

**Mandates of the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

REFERENCE:  
OL PAK 10/2019

30 December 2019

Excellency,

We have the honour to address you in our capacities as Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 36/6, 40/16 and 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the Khyber Pakhtunkhwa Actions (In Aid of Civil Power) Ordinance 2019, issued by the provincial governor on 5 August 2019, which assigns wide-ranging powers to the armed forces**. On 17 October 2019, the Ordinance was declared unconstitutional by the Peshawar High Court (PHC). However, the decision was overturned on 25 October 2019 by the Supreme Court in Islamabad.

According to the information received:

The Khyber Pakhtunkhwa Actions (In Aid of Civil Power) Ordinance 2019 was issued by the Provincial Governor of Khyber Pakhtunkhwa on 5 August 2019. It is reportedly almost a reproduction of regulations implemented in 2011 in the former Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA), yet now extends to the entire province.

The Ordinance assigns wide-ranging powers to the armed forces "to carry out actions in aid of civil power" and authorizes the requisition, mobilization or stationing of armed forces in the province.

Chapter II states that the armed forces may be requisitioned by the Provincial Government and the Federal Government to "carry out actions in aid of civil power", including "actual fighting, military engagement, hostilities or combat of the Armed Forces", and shall continue to undertake these actions unless specifically reviewed or withdrawn by the written order of the Federal Government.

Chapter III enables the armed forces to, *inter alia*, use force, arms and ammunitions, including but not limited to firearms, weapons and air power, to "achieve the objectives during any armed action" and to take "any action, measures, decision that is necessary in this regard". Regarding any abuse or

misuse of force by members of the armed forces, the Ordinance establishes that this will be investigated solely by the armed forces.

Chapter IV refers to the powers during actions in aid of civil power, and authorizes the armed forces to enter, search and occupy any property or place on the basis of suspicion, and to “collect information through all means about the credentials of the miscreant”.

Chapter V refers to “internment” and stipulates that armed forces are entitled to detain any person who “may obstruct actions in aid of civil power in any manner whatsoever”, who “may cause a threat to the solidarity, integrity or security of Pakistan”, or who “has committed or is likely to commit” any offence under the Ordinance, among other provisions. The internment may be carried out without charge, against any person in the province, for an indefinite period of time, and without having to appear before a magistrate. The Ordinance does not include any provisions regarding the detainee’s rights to access legal counsel.

Chapter VII refers to offences and punishments, and establishes that whoever commits an offence under the Ordinance shall be punished with death, imprisonment for life or imprisonment for 10 years. The Ordinance also establishes that all evidence and material collected by the Internment Authority shall be admissible as evidence, and that the statements or depositions made by members of the Armed Forces before the Court shall be sufficient for convicting the accused.

It is reported that on 17 October 2019, the Peshawar High Court declared the Khyber Pakhtunkhwa Action (in Aid of Civil Power) Ordinance 2019, as unconstitutional, and further directed the provincial Inspector General of Police to take control of the detention centers. However, on 25 October, the Supreme Court in Islamabad suspended the order.

While we do not wish to prejudge the accuracy of this information, we express concern at the issuance of the Khyber Pakhtunkhwa Actions (In Aid of Civil Power) Ordinance 2019, which may be contrary to Pakistan’s international human rights obligations.

While the promulgation of the Ordinance was allegedly prompted by the need to combat terrorism and other serious crimes, we are profoundly concerned that the implementation of the Ordinance in FATA and PATA may lead to miscarriages of justice and a number of human rights violations, including the enforced disappearance of persons suspected of having committed offences under the Ordinance. New counter-terrorism laws across the globe that criminalize freedom of expression or views that appear to praise, glorify, support, defend, apologize for or that seek to justify acts defined as “terrorism” under domestic law raise both serious concerns of legality and limitations on freedom of thought and expression. The application of such provisions has been targeted at, *inter alia*, the legitimate activities of political opposition, critics, dissidents, civil society, human rights defenders, lawyers, religious clerics, bloggers, artists, musicians and others. Furthermore, the non-violent criticism of State policies or institutions,

including the judiciary, should not be made a criminal offence under counterterrorism measures in any society governed by rule of law and abiding by human rights principles and obligations. (A/HRC/37/52, para. 47).

Under international law, States have obligations and duties to respect, protect and fulfil human rights and fundamental freedoms. Even during an emergency — no matter how it is occasioned — if the situation constitutes a threat to the life of the nation and its exigencies require suspension of certain international human rights, such action must be taken while fulfilling State's obligations under international law. Only derogable rights may be subject to limitations during an emergency. Nonderogable rights are rights that are especially protected under treaty law that cannot be limited or suspended, regardless of the extent or the source of the crisis faced by the State. There is some variance across treaties on what constitute non-derogable rights. The International Covenant on Civil and Political Rights does not permit derogation on the arbitrary deprivation of life, freedom from torture, inhuman and degrading treatment, slavery and servitude, imprisonment for the inability to fulfil contractual obligations, application of *ex post facto* laws and freedom of thought, conscience and religion. (A/HRC/37/52, paras. 40-41).

We are also concerned about the vague and overly broad detention provisions of this Ordinance. These provisions grant armed forces sweeping powers to arrest and to indefinitely hold in “internment centres”, which are not formally within the prison system, any individual suspected of having committed prohibited acts or “having nexus” with such acts, on the basis of mere suspicion, without charge, trial or any form of judicial oversight. Furthermore, individuals may be detained for an indefinite period and be effectively barred from the right to take part in proceedings or to challenge the lawfulness of detention before a court.

