



UNITED NATIONS HUMAN RIGHTS COUNCIL

28th Session of the Working Group on the Universal Periodic Review
6 – 17 November 2017

**INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF PAKISTAN**

Submitted on 30 March 2017

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

P.O. Box, 91, Rue des Bains, 33, 1211 Geneva 8, Switzerland Tel: +41(0) 22 9793800 –
Fax: +41(0) 22 979 3801 – Website: <http://www.icj.org> E-mail: info@icj.org

SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE UNIVERSAL PERIODIC REVIEW OF PAKISTAN

Introduction

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review (UPR) of Pakistan.
2. In this submission, the ICJ raises concern about the following issues:
 - a. Trials of civilians by military tribunals;
 - b. Enforced disappearances;
 - c. Torture and other ill-treatment;
 - d. Blasphemy laws; and
 - e. International human rights instruments.
3. With respect to each of the above-mentioned concerns, the ICJ calls upon the Working Group on the UPR and the Human Rights Council to make a number of recommendations to the Pakistani authorities.

(a) Trials of civilians by military tribunals

4. In January 2015, Pakistan empowered military courts to try civilians for terrorism-related offences as part of a 20-point "National Action Plan", adopted by the Government following the horrific attack on the Army Public School in Peshawar in December 2014. 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 allowed military courts to try civilians for offences related to "terrorism", allegedly committed by those who claim to, or are known to, belong to a terrorist organization "using the name of religion or a sect". Both sets of amendments lapsed on 6 January 2017 pursuant to a two-year "sunset clause". In the two years the amendments were operational, military courts convicted 274 people for various terrorism-related offences; 161 civilians were sentenced to death and 113 civilians were given prison sentences. At least 21 civilians given death sentences have since been executed by hanging.¹
5. The trial of civilians by military courts is incompatible with international standards. International standards clarify that the jurisdiction of military tribunals should be restricted solely to specifically military offences committed by military personnel. The UN Human Rights Committee, for example, has stated, "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",² and has repeatedly called on countries to prohibit trials of civilians before military courts.³
6. Furthermore, the ICJ has documented how proceedings before Pakistani military courts fall far short of national and international fair trial standards: Judges are part of the executive branch of the State and continue to be subjected to military command; the right to appeal to civilian courts is not available; the right to a public hearing is not guaranteed; a duly reasoned, written judgment – detailing both the essential findings and the evidence and legal reasoning on which the said findings are based – is denied; the procedures of military courts, the selection of cases to be referred to them, the location and timing of trial, and details about the alleged offences are kept secret; the right to legal counsel of choice is denied; and a very high number of convictions are based on "confessions" without adequate safeguards against torture and ill treatment.⁴ The ICJ has also documented how a number of

civilians tried by military courts were subjected to enforced disappearance and kept in secret detention by military authorities before their military trials.⁵ Furthermore, the imposition of the death penalty after clearly unfair trials is also both a violation of the right to life and of the right to be free from torture and other ill-treatment.⁶ Finally, the ICJ has also received reports that military courts have put children on trial, which is prohibited under international law, including the Convention on the Rights of the Child.⁷

7. Notwithstanding the fact that the Pakistani authorities have failed to address any of the serious human rights concerns raised during the two years when military courts were empowered to try civilians for terrorism-related offences, on 28 March 2017 Parliament once again passed legislation to renew the jurisdiction of military courts to try civilian terrorism suspects in secret trials for a further two years.⁸

(b) Enforced disappearance

8. During its second UPR, Pakistan accepted a number of recommendations on ending the practice of enforced disappearances, including by committing to criminalizing enforced disappearances and to bringing perpetrators to justice.⁹ At the time of writing, however, Pakistan has failed to implement either of these recommendations.
9. On 26 February 2013, the UN Working Group on Enforced and Involuntary Disappearances (WGEID) published its report on Pakistan following its visit to the country in September 2012.¹⁰ The report expressed concern at the continuing practice of enforced disappearances in Pakistan and made a series of recommendations to the Government. One of the recommendations was that the crime of enforced disappearance be included in the Criminal Code of Pakistan in line with the definition given in the International Convention for the Protection of All Persons from Enforced Disappearances. In its follow up report to the Human Rights Council in September 2016, the WGEID regretted that "most of the recommendations contained in its country visit report have not been implemented", and once again reiterated the importance of recognizing enforced disappearance as a distinct, autonomous crime.¹¹
10. Efforts to bring perpetrators of enforced disappearances to justice have failed at all levels. The National Commission of Human Rights (NCHR) does not have jurisdiction over intelligence agencies and can only make recommendations where the armed forces are responsible for human rights violations. The Commission of Inquiry on Enforced Disappearances keeps a record of reported enforced disappearances and "traces" the whereabouts of "missing" people, but has failed to take any action in cases where the "missing" people are found in the custody of security agencies.
11. The Courts, particularly the Supreme Court and provincial high courts, have played an important role in highlighting and condemning the practice of enforced disappearances, but have largely confined their role to tracing the location of "disappeared" people, not bringing perpetrators to account. Even where courts have actively pursued such cases, loopholes in the legal system – including the possibility of military trials of suspected perpetrators – have allowed culprits to evade responsibility. In this context, the WGEID has also pointed to "a climate of impunity in Pakistan with regard to enforced disappearances" in its follow-up report on Pakistan in 2016. The WGEID concluded "the authorities are not sufficiently dedicated to investigate cases of enforced disappearance and hold the perpetrators accountable"¹² and the Government had failed to communicate a single case where a perpetrator of the crime of enforced disappearance was successfully prosecuted in Pakistan.

