



**International Commission of Jurists  
South Asia  
Rule of Law Programme**

**Protection of Pakistan Bill, 2014  
An affront to Human Rights**

**May 2014**

# **Protection of Pakistan Bill 2014 –an affront to human rights**

## **1. Introduction and executive summary**

The International Commission of Jurists (ICJ) urges the Pakistan Senate to reject the Protection of Pakistan Bill (PPB), 2014, which requires Senate approval to become law after it was passed by the National Assembly on 7 April 2014.<sup>1</sup>

This Bill grants military and law enforcement authorities wide powers to preventively detain individuals in violation of international safeguards; to search and seize property without warrant; and to withhold information about the location, fact of detention, and for some people, even grounds for detention. Provisions of the Bill are also inconsistent with respect for the principle of separation of powers and the independence of the judiciary. In addition, if adopted, the Bill would permit secret and otherwise unfair proceedings before Special Courts and facilitate human rights violations including arbitrary detention, incommunicado detention, enforced disappearance, and torture and other ill-treatment.

The Bill must be seen in the context of continuing enforced disappearances that remain unresolved and allegations of torture and extrajudicial executions that remain uninvestigated. In this light, certain provisions of the Bill appear designed to entrench impunity for serious human rights violations that are crimes under international law –specifically, those provisions which would retrospectively authorize arbitrary or otherwise unlawful detentions and enforced disappearances, and grant immunity for actions carried out in “good faith” by security forces and law enforcement agencies “during the performance of their duties”.

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<sup>1</sup> Article 70 of the Constitution of Pakistan, 1973, says: (1) A Bill with respect to any matter in the Federal Legislative List may originate in either House and shall, if it is passed by the House in which it originated, be transmitted to the other House; and, if the Bill is passed without amendment by the other House also, it shall be presented to the President for assent.

(2) If a Bill transmitted to a House under clause (1) is passed with amendments it shall be sent back to the House in which it originated and if that House passes the Bill with those amendments it shall be presented to the President for assent.

(3) If a Bill transmitted to a House under clause (1) is rejected or is not passed within ninety days of its laying in the House or a Bill sent to a House under clause (2) with amendments is not passed by that House with such amendments, the Bill, at the request of the House in which it originated, shall be considered in a joint sitting and if passed by the votes of the majority of the members present and voting in the joint sitting it shall be presented to the President for assent.

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The ICJ condemns terrorism and recognizes that Pakistan is facing a very real and serious threat from armed extremists and insurgents. The ICJ also reaffirms that all states have an obligation to take effective measures against acts of terrorism in a manner that is consistent with international law.

However, there is no conflict between the international legal duty of states to protect people threatened by terrorism and their responsibility to uphold the rule of law and human rights. Human rights law gives governments a reasonable margin of flexibility to combat terrorism without contravening human rights obligations, and threats to national security can never be used as a justification for *inter alia* the practice of secret detentions, enforced disappearance, and extrajudicial executions.

This briefing paper analyses the compatibility of the Protection of Pakistan Bill, 2014, with international human rights standards. The briefing paper highlights how the Bill is an affront to fundamental human rights protections and principles of the rule of law. The following provisions are of particular concern:

- Section 9, which, among other things, authorizes secret and unacknowledged detention, as well as in some cases, the non-disclosure of grounds for detention;
- Section 10, which allows for exclusion of the public from hearings on the ground of “public safety”;
- Sections 15 and 5(5), which reverse the burden of proof and are inconsistent with presumption of innocence enjoyed by accused persons;
- Section 20, which confers blanket immunity from prosecution for actions done in “good faith”;
- Section 6, which infringes upon the right to liberty by allowing preventive administrative detention without adequate safeguards and retrospectively authorizes otherwise arbitrary or unauthorized arrests or detentions previously carried out;
- Section 3(2)(c), which allows arbitrary interference with the right to privacy;

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- Sections 8, 17(2), and 17(3), which establish Special Courts and set out procedures for the operation of Special Courts that do not meet the condition of trial by a competent, independent and impartial tribunal.

In addition, the ICJ notes that many of the Scheduled Offences under the PPB are already criminalized in Pakistan, raising questions about why another law is needed to address such offenses. Laws covering these crimes include the Anti-terrorism Act, 1997 (ATA); Maintenance of Public Order Ordinance, 1960; and the Pakistan Penal Code, 1860. Similarly, anti-terrorism courts have already been set up to try a broad range of “terrorism” offences under the ATA.

What is however clear is that the Pakistani State, including the Senate, is required to ensure that laws adopted and implemented respect and protect internationally recognized rights enshrined in the International Covenant on Civil and Political Rights (ICCPR), among other treaties, which Pakistan as a party is obligated to uphold.

Therefore, the ICJ strongly recommends that the Senate reject the Protection of Pakistan Bill, 2014.

## **2. Background**

The Protection of Pakistan Bill, 2014, is the latest in a series of laws introduced in recent years purportedly to strengthen Pakistan’s efforts to fight insurgencies, “terrorism” and other unspecified threats faced by the country.

The Bill seeks to enshrine in law many provisions of the Protection of Pakistan Ordinance, 2013, and the Protection of Pakistan (amendment) Ordinance, 2014, both of which were Presidential promulgations, passed without any debate in Parliament.

