup> *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.'

<sup>36</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.

### 6.2.3. Bar on appeals to civilian courts

The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of courts martial.<sup>37</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 judge*,<sup>38</sup> *mala fide*,<sup>39</sup> or without jurisdiction.”<sup>40</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>41</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>42</sup> and “controversial questions of facts...cannot be looked into in this limited extraordinary writ jurisdiction.”<sup>43</sup>

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>44</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 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?”

### 6.2.4. 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

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<sup>37</sup> Section 133, Pakistan Army Act, 1952.

<sup>38</sup> If the case is referred to or decided by a court lacking the authority to hear and decide the case in question.

<sup>39</sup> If the decision is made in bad faith.

<sup>40</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 judge* 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>41</sup> Const.P.12 of 2010, page 362.

<sup>42</sup> 2014 SCMR 849, Supreme Court, para 6.

<sup>43</sup> 2010 YLR 2895, Lahore High Court, para 14.

<sup>44</sup> Principle 17 of the draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

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interest of juveniles, or proceedings concerning matrimonial disputes or the guardianship of children.<sup>45</sup>

Military courts in Pakistan often do not make detailed reasoned judgments.<sup>46</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>47</sup> The Court's directions, however, are yet to be implemented.

It should be noted that in the 646 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.<sup>48</sup>

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 death sentences given by military courts thus far.

### 6.2.5. 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 2018, the UN General Assembly adopted a resolution, for the seventh 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.

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<sup>45</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>46</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>47</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>

<sup>48</sup> 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>

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120 UN Member States, a clear majority, voted in favor of a worldwide moratorium on executions as a step towards abolition of the death penalty.<sup>49</sup>

### **6.2.6. Concerns about torture and ill-treatment and enforced disappearance**

According to the ISPR, more than 97 per cent of the 345 people sentenced to death 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,<sup>50</sup> especially in light of Peshawar High Court’s findings discussed above (see section 4.1.1). 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 primarily located in the former Federally Administered Tribal Areas, which after a constitutional amendment in 2018 are now a part of the Khyber Pakhtunkhwa province.

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.

In a number of cases, families have petitioned high courts and the Supreme Court, alleging people convicted by military courts had been subjected to enforced disappearance by military authorities as far back as 2008 and kept in secret detention for many years before their military trials. State agencies kept denying any knowledge of their whereabouts, until their names appeared in ISPR press statement on people convicted and sentenced to death by military courts. The Peshawar High Court’s judgment (see section 4.1.1.) has confirmed their concerns.

The convictions of persons by military courts thereby effectively “legitimize” the act of enforced disappearance, since the courts in most cases do not look into these serious violations or consider their effects on the capacity to receive a fair trial or in any way facilitate redress and accountability. As a result, people “disappeared” by law enforcement agencies years before military courts were even authorized to try cases of civilian terrorism suspects are left with little legal recourse to challenge their “disappearance”.<sup>51</sup>

### **6.2.7. Equality before the law and non-discrimination**

As discussed above, the amendments extend the jurisdiction of military courts only to those who claim to or are alleged to belong both to organizations that misuse the name of “religion or a sect” and to have carried out certain terrorism-related offences. Those charged with committing acts of violence and terrorism,

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<sup>49</sup> See <https://deathpenaltyinfo.org/node/7277>. See also, Principle 19, Principle 7, Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

<sup>50</sup> See Reema Omer, “Suspect Confessions”, *Dawn News*, 13 November 2016, accessed at: <https://www.dawn.com/news/1295973/suspect-confessions>

<sup>51</sup> See Reema Omer, “Crisis of Impunity”, *Dawn News*, 31 January 2017, accessed at: <https://www.dawn.com/news/1311707/crisis-of-impunity>

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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. This creates two separate systems of justice for people accused of committing the same offences on the basis of whether they meet the vaguely defined criteria of “misusing religion or sect.”

The application of the amendments to people belonging to organizations that “misuse the name of religion or a sect” alone appears incompatible with the right to equality before the law and non-discrimination, including under Article 26 of the ICCPR. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees equal and effective protection against discrimination on any ground such as race, sex, language, religion, and political or other opinion.

The Human Rights Committee has interpreted “discrimination” to mean “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion...and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>52</sup>

### **6.3. Concluding Observations of UN treaty-monitoring bodies**

In 2017, both the Human Rights Committee and the Committee against Torture reviewed Pakistan’s implementation of the ICCPR and CAT respectively for the first time. In their Concluding Observations, both committees raised concern about the trial of civilians by military courts.

#### **6.3.1. Human Rights Committee**

In July 2017, the UN Human Rights Committee carried out its first review of Pakistan’s implementation of the ICCPR.

The Committee expressed concern at the extension of the jurisdiction of military courts to civilians accused of terrorism-related offences; the high number of “confessions” without adequate safeguards; the failure to provide defendants the right to appoint legal counsel of their own choice; and lack of appeal to civilian courts; and the secrecy of the proceedings.

The Committee recommended that Pakistan review “the legislation relating to the military courts with a view to abrogating their jurisdiction over civilians and their authority to impose the death penalty” and “reform the military courts to bring their proceedings into full conformity with articles 14 and 15 of the Covenant in order to ensure a fair trial.”<sup>53</sup>

#### **6.3.2. Committee against Torture**

In April 2017, the Committee against Torture reviewed Pakistan’s implementation of CAT.

In its Concluding Observations, the Committee expressed deep concern that Pakistan had authorized military courts to try civilians for terrorism-related offences, “particularly in view of the lack of independence of military court

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<sup>52</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <https://www.refworld.org/docid/453883fa8.html>, para 7.

<sup>53</sup> UN Human Rights Committee, Concluding observations on the initial report of Pakistan, 23 August 2017, U.N. Doc. CCPR/C/P AK/CO/1, para. 24.

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judges, which are within the military hierarchy” and the “practices of such courts, including the holding of closed trials.”<sup>54</sup>

The Committee recommended that Pakistan “[p]ut an end to the use of military courts for terrorism-related prosecutions, transfer criminal cases brought against civilians from military courts to civil courts and provide the opportunity for appeal in civil courts of cases involving civilians that have already been adjudicated under military jurisdiction.”<sup>55</sup>

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<sup>54</sup> UN Committee against Torture, Concluding observations on the initial report of Pakistan, 1 June 2017, U.N. Doc. CAT/C/PAK/CO/1, para 10.

<sup>55</sup> *Ibid.*, para. 13(b).

## **7. 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.<sup>56</sup> 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.

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,<sup>57</sup> excessive use of force by the police,<sup>58</sup> and sexual violence.<sup>59</sup>

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

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<sup>56</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>

<sup>57</sup> "Awan wants military courts to probe offshore investments", *Dawn News*, 22 April 2016, accessed at: <http://www.dawn.com/news/1253665>

<sup>58</sup> "Model Town killings: Qadri's 'veiled threat' to govt", *Dawn News*, 4 January 2016, accessed at: <http://www.dawn.com/news/1230609>

<sup>59</sup> "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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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:

- Ensure the jurisdiction of military courts to try civilians is not extended beyond 30 March 2019.

While the 23<sup>rd</sup> Amendment is in force:

- 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; and the Actions (in Aid of Civil power) Regulations, 2011, 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.