(c) Torture and other ill-treatment

12. Pakistan ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2010, committing to making all acts of torture criminal offences under its laws, sanctioned by appropriate penalties that take into account their grave nature. Seven years later, torture and other ill-treatment are still not specifically criminalized in Pakistan, and the legal framework applicable to ill-treatment perpetrated by public officials, including members of security and intelligence agencies, clearly falls short of the requirements of the Convention against Torture.
13. Legal provisions relating to torture under Pakistani law fail to incorporate the various elements of torture as defined in the Convention against Torture. For example, Article 14(2) of Pakistan's Constitution prohibits "torture for the purpose of extracting evidence". Not only does the constitutional protection fail to define torture in accordance with Article 1 of the Convention, it also limits the prohibition exclusively to torture perpetrated for the purpose of extracting evidence.
14. Provisions related to torture in provincial legislation such as the Punjab Police Order, 2002, and the Khyber Pakhtukhwa Police Act, 2017, do not meet the requirements of the Convention against Torture for a number of reasons: first, the Police Order and the Khyber Pakhtukhwa Police Act do not define torture; second, their application is restricted to torture or violence "in custody" of a police officer, whereas the Convention places no such requirement;¹³ and third, torture is listed as one of the many unlawful activities by police officers with trespass, improper arrest etc., which fails to take into account the gravity of the crime of torture.¹⁴
15. In January 2017, a standing committee of the National Assembly (lower house of Parliament) approved the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill, 2014. The bill needs to be passed by a majority vote in the National Assembly and Senate to become law. In its current form, the bill features a number of deficiencies that make some of its provisions incompatible with the Convention. Of particular concern are the lack of adequate provisions for compensation, including by the State, for victims of torture and other ill-treatment; the failure to criminalize all acts of torture as defined in Article 1 of the Convention; the failure to criminalize acts that amount to cruel, inhuman or degrading treatment; the failure to provide for preventative measures, consistent with Article 2(1) of the Convention, including express prohibition of incommunicado or secret detention; and the introduction of a punishment, that may extend to one year's imprisonment or with a fine of up to Rs. 100,000 (1000 US Dollars) for so-called *mala fide* complaints.¹⁵
16. Another major shortcoming of the bill is the proposed requirement for a special procedure for complaints against the security and intelligence agencies, which, in turn, would risk making the proposed law futile and ineffective. Section 15 of the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Bill provides that where a complaint of torture is made against members of the armed forces or intelligence agencies, the Federal Investigating Agency must first "seek directions" from the federal government before launching an investigation. This proposed provision attempts to shield security agencies from criminal proceedings and impede victims' right to remedy when the security forces are accused of perpetrating human rights violations.