The Protection of Pakistan Ordinance (PPO), 2013, was promulgated by President Mamnoon Hussain in October 2013.<sup>2</sup> Among other things, the PPO created Special Courts for trying offences set out in the Ordinance and gave law enforcement agencies wide powers to

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<sup>2</sup> Article 89 of the Constitution of Pakistan, 1973, gives the President the power to promulgate an Ordinance when the Parliament is not in session, and the President is satisfied that circumstances exist which render it necessary to take immediate action. An Ordinance has the same force and effect as an Act of Parliament. An Ordinance stays in force for 120 days unless it is extended by either House of Parliament or disapproved by either House of Parliament.

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preventively detain individuals suspected of being involved in the Scheduled Offences.

The PPO was later amended through Protection of Pakistan (amendment) Ordinance, 2014, promulgated by President Mamnoon Hussain in January 2014, seemingly to circumvent the Supreme Court's judgment in the *Muhabat Shah*<sup>3</sup> case. The case involved allegations related to the unauthorized removal of 35 persons from a Malakand internment center by the armed forces. Despite multiple orders of the Court, the army authorities only produced seven persons before the Court and the remaining 28 persons remain unaccounted for.

In its ruling on the case in December 2013, the Supreme Court held that the unauthorized and unacknowledged removal of detainees from an internment center amounted to an 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"<sup>4</sup> and that currently, there was no law in force in Pakistan that allowed the armed forces to "unauthorizedly detain undeclared detainees".<sup>5</sup> Finally the Court held that armed forces personnel responsible for the enforced disappearances should be dealt with "strictly in accordance with law".<sup>6</sup>

The amended PPO, promulgated a few weeks after the *Muhabat Shah* judgment, retrospectively authorized arrests, detention and transfers by law enforcement agencies, and granted them complete immunity for "acts done in good faith during the performance of their duties". The amendments to the PPO also gave law enforcement agencies authority to withhold information about the location of detainees, and in some cases, the charges against them.

The National Assembly of Pakistan<sup>7</sup> extended the operation of the amended Ordinance for 120 days in February 2014.<sup>8</sup> The amended PPO, which is currently in operation, will lapse in June 2014.

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<sup>3</sup> HRC No.29388-K/13, 10 December 2013.

<sup>4</sup> *Ibid.*, p 12.

<sup>5</sup> *Ibid.*, p 20.

<sup>6</sup> *Ibid.*

<sup>7</sup> Lower House of Parliament.

<sup>8</sup> Article 89 (2) (ii) of the Constitution of Pakistan, 1973, provides that either House of Parliament may extend the operation of an Ordinance for a further 120 days. Such an extension can only be made once.

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The National Assembly passed the Protection of Pakistan Bill, 2014, on 7 April 2014. The stated objectives of the Protection of Pakistan Bill (PPB), like that of the PPO, are to provide for protection against “waging of war against Pakistan”, preventing acts “threatening the security of Pakistan”, and for speedy trial of offences set out in the Schedule annexed to the Ordinance.

Apart from some minor changes, the Bill passed by the National Assembly imports many provisions of the amended PPO.

The Bill is currently being debated in the Senate of Pakistan<sup>9</sup> and has to be approved before it becomes law. As the Bill is being considered by the Senate, two separate petitions challenging the constitutionality of the Protection of Pakistan Ordinance, 2013, on the basis that it violates fundamental human rights protections guaranteed under the Constitution of Pakistan, 1973, remain pending before the Supreme Court of Pakistan and the Islamabad High Court.

Some of the most alarming provisions of the Bill are discussed below in light of Pakistan’s obligations under international human rights law and standards.

### **3. Section 9 of the Bill proposes to legalize secret detention**

Section 9 of the PPB authorizes law enforcement agencies, security forces and investigating officers to withhold information regarding the location of individuals deprived of their liberty, the place of their detention, and rather ambiguously, any “information with respect to any detainee or accused or intern”. The withholding of information is justified not only in the interest of the security of its personnel but also for any “reasonable cause”.<sup>10</sup>

Section 9 also allows the government to keep secret “the grounds for detention” and any information relating to a detainee, accused or internee” characterized as an Enemy Alien<sup>11</sup> or an Enemy,<sup>12</sup> as defined

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<sup>9</sup>Upper House of Parliament.

<sup>10</sup> Section 9(2)(a): “Subject to the Constitution -the Government, Joint Investigation Team, armed forces or civil armed forces may, in the interest of the security of its personnel or for the safety of the detainee or accused or intern, as the case may be, or for any other reasonable cause withhold the information regarding the location of the detainee or accused or intern or internment centre established or information with respect to any detainee or accused or intern or his whereabouts”.

<sup>11</sup> Section 2 (e) of the Protection of Pakistan Bill, 2014, defines an “enemy alien” as “a person whose identity is unascertainable as a Pakistani whether by documentary or oral evidence or who has been deprived of his citizenship acquired by

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in the Bill.<sup>13</sup> Section 9 (3) allows those convicted under the law to be “confined at any place in Pakistan”.<sup>14</sup>

These provisions of Section 9 of the PPB thus seek to authorize secret detention. In doing so, they contravene a range of international human rights standards that aim to protect people deprived of their liberty from violations of their rights including arbitrary detention, torture or other ill-treatment and enforced disappearance. These standards include the International Covenant on Civil and Political Rights (ICCPR), the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearances),<sup>15</sup> and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

These standards include a number of measures intended to protect against such violations, including: prohibiting secret detention;<sup>16</sup> requiring that persons deprived of their liberty must be held only in a place of detention that is officially recognized;<sup>17</sup> respecting the right of

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naturalization and is suspected to be involved in waging of war or insurrection against Pakistan or depredation on its territory by virtue of involvement in offences specified in the Schedule”.

