

Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

We have the honour to address you in our capacities as First Vice-Chair of the Working Group on Arbitrary Detention; Chairperson-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolutions 24/7, 27/1, and 22/8.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **Protection of Pakistan Act**, adopted on 2 July 2014, and the incompatibility of a number of its provisions with international human rights standards, particularly as set forth in the International Covenant on Civil and Political Rights (ICCPR), which Pakistan ratified on 23 June 2010, and the United Nations Declaration on the protection of all persons from enforced disappearance (hereinafter the Declaration on disappearances).

The Protection of Pakistan Act (PPA) was adopted by the Parliament of Pakistan on 2 July 2014 to respond to security concerns in the country. Relevant provisions in the PPA empower security forces, including the Army, Frontier Corps, Police and Rangers, involved in the fight against terrorism in Pakistan with the authority to arrest without warrant, to order preventive detention without adequate safeguards, and in some cases, to even detain individuals secretly, and to retroactively apply the law to legitimise illegal detentions. The PPA also grants immunity to law enforcement officers who might be responsible for serious human rights violations such as arbitrary detention and enforced disappearance. These provisions are incompatible with a number of international human rights norms and standards, including the ICCPR, to which Pakistan is a party, as well as the Declaration on disappearances.

Arrest and search without warrant

Section 3 (2) (b) of the PPA grants to “any police officer not below [the rank of] BS-15 or member of the armed forces or civil armed forces” the power to “arrest, without warrant, any person who has committed a scheduled offence or against whom a

reasonable suspicion or credible information exists that he has committed, or is about to commit any such act or offence”. Section 3 (2) (c) empowers the aforementioned forces to “enter and search without warrant any premises to make any arrest or to take possession of any fire-arm explosive, weapon, vehicle, instrument or article used, or likely to be used and capable of being used, in the commission of any scheduled offence”.

We are concerned that the scope of these provisions may grant overly broad powers to law enforcement and military forces without subjecting them to any judicial oversight, thereby opening the door to discretionary and arbitrary interpretation or application of the law.

In this regard, we would like to refer to article 9(1) of the ICCPR which guarantees that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention.

We would also like to refer to the report by the Working Group on Enforced or Involuntary Disappearances following its visit to Pakistan in 2012, in which the WGEID stressed that “the constitutional, legislative and regulatory provisions, in particular [...] rules allowing for arrest without warrant of suspects, should be carefully scrutinized, in order to ensure their compatibility with international standards and, if necessary, their repeal” (para. 91 (a), A/HRC/22/45/Add.2).

‘Scheduled offences’

The “scheduled offences” set out in the PPA are defined in overly broad language, and could thus be used to prosecute a wide range of conducts, which may go beyond the limits of what should be considered a terrorist activity. For instance, “scheduled offences” include very vague offences such as “cyber-crimes and Internet offences and other offences related to information technology which facilitates any offence under this Act” (schedule 1 (xiv)), or “wrecking, disrupting or attacking mass transport systems including trains, buses, cars and their stations and ports” (schedule 1 (xv)), without clearly defining what acts are prohibited under these offences.

Moreover, the PPA extends over “the preparation, abetment, attempt or conspiracy to commit” any of the “scheduled offences” listed in the text. Furthermore, section 22 of the PPA allows the Government to amend the list of “scheduled offences” by adding, modifying or omitting any entry.

We are concerned that such vaguely defined offences may be in contravention of article 9 of the ICCPR which establishes the right of any person not to be arbitrarily deprived of his/her liberty except on grounds established by law. In its General Comment No. 35 interpreting article 9 of the ICCPR, the Human Rights Committee established that “any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application” (see CCPR/C/GC/35, para. 22). The Human Rights Committee has determined that “the principle of legality is violated if an individual is arrested or

detained on grounds which are not clearly established in domestic legislation” (Case 702/1996, *McLawrence v. Jamaica*, para. 5.5).

We are further concerned that such vaguely defined offences could be potentially misused to prosecute peaceful political protesters and those who criticize Government policies.

Preventive detention

Section 6 of the PPA empowers the Government and law enforcement agencies to preventively detain individuals suspected of being involved in “scheduled offences”. Section 6(1) of the PPA permits the Government to authorize preventive detention for up to 90 days for a person it has “reasonable grounds to believe” is acting in a manner “prejudicial to the integrity, security, defence of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services.”

We are concerned that persons arrested and detained under “preventive detention” are denied their rights to be informed of the grounds for arrest, to a lawyer of free choice, to be brought promptly before a court, and not to be detained beyond the initial legal period without the authority of a magistrate, as provided by article 10 of the Constitution which sets out safeguards for persons deprived of liberty (article 10 (3), Constitution of Pakistan). Moreover, we are concerned that none of these constitutional safeguards are applicable to persons considered as an “enemy alien¹” (article 10 (9), Constitution of Pakistan).

We would like to reiterate the recommendation made by the Working Group on Enforced or Involuntary Disappearances during its visit to Pakistan that the “preventive detention” regimes should be carefully reviewed in order to ensure their compatibility with international standards, especially in relation to fundamental procedural safeguards (para.22, A/HRC/22/45/Add.2).