(d) Blasphemy laws

17. During its second UPR, Pakistan “noted” a number of recommendations related to amending its blasphemy laws in line with international standards.¹⁶ Pakistan also accepted two recommendations on preventing the abuse of the blasphemy laws.¹⁷ However, at the time of writing, Pakistan has failed to address any of these concerns in law or in practice.
18. Pakistan’s “blasphemy laws” are set out in sections 295-298-C of the Penal Code under the chapter “offences related to religion”. They include a variety of crimes, including “misusing” religious epithets; “defiling” the Holy Quran; “deliberately outraging” religious sentiment; and using derogatory remarks in respect of the Prophet Muhammad. Sentences for these offences range from fines to long terms of imprisonment, and in the case of defamation of the Prophet Muhammad (section 295-C), a mandatory death sentence.
19. These laws violate Pakistan’s international human rights obligations, including under the International Covenant on Civil and Political Rights, to respect the rights to freedom of thought, conscience and religion; freedom of expression; and equal treatment before the law. The mandatory death sentence prescribed under section 295-C of the Penal Code is incompatible with the right to life and the prohibition of torture and other ill-treatment.¹⁸
20. Most blasphemy-related accusations in Pakistan are motivated by personal vendettas and political interests. In the 25 cases reviewed by the ICJ where high courts have heard appeals challenging conviction by trials courts under section 295-C, in 15 cases (60 per cent) the appellants were acquitted on the grounds that the complaints against them had been either fabricated for personal or political reasons.
21. In addition, the ICJ has documented widespread and systematic violations of the right to a fair trial in the enforcement of these laws. These violations include:
 - Vague and over-broad formulations violating the principle of legality and leaving the laws open to subjective interpretation and misuse;
 - Intimidation and harassment of judges and lawyers, which, in turn, detrimentally affect the independence of the judiciary and the right to a defense;
 - Demonstrable bias and prejudice against defendants by judges during the course of blasphemy proceedings and in judgments;
 - Violations of the right to effective assistance of counsel;
 - Unreasonable denials of bail and prolonged pre-trial detention;
 - Incompetent investigation and prosecution that do not meet due diligence requirements under the law;
 - The prosecution and detention of people living with mental disabilities; and
 - Inhumane conditions of detention and imprisonment, including prolonged solitary confinement.

ICJ’s documentation confirms concerns raised by the Supreme Court of Pakistan that individuals accused of blasphemy “suffer beyond proportion or repair” in the absence of adequate safeguards against misapplication or misuse of such blasphemy laws.¹⁹

(e) International human rights instruments

22. Pakistan has not signed: the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their

Families (ICRMW); the Rome Statute of the International Criminal Court (ICC) the Optional Protocols (OPs) to: the Convention against Torture (OP-CAT), to the two International Covenants (OPs-ICCPR and OP-ICESCR), to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW), to the Convention on the Rights of the Child (OP-CRC), to Convention on the Rights of Persons with Disabilities (OP-CRPD). Pakistan has also not recognized the competence of CAT to receive individual communications under Article 22 of the Convention.

23. In its second UPR, Pakistan “noted” recommendations to become a party to some of these treaties and to extend invitations to special procedures of the Human Rights Council. At the time of writing, requests for country visits from a number of special procedures, including the Special Rapporteur on the freedom of religion or belief and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, were pending.

Recommendations

24. In light of the concerns set out above, the ICJ calls upon the UPR Working Group and the Human Rights Council to recommend the following to Pakistani authorities:

- Ensure that military courts can only try military personnel for exclusively military offences and in no manner have jurisdiction over civilians, including for terrorism-related offences.
- Ensure that under no circumstances should cases of children who were under the age of 18 at the time of the alleged offence are transferred to military courts for trial.
- Ensure procedures of military courts meets fair trial standards in accordance with article 14 of the ICCPR.
- Establish a moratorium on the use of the death penalty, with the view of abolishing the death penalty in law and in practice.
- Expressly prohibit incommunicado detention or the detention of people in secret places, including in the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA).
- Make enforced disappearance a distinct, autonomous crime in the Penal Code, consistent with its definition in the ICPPED.
- Become a party to the ICPPED, the ICRMW, the Rome Statute of the ICC, OP-CAT, OP-CRC, OP-CEDAW, OP-ICESCR, OP-CRPD, OP-ICCPR and make a declaration under Article 22 of the CAT.
- Issue a standing invitation to Special Procedures mandate holders.
- Carry out prompt, thorough, independent and impartial investigations into all allegations of enforced disappearance.
- Repeal Actions (in Aid of Civil Power) Regulations, 2011, or bring them in conformity with international standards.
- Enact clear rules and dedicated institutions to ensure the oversight and accountability of law enforcement and intelligence agencies.

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

ENDNOTES

¹ For a detailed list of civilians convicted by military courts see *International Commission of Jurists*, "Details of civilians convicted by military courts, 6 January 2017, accessed at: <https://www.icj.org/wp-content/uploads/2017/01/Pakistan-Updated-List-of-convicted-Advocacy-2017-ENG.pdf>.

² Human Rights Committee General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial," (General Comment 32) U.N. Doc. CCPR/C/GC/32, para. 22.

³ For example, Human Rights Committee, Concluding Observations: Slovakia, U.N. 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, U.N. Doc. CCPR/CO/84/ TJK (2004) para. 18.

³ *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

⁴ For a detailed commentary on the incompatibility of military trials with international fair trial standards, see *International Commission of Jurists*, "Military Injustice in Pakistan", June 2016,

accessed at: <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf> and Reema Omer, "Suspect Confessions", *Dawn News*, 13 November 2016, accessed at: <https://www.dawn.com/news/1295973>

⁵ See Reema Omer, "Crisis of Impunity", *Dawn News*, 31 January 2017, accessed at: <https://www.dawn.com/news/1311707>

⁶ See *International Commission of Jurists*, "Military Injustice in Pakistan", June 2016, accessed at: <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>, p. 15.