<sup>12</sup> Section 2(d) of the Protection of Pakistan Bill, 2014, defines an “enemy” as “any person who raises arms against Pakistan, its citizens, the armed forces or civil armed forces or aids or abets the raising of arms or waging of war against Pakistan or threatens the security and integrity of Pakistan or commits or threatens to commit any Scheduled Offence and includes a person who commits any act outside territory of Pakistan for which he has used the soil of Pakistan for preparing to commit such act that constitutes an offence under the laws of Pakistan and the laws of the state where such offence has been committed and includes an act of aiding or abetting such offence”.

<sup>13</sup> Section 9(2)(b): “Subject to the Constitution -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 interne who is an Enemy Alien or Enemy.”

<sup>14</sup> Section 9(3): “A person convicted of a Scheduled Offence subject to direction of the Government may be confined at any place in Pakistan including the prisons established by the Provincial and Federal Governments.”

<sup>15</sup> In *Muhabat Shah* (*supra* fn. 3), the Supreme Court held that even though Pakistan has not yet ratified the Convention on Enforced Disappearance, principles enunciated in the Convention are applicable in Pakistan in the interpretation of other rights such as the right to life.

<sup>16</sup> Article 17(1) of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>17</sup> UN Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992) para 11, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994); Article 17(2)(c) of the International Convention for the Protection of All Persons from

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all detainees to have family members (or others) notified promptly after arrest, detention and any transfer from one place of detention to another;<sup>18</sup> authorities maintaining adequately detailed official records of all detainees under their effective control;<sup>19</sup> and authorities sharing this information, upon request, with those who have a legitimate interest including the detainees themselves, their lawyers, their family, courts and human rights bodies or mechanisms.<sup>20</sup>

The provisions of Section 9, allowing the authorities to withhold information about the grounds for detention of individuals characterized as Enemies or Enemy Aliens are inconsistent with the duty of the authorities under Article 9(2) of the ICCPR to respect and protect the right of all individuals who are arrested or detained to be notified, upon arrest of the reasons for arrest, and to be promptly informed of any changes against them. This provision facilitates arbitrary detention, which is prohibited by Article 9(1) of the ICCPR and undermines the right of the detained individual or others on his or her behalf to challenge the lawfulness of their detention, as guaranteed under Article 9(4) of the ICCPR.

Section 9 of the PPB permits people to be placed outside the protection of law by allowing officials, including law enforcement agencies, armed forces and civil armed forces, to confine individuals convicted of Scheduled Offences in any place in Pakistan and broad discretion to withhold information “for any reasonable cause” about their arrest, detention and place of detention, and in some cases the reason for

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Enforced Disappearance, Article 10(1) of the Declaration on the Protection of All Persons from Enforced Disappearance.

<sup>18</sup> Article 10(2) of the Declaration on the Protection of All Persons from Enforced Disappearance; Guideline 3 para 43(e) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly in resolution 67/187 on 20 December 2012; Principle 16(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>19</sup> These records must include, at a minimum, information about the identity of each individual deprived of their liberty; where and when the individual was deprived of liberty; the authority that ordered the deprivation of liberty and on what grounds; where the individual is being held and the date and time they were admitted; the authority responsible for the detention facility; the detainee’s health; the date and time when the individual was brought before a court; the date and time of release or transfer to another detention facility; the new place of detention; and the authority responsible for the transfer.

<sup>20</sup> Article 17(3) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 10(2)-(3) of the Declaration on the Protection of All Persons from Enforced Disappearance; Principle 12 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly resolution 43/173 of 9 December 1988.



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their detention. This would render any such detention arbitrary, and make detained individuals vulnerable to other human rights violations such as torture and ill-treatment.<sup>21</sup> Furthermore, acting in accordance with these provisions may result in an enforced disappearance, a crime under international law, which has been defined in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearances) as

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

The proposed legalization of secret or unacknowledged detention under Section 9 must be read in conjunction with other provisions of the Bill, including notably Section 5(1), which states that all Scheduled Offences are non-bailable. This means that all persons suspected of and charged with a Scheduled Offence will be detained pre-trial and thus may be subjected to the provisions of Section 9 permitting unacknowledged and otherwise secret detention.

Concern about the application of these provisions is even more acute in view of the fact that security forces in Pakistan, particularly the armed forces, have long been implicated in arbitrary arrest, prolonged incommunicado detention, enforced disappearance and torture and other ill-treatment of individuals in custody.<sup>22</sup> These new powers would provide legal cover to their actions, which amount to gross human rights violations, and with respect to torture and enforced disappearance, crimes under international law.

### **4. Section 10 violates the right to a public hearing**

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<sup>21</sup> The adoption of such provisions in law would be inconsistent with Pakistan's obligations under Articles 16 (right to recognition as a person before the law); Article 9 (right to liberty and security); and Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR.