Under the Ordinance, officials would be authorized to use evidence extracted from individuals during their detention, in subsequent criminal prosecutions, and accepted as admissible and sufficient for conviction. This could amount to torture and other cruel, inhuman or degrading treatment or punishment in exchange for information or confessions.

It is equally worrying that the Ordinance provides wide immunity for armed forces and empowers the army under Article 245 of the Constitution, which means that its actions cannot be challenged in any court. In addition, it stipulates that statements or depositions by any member of the armed forces, or any officer authorized on his behalf, shall be sufficient for convicting an accused. These provisions deny the individuals' right to due process and risks providing legal basis for arbitrary detention and enforced disappearances.

We are also concerned by the alleged rationale behind the Ordinance, that the province is effectively in a state of war with “miscreants” and “foreign funded elements”, which would seem to unjustifiably motivate the curtailing of the constitutional rights of the citizens of the province. According to the Constitution of Pakistan in Article 232, a state of emergency can only be declared by the President of Pakistan and shall be limited to counter specific circumstances, such as a threat of war or external aggression.

We are also concerned about the vague definition of “terrorism”, which potentially enlarges the ambit of the special law. The principle of legal certainty, enshrined in the International Covenant on Civil and Political Rights under Article 15(1), recognizes that ill-defined and overly broad laws are open to arbitrary application and abuse. Using counter-terrorism law to quell legitimate activities that are protected by international law is inconsistent with the State’s treaty obligations. While there is no internationally unified definition of terrorism, domestic counter-terrorism legislation should be strictly guided by the principles of legality, necessity and proportionality, as well as model definition proposed in Security Council resolution 1566 (2004) and also by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly. We would also like to refer your Excellency’s Government to the model definition of terrorism provided by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([E/CN.4/2006/98](#), paras. 26-50, 72).

In this regard, we are deeply concerned that the ambiguity in the text of the Ordinance might allow the law to be misused against political activists, human rights defenders and individuals exercising their constitutionally protected rights to freedoms of assembly, expression and association. We would like to bring to the attention of your Excellency’s Government Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights. We would also like to highlight that in his report on the impact of counter-terrorism measures on civil society, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds (A/70/371, para 46(c)). In addition, we would like to remind your Excellency’s Government that States must ensure that their measures to address the threats of terrorism, violent extremism and protect national security do not negatively affect civil society. In this regard, we would like to bring to your attention the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in 2019 to the Human Rights Council A/HRC/40/52, in particular paragraphs 36, as well as, paragraphs 75 (a) to (i).

We would also like to refer your Excellency’s Government to (1) the International Covenant on Civil and Political Rights, acceded to by Pakistan on 23 June 2010, which in its Article 9 guarantees the right to liberty and security of person, not be subject to arbitrary arrest or detention as well as right to take judicial proceedings before a court. Article 14 guarantees the right to due process and trial, and Article 7 on the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment. (2) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, acceded to by Pakistan on 23 June 2010. (3) the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly on 9 December 1988.

We would also like to refer to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, which sets out the necessary protections with respect to the responsibility of the State; in particular that no State shall practice, permit or tolerate enforced disappearances (Article 2), that any person deprived of liberty shall be held in an officially recognized place of detention (Article 10.1), and that an official up-to date register of all persons deprived of their liberty shall be maintained in every place of detention (Article 10.3). The Working Group on Enforced or Involuntary Disappearances has noticed that States are increasingly justifying the use of enforced disappearances as part of their counter-terrorism activities, including through the adoption of legal provisions that facilitate the occurrence of enforced disappearance and incommunicado detentions, practices in clear breach of international human rights law (A/HRC/42/40, para.58).

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please explain how the provisions of the Khyber Pakhtunkhwa Actions (In Aid of Civil Power) Ordinance 2019 are compatible with international human rights standards, especially those that Pakistan has committed itself to implement through the treaties it has ratified.
3. Please provide detailed information concerning the power extended to law enforcement agencies, the judicial role in independent oversight, and safeguards to ensure that surveillance is conducted only as provided for by law, using only measures which are necessary and proportionate in a democratic society.
4. Please provide information on any measure that your Excellency's Government has taken or intends to take in order to bring the Khyber Pakhtunkhwa Actions (In Aid of Civil Power) Ordinance 2019, in conformity with Pakistan's international human rights obligations under ratified treaties.
5. Please provide information in details of how your Excellency's Government's counter-terrorism efforts comply with the United Nations Security Council resolutions [1373 \(2001\)](#), [1456\(2003\)](#), [1566 \(2004\)](#), [1624 \(2005\)](#), [2178 \(2014\)](#), [2341 \(2017\)](#), [2354 \(2017\)](#), [2368 \(2017\)](#), [2370 \(2017\)](#), [2395 \(2017\)](#) and [2396 \(2017\)](#); as well as Human Rights Council resolution [35/34](#) and General Assembly resolutions [49/60](#), [51/210](#), [72/123](#), [72/180](#) and 73/174, in particular with international human rights law, refugee law, and humanitarian law contained therein.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge your Excellency's Government to continue its cooperation with the mandates of the Special Procedures of the Human Rights Council, to take into account the concerns raised, and to avail of any technical assistance that Special Procedures may be able to provide in order to ensure the full promotion and protection of human rights in Pakistan.

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

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