⁷ *International Commission of Jurists*, "Military Injustice in Pakistan", June 2016, accessed at: <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>, p.17-18. See also Reema Omer, *Dawn News*, "Children and military courts", 14 December 2015, accessed at: <https://www.dawn.com/news/1226173>

⁸ *International Commission of Jurists*, "Pakistan: ICJ denounces the revival of military trials of civilians", 28 March 2017, accessed at: <https://www.icj.org/pakistan-icj-denounces-the-revival-of-military-trials-of-civilians/>

⁹ See, for example, recommendation 122.20. Specifically criminalize enforced disappearances in the penal code and reinforce the capacities of the Pakistanis Inquiry Commission on Enforced Disappearances in order that the Commission can fully carry out its mission (France); 122.111. Reinforce its efforts to fight impunity regarding cases of enforced disappearance by bringing all responsible persons to justice (Switzerland); 122.114. Take effective measures against enforced disappearances by strengthening the Commission of Inquiry and expanding their mandate to all security agencies (Germany)/Vest the national Commission on Inquiry on Enforced Disappearances greater authority and resources to conduct investigations (Sweden); and 122.115. Ensure investigations and prosecution of those responsible for abduction and enforced disappearances and encourage the Supreme Court to continue investigation on this problem. (Belgium).

¹⁰ Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, Addendum, Mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2.

¹¹ Report of the Working Group on Enforced or Involuntary Disappearances, Follow-up report to the recommendations made by the Working Group, Missions to Congo and Pakistan, 13 September 2016, UN Doc. A/HRC/33/51/Add.7.

¹² *Ibid.*, para 25, p. 35.

¹³ Section 120, The Khyber Pakhtunkhwa Police Ordinance, 2016, <http://www.pakp.gov.pk/2013/bills/the-khyber-pakhtunkhwa-police-ordinance-2016/> and Article 156 of the Police Order.

¹⁴ Article 156: "Penalty for vexatious entry, search, arrest, seizure of property, torture, etc.– Whoever, being a police officer– (a) without lawful authority, or reasonable cause, enters or searches or causes to be entered or searched any building, vessel, tent or place; (b) vexatiously and unnecessarily seizes the property of any person; (c) vexatiously and unnecessarily detains, searches or arrests any person; or (d) inflicts torture or violence to any person in his custody; shall, for every such offence, on conviction, be punished with imprisonment for a term, which may extend to five years and with fine."

¹⁵ The bill defines "mala fide complaint" to mean "a complaint filed against any public servant or any person acting in an official capacity, with mala fide intentions or other ulterior motives or to harass such person or public servant".

¹⁶ For example, Recommendation 122.28. Ensure that blasphemy laws and their implementation are in line with international law (Switzerland)/Enact legislation ensuring freedom of religion and belief for all religious groups and consider abolishing the so-called blasphemy laws (Austria)/Repeal or reform thoroughly the so-called blasphemy law (Netherlands); 122.31. Modify or repeal the blasphemy laws in order to bring them in line with the principles related to freedom of thought, conscience and religion, and in particular with its obligations under the ICCPR (Belgium); 1 22.32. Repeal discriminatory blasphemy laws against religious minorities and ensure that there is no impunity for those who commit hate crimes (Namibia)/Repeal the blasphemy law and respect and guarantee freedoms of religion or belief and of expression and opinion for all, including Ahmadis, Hindus and Christians (France); and 122.33. Repeal the blasphemy law, or at least amend it to protect persons from eventual abuses or false accusations and lighten corresponding penalties, that are currently disproportional (Holy See).

¹⁷ See, for example, Recommendation 122.121. Continue efforts to enhance legislations and measures to further address the situation of religious minorities, including blasphemy laws, force conversion and discrimination against non- Muslim minorities (Thailand) and 122.156. Adopt measures to ensure the protection of religious minorities, including Ahmadis, Christians, Hindus and Sikhs, prevent the abuse of blasphemy legislation, halt forced conversions, and take necessary steps to prevent violence against members of religious minority communities (Canada).

¹⁸ For a detailed commentary, see *International Commission of Jurists*, "On Trial: the implementation of Pakistan's blasphemy laws"; November 2015, accessed at:

<https://www.icj.org/wp-content/uploads/2015/12/Pakistan-On-Trial-Blasphemy-Laws-Publications-Thematic-Reports-2015-ENG.pdf>, pp. 16-24.

¹⁹ *Ibid*, pp. 25-55.