<sup>22</sup> See International Commission of Jurists, *Authority Without Accountability: the search for justice in Pakistan*, December 2013, and Human Rights Watch, "We Can Torture, Kill, or Keep You for Years" -Enforced Disappearances by Pakistan Security Forces in Balochistan, July 2011.

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Section 10 of the PPB authorizes a Special Court to exclude “all or any portion of the public” during “any part of the hearing” on the request of the prosecution made on the ground that “the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the public safety”.<sup>23</sup>

Article 14 of ICCPR says “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.<sup>24</sup>

The right to a public hearing means that not only the parties in the case, but also the general public and the media, have the right to be present at the hearing. The UN Human Rights Committee has clarified that the “publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.”<sup>25</sup> As well as safeguarding the rights of the accused, this right also protects the public’s right to monitor how justice is administered by the judicial system.

The UN Declaration on Human Rights Defenders also expressly includes the right of trial observers and others to “attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments”.<sup>26</sup>

The only exceptions to this general rule, which must be narrowly defined and strictly construed, are: reasons of morals; public order or

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<sup>23</sup> Section 10: “In addition, and without prejudice, to any powers which a Special Court may have by virtue of any law for the time being in force to order the exclusion of the public from any proceedings, if at any stage in the course of the trial of any person before a Special Court, an application is made by the prosecution on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the public safety, and that, for that reason, all or any portion of the public should be excluded during any part of the hearing, the Special Court may make an order to that effect, but the passing of sentence shall in any case take place in public.”

<sup>24</sup> Article 14(1), International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

<sup>25</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 28.

<sup>26</sup> Article 9(3)(b) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by UN General Assembly resolution 53/144 of 9 December 1998.

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national security in a democratic society; when the interest of the private lives of the parties so requires; or to the extent strictly necessary, in special circumstances, where in the opinion of the court publicity would prejudice interests of justice.<sup>27</sup>

“Public safety” is not a permissible exception to the general rule enshrined in the ICCPR that everyone is entitled to a public hearing.

While Section 10 does state that the passing of a sentence by a Special Court shall be in public in all cases, the combined effect of Sections 9 and 10 could mean that the first time the family of a detainee or the public is made aware of the detention, charge and trial of an individual for a Scheduled Offence is when their sentence is delivered by a Special Court.

Section 10 of the PPB is therefore incompatible with Article 14(1) of the ICCPR.

### **4. Sections 15 and 5 (5) violate the presumption of innocence**

Section 15 of the PPB stipulates that all persons facing the charge of a Scheduled Offence shall be presumed to be engaged in “waging war against Pakistan” unless they establish their non-involvement in the offence.<sup>28</sup>

Section 5 (5) further provides that a person arrested or detained under the Ordinance whose “identity is unascertainable” shall be considered as an Enemy Alien and “presumed to have joined waging war [sic] or insurrection against Pakistan” unless he or she can prove otherwise.<sup>29</sup>

These provisions are inconsistent with the fundamental right of everyone accused of a criminal offence to be presumed innocent until and unless proven guilty beyond a reasonable doubt by a court of law following a fair trial, guaranteed under international standards

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<sup>27</sup> Article 14(1) of the International Covenant on Civil and Political Rights, *supra* fn. 24.

<sup>28</sup> Section 15: “An accused facing the charge of a Scheduled Offence on existence of reasonable evidence against him, shall be presumed to be engaged in waging war against Pakistan unless he establishes his non-involvement in the offence.”

<sup>29</sup> Section 5(5): “A person arrested or detained under this Act whose identity is unascertainable shall, subject to provisions of section 15, be considered an Enemy Alien and presumed to have joined waging war or insurrection against Pakistan.”

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including Article 14(2) of the ICCPR.<sup>30</sup>

The right to be presumed innocent is also a norm of customary international law and applies at all times and in all circumstances, including in times of war or other public emergency.<sup>31</sup>

The requirement that the accused shall be presumed innocent until proven guilty “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and] ensures that the accused has the benefit of the doubt”.<sup>32</sup>

In light of the fact that according to Paragraph 1 of the Schedule of the Bill, an essential element of each of the Scheduled Offences is that the act is “committed with the purpose of waging war against Pakistan or threatening the security of Pakistan”, Section 15 and 5(5) are inconsistent with the presumption of innocence. This is because they place the burden of proof of an essential element of a Scheduled Offence on the accused person.

In addition, after a person is presumed to be an “Enemy” or “Enemy Alien”, he or she may be preventively detained for an indefinite period. Furthermore, the Government may keep secret “the grounds for detention” and any information relating to his or her detention or arrest. If a person is presumed to be an “Enemy Alien”, he or she is also excluded from the safeguards for deprivation of liberty provided under Article 10 of the Constitution of Pakistan, 1973 (see Part 6). These consequences flow from mere suspicion alone, with no obligation on the executive authority to prove any of the essential elements of the offences.

The adoption of these provisions into law would therefore violate the obligations of Pakistan under the ICCPR to respect and protect the presumption of innocence- a right that is considered to be an essential element of the right to fair criminal proceedings and the rule of law.<sup>33</sup>

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<sup>30</sup> Article 14(2) of the International Covenant on Civil and Political Rights provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

<sup>31</sup> UN Human Rights Committee General Comment 29, para 11; UN Human Rights Committee General Comment 32, para 6; see also *ICRC Study on Customary International Law*, Volume 1, Rule 100, pp357-358.