Under article 9(2) and (4) of the ICCPR “anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”; and “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

We are concerned that section 6 of the PPA grants the authority to decide on the “preventive detention” of persons arrested under the PPA to the Government instead of the judicial branch, without any oversight or control mechanism by the judicial authorities. According to article 9(3) of the ICCPR: “anyone arrested or detained on a

¹ In the PPA, enemy alien refers to a militant whose identity is unascertainable or who has been deprived of his citizenship. A militant, as defined in the PPA, could be any person who commits or threatens to commit any scheduled offence.

criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” In that regard, the Human Rights Committee has established that “once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial” (para. 36, General Comment No. 35).

We are also drawing attention to article 9(3) of the ICCPR, which states “it shall not be the general rule that persons awaiting trial shall be detained in custody”. In this regard, the Human Rights Committee has determined in its General Comment No. 35 that this sentence “applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement prior to charging results from the prohibition of arbitrary detention” (para. 38). Moreover, the Committee has established that the relevant factors to determine pre-trial detention “should be specified in law and should not include vague and expansive standards such as ‘public security’” (para. 38).

We would also like to refer to Principle 2 and Guideline 7 of the UN Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court (hereafter referred to as “The UN Basic Principles and Guidelines”). These Principles and Guidelines, developed by the UN Working Group on Arbitrary Detention at the request of the Human Rights Council, and presented before the Council on 14 September 2015, outline the responsibilities of the State, under international law, to in guarantee the right of every individual in detention to challenge the arbitrariness and/or lawfulness of that detention. Principles 2, 3, 4, 5, 6, as well as the Principles 16 and 17 applicable in situations of armed conflict or other situations of internal disturbances or violence are particularly relevant (A/HRC/30/37). In addition, we would like to reiterate that “the constitutional, legislative and regulatory provisions, in particular “preventive detention” regimes [...], should be carefully scrutinized, in order to ensure their compatibility with international standards and, if necessary, their repeal” (Report of the WGEID visit to Pakistan, para. 91 (a), A/HRC/22/45/Add.2).

Withholding information and secret detention

Section 9(1) of the law provides that the Government may determine the place of custody, inquiry, investigation and trial of a scheduled offence anywhere in Pakistan. Section 9(3) provides that a person convicted of a scheduled offence “may be confined at any place in Pakistan including the prisons established by the Provincial and Federal Governments.”

These provisions seem to be in contravention of article 7 of the ICCPR, which protect individuals against torture or other cruel, inhuman or degrading treatment or punishment. In its General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that: “to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept

in registers readily available and accessible to those concerned, including relatives and friends”.

We are also concerned that these provisions may not be in conformity with article 10 (1) and (2) of the Declaration on disappearances which provides that “any person deprived of liberty shall be held in an officially recognized place of detention” and that “accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned”.

We also recall that in the Joint Study on Global Practices in Relation to Secret Detention in the context of Countering Terrorism, a number of mandate holders concluded that secret detention is irreconcilable with international human rights law and international humanitarian law and that it amounts to a manifold human rights violation that cannot be justified under any circumstances, including during states of emergency (A/HRC/13/42, 19 February 2010, para. 17).

Section 9(2)(a) of the PPA gives the Government and law enforcement and military agencies the authority to “withhold the information except from a High Court or the Supreme Court regarding the location of the detainee or accused or internee or internment centre established or information with respect to any detainee or accused or internee or his whereabouts”. In addition, according to section 9(2)(b) “the Government may not in the interest of the security of Pakistan disclose the grounds for detention or divulge any information relating to a detainee, accused or internee who is an enemy alien or a militant.”

We are concerned that section 9(2)(a) of the PPA could allow the creation of a regime of incommunicado detention and de facto secret detention, which has is contrary to international human rights law, in particular to the ICCPR.

We recall that the Supreme Court of Pakistan, in the judgement concerning the Muhabat Shah case, determined that the unauthorized and unacknowledged removal of detainees from an internment centre amounted to enforced disappearance. The Court also held that “no law enforcing agency can forcibly detain a person without showing his whereabouts to his relatives for a long period” and that currently, there was no law in force in Pakistan that allowed the armed forces to “unauthorizedly detain undeclared detainees”. Finally, the Court held that armed forces personnel responsible for the enforced disappearances should be dealt with “strictly in accordance with law”.

The provision authorizing to withhold information regarding the grounds for the detention (section 9(2)(b)) seems in contravention of the right to be informed, at the time of the arrest, of the reasons for such deprivation of liberty, as established by article 9(2) of the ICCPR, as well as the right of everyone charged with a criminal offence to be informed promptly and in detail of the nature and cause of the charges, as established by article 14(3)(a) of the ICCPR.