<sup>32</sup> UN Human Rights Committee General Comment 32, para 30.

<sup>33</sup> UN Human Rights Committee, General Comment 24, para 8; UN Human Rights Committee, General Comment 29, paras 1 and 16; and UN Human Rights Committee,

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### 5. Section 20 violates the victims’ right to remedy and reparation

Section 20 of the PPB says that “no member of the police, armed forces or civil armed forces acting in aid of civil authority, Prosecutor General, 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.” Section 6(5) retrospectively applies this immunity indefinitely to arrests and detentions made by the armed forces or civil armed forces before the Protection of Pakistan (amendment) Ordinance, 2014, came into force.<sup>34</sup>

Amnesties for crimes under international law and grave violations of human rights are prohibited under international law. The prohibition is based on the explicit duty of states to investigate and prosecute such violations as well as on victims’ right to truth, justice and reparation.

The obligation to respect, ensure respect for and implement international human rights law includes, inter alia, the duty to:

- (a) *Take appropriate legislative and administrative and other appropriate measures to prevent violations;*
- (b) *Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;*
- (c) *Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice... irrespective of who may ultimately be the bearer of responsibility for the violation; and*

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General Comment 32, para 6; See also *International Committee of The Red Cross Study on Customary International Law*, Volume 1, Rule 100, pp357-358.

<sup>34</sup> Section 6(5): 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 (Ordinance No. I of 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.

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(d) *Provide effective remedies to victims, including reparation...*<sup>35</sup>

As expressed in the UN Basic Principles and Guidelines on the Right to a Remedy

*In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.*<sup>36</sup>

The right of victims to a remedy is also a well-established principle under international law, contained in international human rights treaties and other international standards. It is not only a right in itself; it is the mechanism by which all other rights are realized.

The UN Human Rights Committee has described the right to a remedy as “a treaty obligation inherent in the Covenant as a whole”<sup>37</sup>: even in times of emergency, “the State party must comply with the fundamental obligation, under Article 2, paragraph 3 of the Covenant to provide a remedy that is effective.”<sup>38</sup> Effectiveness requires that the remedy is practical and provides real access to justice.

The PPB gives wide powers to law enforcement agencies to use firearms; to arrest suspects, search premises and seize property without warrants; to detain suspects in unofficial detention centers; and to withhold information regarding the whereabouts of and charges against detainees. In addition, it gives them complete immunity, including indemnity for actions prior to the promulgation of the PPB, from prosecution for acts done in “good faith”.

This immunity provision, if adopted into law, would violate Pakistan’s obligations under the ICCPR, including under Article 2(3), to

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<sup>35</sup> Principle 3, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

<sup>36</sup> *Ibid*, principle 4.

<sup>37</sup> UN Human Rights Committee, General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 14.

<sup>38</sup> *Ibid*.

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investigate allegations of such violations and prosecute those responsible for violations, as well as to ensure victims' rights to truth, justice and reparation.

### **6. Section 6 violates the right to liberty**

Section 6(1) of the PPB permits the government to authorize preventive detention for up to ninety days for persons acting in a manner "prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services".<sup>39</sup> The law further provides that any person "connected or reasonably believed to be connected" with the commission of a Scheduled Offence under the law may be preventively detained.

The provision allows the government to determine the detention period of "Enemy Aliens" and "Enemies" from time to time, subject to Article 10 of the Constitution of Pakistan. Article 10 of the Constitution of Pakistan provides for some safeguards including judicial supervision of preventive detention. However, Article 10 expressly excludes "Enemy Aliens" from the prescribed safeguards and the right to be defended by counsel and to prompt access to counsel is not guaranteed to individuals preventively detained.

Section 6(3) further provides that at any time during the detention period, internees may be handed over to police or any other investigating agency for formal investigation and prosecution.<sup>40</sup>

Preventive detention, generally, is a practice anathema to respect for human rights and rule of law, creating conditions not only for arbitrary

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<sup>39</sup> Section 6(1): The Government may, by an order in writing, authorize the detention of a person for a period specified in the order that shall not exceed ninety days if in the opinion of the Government such person is acting in a manner prejudicial to the integrity, security, defense of Pakistan or any part thereof or external affairs of Pakistan or public order or maintenance of supplies and services: Provided that detention of such person shall be in accordance with the provisions of Article 10 of the Constitution:

Provided further that without prejudice to the above, an Enemy Alien or an Enemy may be detained by the Government for such period as may be determined by it from time to time in accordance with Article 10 of the Constitution.

*Explanation\_*—A person connected or reasonably believed to be connected with the commission of a Scheduled Offence or a person falling under sub-

<sup>40</sup> Section 6(3): At any time during the said notifications or upon their withdrawal, such internee may be handed over to Police or any other investigating agency for formal investigation and prosecution.

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detention, but also facilitating other human rights violations. The UN Human Rights Committee has frequently found the practice of preventive detention to be in breach of the state party's obligations to respect and protect the right to liberty and the prohibition of arbitrary detention under Article 9 of the ICCPR, and has raised concern about purported security concerns as a ground to undermine the right to liberty.<sup>41</sup>

The UN Working Group on Arbitrary Detention (WGAD) too has highlighted the growing problem of states' legislation limiting fundamental rights of persons "detained in the context of the fight against terrorism, [whereby] States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention."<sup>42</sup>

Preventive detention, also called administrative detention, particularly when prolonged, renders detained persons vulnerable to torture or other ill-treatment and other violations of human rights. For this reason, the UN Special Rapporteur on Torture has recommended: "countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention."<sup>43</sup> The Committee against Torture has similarly found administrative detention to be a practice that should be eliminated.<sup>44</sup>

The widespread use of administrative detention may also erode or even to some extent displace the role of the normal criminal justice system, which includes more stringent rules and procedures aiming to protect individual liberty.

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<sup>41</sup> See for example Human Rights Committee, Communication 1069/2002, *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 29 October 2003, para 9.3 and Human Rights Committee, Communication 1324/2004, *Shafique v. Australia*, CCPR/C/88/D/1324/2004, 13 November 2004, para 7.2.

<sup>42</sup> Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 61.

<sup>43</sup> Report of the Special Rapporteur, UN Doc E/CN.4/2003/68, 17 December 2002, para. 26 (h).

<sup>44</sup> See for example, Committee against Torture Concluding Observations on: Jordan, UN Doc A/65/44, para 60(13); Moldova, UN Doc CAT/C/CR/30/7 (2003), para 6(d); Egypt, UN Doc CAT/C/CR/29/4 (2002), para 6(f); and China, UN Doc A/55/44, para 101. See also Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/10/21, para 54(b).



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However, if a State is to resort to administrative or preventive detention, it must do so only in limited and exceptional circumstances, only to the extent strictly necessary in times of an officially declared state of emergency or pursuant to a lawful derogation from and under human rights treaty obligations.<sup>45</sup>

When read with Article 10 of the Constitution of Pakistan, 1973, and other relevant provisions of the PPB, Section 6 not only infringes upon the right to liberty, it also makes detained persons vulnerable to other violations such as torture and other forms of ill-treatment and indefinite detention.

First, the law allows the executive to preventively detain persons it considers “connected or reasonably believed to be connected” in the commission to a Scheduled Offence. In addition, it allows for detention for up to ninety days for persons acting in a manner that is prejudicial to the integrity, security, defense of Pakistan, external affairs of Pakistan, public order or maintenance of supplies and services. These grounds, as well as the Scheduled Offences under the Bill, are vague and overly broad, allowing the executive authorities to detain persons for long periods on mere suspicion of a wide range of vaguely defined offences. This is likely to lead to arbitrary detention.

Second, this detention period may be further extended indefinitely if the individual is deemed to be either an “Enemy Alien” or “Enemy”, as defined by the Bill, allowing for indefinite detention without charge. When this provision is read together with Section 15 of the PPB, it

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<sup>45</sup> When preventively detaining a person for reasons of public security, States must provide the following safeguards: 1. The grounds and procedures for detention shall be prescribed by law and reasonable time limits set on the length of preventive detention; 2. Detainees have the right to be informed of the reasons for their detention; to have prompt access to legal counsel, family and medical care and assistance, and foreign nationals have the right to access to consular assistance; to be treated humanely; 3. Detainees must be provided guarantees against prolonged incommunicado and indefinite detention; 4. The detention should be judicially controlled, detainees should be brought promptly before a court, and the legality and necessity of continuing detention must be periodically reviewed. Furthermore, detainees have the right to have access to a court to challenge the legality of their detention in a prompt and expeditious proceeding, and to be released if their detention is not lawful (habeas corpus); 5. Detainees must be held in official places of detention and the authorities must register the detention of every individual and keep up to date thorough and accurate records on them throughout their detention. See the International Commission of Jurists, *International Legal Framework on Administrative Detention and Counter-terrorism*, Geneva, March 2006, and the International Commission of Jurists, *Beyond Lawful Constraints: Sri Lanka’s Mass Detention of LTTE Suspects*, September 2010, pp 21-25.

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would appear to authorize indefinite detention without charge to people suspected of any Scheduled Offence, unless the individual proves that they were not involved in such an offence. Under international law, this would constitute arbitrary detention.

Third, Section 9 of the PPB allows law enforcement agencies to detain persons in undisclosed internment centers and in addition, with respect to “Enemies”, who are defined as individuals suspected of committing Scheduled Offences, or “Enemy Aliens”, to withhold reasons for the detention. These powers also apply in cases of preventive detention. Such provisions place internees at risk of enforced disappearance.

Fourth, persons detained preventively may be handed over to the police or any investigation agency during the detention period for interrogation. In light of the prevalence of custodial violence in Pakistan, particularly in remand, the ICJ is concerned that this provision puts detained persons at risk of torture and other ill-treatment.<sup>46</sup>

Fifth, under Article 10 of the Constitution, which expressly excludes Enemy Aliens, judicial review and approval of preventive detention is only mandatory where the executive authorities seek to extend detention beyond ninety days.

Sixth, the executive authorities are obligated to communicate grounds of detention only within fifteen days of the detention and prompt access to legal counsel is not specifically guaranteed for individuals detained preventively.