Presumption of guilt

According to Section 15 of the PPA, a person charged with a scheduled offence “shall be presumed to be engaged in waging war or insurrection against Pakistan unless he establishes his non-involvement in the offence”. The PPA denies the fundamental principle of presumption of innocence, which is enshrined in the ICCPR. Article 14 (2) of the ICCPR provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.” This article clearly places the burden of proof to justify the deprivation of liberty on the prosecution. Similarly, “The UN Basic Principles and Guidelines” provide that in every instance of detention the burden of establishing the legal basis, as well as the reasonableness, necessity and proportionality of the detention lies with the authorities responsible for the detention (Principles 13, A/HRC/30/37) and that no restriction may be imposed on the court’s authority to review the factual and legal basis of the arbitrariness and lawfulness of the deprivation of liberty (Principle 14).

Instead, the Act shifts the burden of proof of a criminal conduct from prosecution to persons charged with a criminal offence under the Act.

Special courts and secret hearings

Pursuant to Section 8 of the PPA, the Government may establish as many Special Courts as it deems necessary and may appoint any person who meets basic requirements as judge of the Special Court. This provision may contravene ICCPR Articles 9 and 14. “The UN Basic Principles and Guidelines” specify the characteristics of the courts and procedural guidelines for the review of the detention. Principle 6 specifies the court reviewing the arbitrariness and lawfulness of the deprivation of liberty, shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful. Guideline 4 specifies that such court must be a different body from the one that ordered the detention, and that its competence, independence and impartiality should not be undermined by procedures or rules pertaining to the selection and appointment of judges.

Retrospective authorization

Section 6(5) of the PPA retrospectively authorizes arrests and detentions carried out by law enforcement agencies prior to the entry into force of this Act: “Any person, arrested or detained by the armed forces or civil armed forces and kept under arrest or detention before the coming into force of the Protection of Pakistan (Amendment) Ordinance, 2014 shall be deemed to have been arrested or detained pursuant to the provisions of this Act if the offence in respect of which such arrest or detention was made also constitutes an offence under this Act. (PPA Section 6(5))” This provision is in violation of the fundamental principle of non-retroactivity of criminal law, enshrined, among others, in article 15(1) of the ICCPR. As a result, individuals detained prior to the adoption of this law, which may include victims of enforced disappearances, could find themselves accused and condemned under the PPA.

Immunity and impunity

Furthermore, section 20 of the Act provides that “no member of the police, armed forces or civil armed forces acting in aid of civil authority, the Prosecutor General, a prosecutor, Special Judicial Magistrates or the judge of a Special Court shall be liable to any action for the acts done in good faith during the performance of their duties”.

This provision grants effective immunity from prosecution to those potentially responsible for serious human rights violations, including extrajudicial executions, enforced disappearance and arbitrary detention. Article 2(3) of the ICCPR provides that each State Party to the Covenant should undertake “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

While recognising the importance of prevention of terrorist attacks and acknowledging that Pakistan is facing considerable security challenges, including attacks by terrorist movements and violent groups, we would like to emphasize that any restrictions of rights must comply with the core international humanitarian law principles of humanity, necessity, proportionality and non-discrimination as well as with international human rights law. In this regard, we reiterate what previously stated by the WGEID that “actions taken to deal with security threats and in particular with terrorism, must at all times respect nationally and internationally recognized human rights” (para. 90, A/HRC/22/45/Add.2). This is also the letter and spirit of the 2006 UN Global Counter-Terrorism Strategy, which was recently reaffirmed in 2014. The strategy emphasises that any measure adopted by States to counter terrorism must comply with their obligations under international law, and in particular be conducted with due respect to international human rights, refugee and humanitarian law.

In the report of its visit to Pakistan, the WGEID recommended that “it is important that the constitutional, legal and regulatory framework, in particular in relation to the issue of the deprivation of liberty, be in full conformity with international standards in order to ensure that it does not give licence to secretly detain or disappear anyone, or that it does not lead in practice to circumstances where enforced disappearances could be perpetrated” (para. 91, A/HRC/22/45/Add.2). The General Assembly (resolution 68/178) and the Human Rights Council (resolution 25/7) have repeatedly emphasized that States must adhere to international human rights while countering terrorism.

In light of the above, we strongly recommend to your Excellency’s Government to promptly initiate a process of revision of the PPA, with the aim of bringing it in line with Pakistan’s international human rights obligations under the treaties it has ratified, and other international human rights and humanitarian standards.

In order to clarify the aforementioned concerns, we would be grateful for your observations on the following matters:

1. Please explain how the provisions of the Protection of Pakistan Act are compatible with international human rights standards, especially those that Pakistan has committed itself to implement through the treaties it has ratified
2. Please provide information on any measure that your Excellency's Government has taken or intends to take in order to bring the PPA in conformity with Pakistan's international human rights obligations under ratified treaties; and as a Member State, in conformity with the UN framework.
3. Please provide information on any measures that your Excellency's Government has taken or intend to take in order to implement relevant recommendations by the Working Group on Enforced or Involuntary Disappearances made in the context of its country visit.

We would appreciate to receive a response within 60 days and remain available for any type of technical advice on legislative reform that your Excellency's Government may require.

While awaiting a reply, we urge that all necessary interim measures be taken to halt any enforced disappearance or arbitrary deprivation of liberty in Pakistan.

We would also like to inform your Excellency's Government that we are reserving the possibility to publicly express our concerns in the near future as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issues in question.

This communication and your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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