Seventh, “Enemy Aliens” do not enjoy any of the protections provided by Article 10 of the Constitution, placing them outside the protection of law. This is inconsistent with Pakistan’s obligations under Article 16 of the ICCPR guaranteeing the rights of all people to recognition as a person before the law.

In addition, Section 6 of the PPB also includes a provision that would provide indefinite retroactive legal authorization for arrests and detentions made before the enactment of the Protection of Pakistan (amendment) Ordinance, 2014, that were related to a Scheduled Offence under the PPB. Section 6(5) states that “any person arrested or detained by the armed forces or civil armed forces and kept under

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<sup>46</sup> See Redress, *Torture in Asia: Law and Practice*, October 2013, pp 123-127.

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arrest or detention before the coming into force of the Protection of Pakistan (Amendment) Ordinance, 2014 (Ordinance No. I of 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.”

As discussed earlier in Part 2, this provision, when read with Section 20 of the Bill that allows law enforcement and agencies and the armed forces immunity for acts done in “good faith”, would grant immunity to those responsible for the hundreds, if not thousands, of cases of enforced disappearances in the country for which no one has been brought to justice. This retrospective immunity, if allowed to pass into law, will undo the efforts of the Supreme Court of Pakistan and civil society groups to provide accountability for arbitrary detentions and enforced disappearances.

### **7. Section 3(2) (c) allows arbitrary interference with privacy**

Section 3(2)(c) of the PPB, if enacted, would allow members of the armed forces, civil armed forces or the police to “enter and search, without warrant any premises to make any arrest or to take possession of any property, fire-arm, weapon or article used, or likely to be used, in the commission of any Scheduled Offence.”

Article 17 (1) of the ICCPR provides that no one “shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...” and Article 17 (2) adds that everyone has the “right to the protection of the law against such interference or attacks.”

The UN Human Rights Committee has clarified that that the prohibition of “arbitrary interference” in Article 17 also extends to interference provided for under the law. The protection against arbitrariness is “intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”<sup>47</sup>

The UN Human Rights Committee has further observed: “relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted” and that searches of a person's

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<sup>47</sup> UN Human Rights Committee, General Comment 16, (Twenty-third session, 1988), para 4, compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

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home “should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.”<sup>48</sup>

The ICJ notes with concern that Section 3(2)(c) of the PPB, if enacted, would give unfettered power to enter and search private premises for a wide range of vaguely defined offences to all law enforcement agencies and armed forces, without the need for judicial approval or any requirement of exigent circumstances that would justify a warrantless search or seizure. This provision, as drafted, would provide arbitrary, warrantless searches with a cloak of legality and thus violates the state’s obligation to respect and protect the guarantee of the right to privacy under Article 17 of the ICCPR.

### **8. Section 8, 9, 17(2) and 17(3) violate the right to a fair trial**

A number of provisions of the Protection of Pakistan Bill, 2014, are inconsistent with Pakistan’s obligations, including under Article 14 of the ICCPR, to respect and ensure the right of individuals to fair proceedings before independent, impartial and competent courts.

Section 8 of the PPB authorizes the government to establish Special Courts to try Scheduled Offences.<sup>49</sup> It empowers the government, in consultation with the chief justice of the relevant high court, to appoint serving or former judges of Sessions Courts or Advocates of the High Court with at least 10 years experience to serve as judges of the Special Court.<sup>50</sup> Section 8(4) states the government “may provide security of tenure” to judges of the Special Courts by framing rules under the Ordinance.

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<sup>48</sup> *Ibid.*, para 8. See also, Inter-American Commission on Human Rights, *Robles Espinoza e Hijos v. Peru*, (Case 11.006). A search must be justified by a “well-substantiated search warrant issued by a competent judicial authority, spelling out the reasons for the measure being adopted and specifying the place to be searched and the objects that will be seized.”

<sup>49</sup> Section 8(1): “The Government may establish as many Special Courts under this Act as determined by it.”

<sup>50</sup> Section 8(2): “The Government, in consultation with the Chief Justice of the concerned High Court, may appoint any person as judge of the Special Court constituted under this Act who is or has been a Sessions Judge in any province of Pakistan or has been an Advocate of the High Court for a period of not less than ten years.”

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Section 9(1) of the PPB authorizes the government to determine the place of trial of a Scheduled Offence, which may be anywhere in Pakistan.<sup>51</sup>

Section 17(2) of the PPB gives the Prosecutor General the power to withdraw a case, at anytime, from one Special Court and submit it before another Special Court constituted under the Ordinance.<sup>52</sup>

Section 17(3) of the PPB requires a court to transfer a case involving an offence that appears in the Schedule annexed to the PPB to a Special Court on the request of the government, at any time during the proceedings. It also permits the Special Court in such cases to render a judgment without hearing all of the witnesses or having recorded all the evidence.<sup>53</sup>

The UN Human Rights Committee, with its years of monitoring the delivery of justice in States which are party to the ICCPR in the light of the treaty's guarantees, has noted that the trial of civilians in special courts raises serious problems regarding the "equitable, impartial and independent administration of justice"<sup>54</sup> and has urged States Parties to the ICCPR to take all necessary measures to ensure that such trials take place under conditions which "genuinely afford the full guarantees stipulated in article 14".<sup>55</sup> Trials of civilians by special courts should be exceptional, only limited to cases where the authorities can show that resorting to such trials is "necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials."<sup>56</sup>

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<sup>51</sup> Section 9 (1): "The Government, on the report of a prosecuting agency, shall determine the place of custody, inquiry, investigation and trial of a Scheduled Offence anywhere in Pakistan."

<sup>52</sup> Section 17(2): "The Prosecutor General may at any stage of the proceedings withdraw a case from one Special Court and may submit the same before another Special Court constituted under this Act."

<sup>53</sup> Section 17(3): "Notwithstanding anything contained in any other law for the time being in force, the Government may apply to any court of law or tribunal that any case involving any Scheduled Offence punishable under this Act, pending before such a court or tribunal be transferred to a Special Court, then such other court or tribunal shall transfer the said case to a Special Court and it shall not be necessary for the Special Court to recall any witness or again record any evidence that may have been recorded."

<sup>54</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 22.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

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Equality before courts and tribunals also requires that similar cases be dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction.

The ICJ notes that anti-terrorism courts constituted under the Anti-terrorism Act, 1997 (ATA), are already in operation in Pakistan to try terrorism related offences,<sup>57</sup> for which the new Special Courts also have jurisdiction.<sup>58</sup>

The Government has failed to provide any “objective and serious reasons” to justify the creation of Special Courts under the PPB and to justify the distinction between offences to be tried by the Special Courts to be established by the PPB, the anti-terrorism courts constituted under the ATA and ordinary courts, which try offences under the Pakistan Penal Code. Thus, the provisions of Section 8 of the PPB that authorize the establishment of Special Courts and grant them jurisdiction over the offences that appear in the Schedule annexed to the PPB, do not appear to be consistent with Pakistan’s obligation to safeguard the independence and impartiality of the administration of justice to ensure that trials by special courts are limited to “exceptional” cases where it is “necessary and justified by objective and serious reasons”.<sup>59</sup>

The UN Human Rights Committee has clarified that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal. Further, an important aspect of the condition of impartiality is that tribunals must appear to a reasonable observer to be impartial.<sup>60</sup>

In addition, the UN Basic Principles on the Independence of the Judiciary provide that “there shall not be any inappropriate or

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<sup>57</sup> See Najam U din, “Terrorist unless proven otherwise: human rights implications of anti-terror laws and practices in Pakistan”, *Human Rights Commission of Pakistan*, 2007, for a detailed study of the operation of Anti-terrorism courts in Pakistan.

<sup>58</sup> Hostage taking, intimidation of public officials and crimes against religious, ethnic or racial groups are criminalized under the Anti-Terrorism Act under Section 6 (2)(e), 6 (2) (m), and 6 (2) (f) respectively.

<sup>59</sup> *Supra* fn. 54.

<sup>60</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para 19.

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unwarranted interference with the judicial process". They also state that the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.<sup>61</sup>

In Section 9(1) of the PPB, the proposed grant of choice of venue to the government rather than regulation of venue by legislation and by order of the Court for the purpose of ensuring impartiality and justice, opens the door to abusive forum shopping that flies in the face of the very notion of the right to a hearing before an independent and impartial court. Thus it fails to comply with the duty of the authorities under Article 14(1) of the ICCPR to respect and protect the right to proceedings before independent and impartial courts and the principle of separation of powers.

It is also of serious concern that Section 17(2) of the PPB authorizes the Prosecutor General to withdraw a case from one Special Court and submit it before another Special Court at any stage of the proceedings. The provision would allow the Prosecutor General power to transfer a case after the proceedings have begun. Section 17(2) is an open invitation to forum shopping during the proceedings if there is concern that a particular Special Court will rule unfavorably to the Prosecution.

Section 17(3) of the Bill further compounds concerns about inconsistencies of the provisions of the PPB with Pakistan's obligations under Article 14(1) of the ICCPR. As noted, this provision would require any court that has exercised jurisdiction over a case involving an act that is classified as a Scheduled Offence by the PPB, to transfer the case to a Special Court on the request of the government, rather than leaving such a matter to the discretion of the court. This is inconsistent with principle of the separation of powers and the independence of the judiciary. The legality and advisability of such a transfer should rather be a matter of judicial discretion, based on considerations of application of the law, the interests of justice and fairness to the parties. Furthermore, the fact that the provision would also permit a Special Court that receives such a case to render judgment in that case without recalling witnesses that had been heard or re-recording evidence that had been recorded during the proceedings in the first court, flies in the face of principles of justice

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<sup>61</sup> Principle 4, UN *Basic Principles on the 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.

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and the notion of a fair proceeding before an independent and impartial court, guaranteed under Article 14(1) of the ICCPR.

### **9. Conclusion**

As discussed in detail above, many provisions of the Protection of Pakistan Bill, 2014, like the amended Protection of Pakistan Ordinance, 2013, which is currently in operation, violate international human rights law guarantees, among others, of the right to liberty, the right to a fair trial and the right to privacy. Given the serious incompatibility of the Bill in substance and procedure with international law principles, the ICJ is of the opinion that unless fundamentally redrafted, merely amending provisions of the Bill will not be sufficient to bring it in conformity with international law.

Therefore, the ICJ strongly recommends that the Senate reject the Protection of Pakistan Bill, 2014.