

South Asians for Human Rights

Emergency and Security Laws

Pakistan

Saba Naveed Shaikh
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Introduction

In Pakistan's short history of 63 years, state of emergencies proclamations have been issued five times, necessitated by the doctrine of national security. The constitutional emergency provisions in Pakistan are essentially designed for the executive to immediately respond to a sudden national crisis without the need of the intervention of the legislature. The common legal consequence of a Proclamation is the redistribution of legislative and executive powers between the centre and the federating units¹. Even though emergencies are declared as conservative measures to stabilize the security situation in the State, they have each time brought with them further destabilizing hazards, suspension of the constitution and usurpation of the fundamental rights of citizens. The emergency provisions inscribed in the Constitution are aimed to be protective and not repressive by nature. Extra-constitutional emergencies in the form of martial law have also been declared in Pakistan but those will not be the focus of our study. The study will endeavor to examine the conditions precedent for the declaration of emergencies under the Constitution of Pakistan 1973, its repercussions on fundamental rights of the citizens and the scope of the executive and legislative powers under the emergency provisions.

The changing dimensions of security threats in Pakistan have given birth to a new set of protectionist laws referred to as anti-terror laws. The rising sectarian violence and terrorism lead to the enactment of the Anti-Terrorism Act 1997. As the nature of violence changed, successive governments amended the law to make it more relevant to the situation at hand. This report will also review the amendments made in this law and analyze its role and effectiveness in curbing terrorist activities.

The study will then proceed to analyze the effectiveness of the military in curbing internal and external security threats and whether actions have been in accordance with its constitutional role. The study will also review the role of the National Security Council (NSC) which was formed in 2004 in Pakistan as an attempt to counter terrorism in the country in a more efficient and effective manner². The National Security Council was setup with an objective to serve as a "*forum for consultation matters including the sovereignty, integrity, defence, security of the State and crisis management.*" This study will delve in to the detailed functions of the NSC and its benefits, if any, since its inception in 2004.

Lastly, the study will focus on the rising problem of enforced disappearances in the country. Arbitrary arrests and unlawful detention by the military, justified as necessary measures to curb terrorism and extremism tendencies, have been inextricably linked to the increasing number of missing persons in the country. The study will examine the relation between the two, followed by the involvement of the military in extrajudicial detentions and killings in Balochistan and Swat Valley regions of the country.

A. Emergency Laws in Pakistan

Conditions Precedent for the Declaration of Emergency in Pakistan

Under the Constitution of Pakistan, a Proclamation of Emergency can be issued if the Chief Executive or the President is satisfied that a grave emergency exists and the emergency is of such nature that it is threatening the security of the country (See Appendix). The situations that justify the declaration of a state of emergency are expressly stipulated in the Constitution as war or external aggression or internal disturbance beyond the power of provincial governments, failure of constitutional machinery in a province³ or financial emergency⁴. Constitutionally for a proclamation of emergency to validly remain in force, it must be laid before the Parliament within thirty days of its issuance for approval and Parliament is required to furnish its decision within two months. However, this in effect has never been applied and parliamentary disapproval has never affected the issuance of a Proclamation until its expiry.

The first Proclamation of Emergency was issued in Pakistan in September 1965. The emergency was declared by President General Ayub Khan on account of war that had broken out between India and Pakistan over the Kashmir dispute. The state of emergency lasted for four years and was lifted in 1969. This was followed by a brief civil war in 1971 that led to the secession of East Pakistan, justifying another proclamation of emergency by then President Yahya Khan. Though the war only lasted for few days, the emergency rule perpetuated till 1977. In 1990, President Ghulam Ishaque ousted Prime Minister Benazir Bhutto from power on charges of nepotism, corruption and illegal acts and in order to avoid internal aggression that may be instigated by her removal a state of emergency was declared for a brief period between August and November 1990⁵. In May 1998, a Proclamation of Emergency⁶ was issued once again by President Rafique Tarar amidst the perceived threat of aggression by India in response to the nuclear tests carried out by Pakistan. These tests were conducted by Pakistan in reaction to India's nuclear test two weeks earlier⁷. The most recent state of emergency was declared in Pakistan in November 2007 by President and Army Chief Pervez Musharraf in an attempt "to end judicial activism". After the unconstitutional removal of the Chief Justice of Pakistan, the Supreme Court of Pakistan emboldened to assert the independence of the judiciary and the lawyers launched a movement, referred to as the Lawyers Movement, demanding the reinstatement of the Chief Justice of Pakistan. The President considered the Movement and ensuing protests a serious security threat and declared a state of emergency in the country.

The legal condition precedent for the Proclamation of Emergency, as endorsed by the five instances articulated above, is the President's "satisfaction" that a grave emergency exists and not the de facto existence of the threat. However, some reasonable nexus has to exist between the law or the executive action taken in derogation of fundamental rights and the objects of the proclamation of emergency⁸.

International law emphasizes that the crisis likely to emanate from the threats must be of exceptional nature. The following extract from a judgment of the Supreme Court of Pakistan highlights how a President should determine his level of satisfaction:

“Before the President can issue a Proclamation under clause (1) of Article 232 of the Constitution, his satisfaction as to the existence of a grave emergency in which the security of Pakistan or any part thereof is threatened by war or external aggression or by internal disturbance beyond the power of a Provincial Government to control, should be based on proper application of mind which involves exercise of judgment in relation to a number of relevant factors having nexus with the objects mentioned in the aforesaid clause of Article 232 of the Constitution. The judgment should be founded on a state of mind bordering on conviction introduced by the existence of facts which have removed the doubts, if any, from the mind of the President, keeping in view far-reaching consequences which flow from the imposition of Emergency under the provisions of the Constitution”⁹

Powers of the Executive under a State of Emergency

During the state of emergency, the Federal executive has the power to assume all or any of the functions of the provincial government. The executive authority of the Federation is empowered to give directions to a Province in the same manner in which the executive authority of the Province is to be exercised. Through an order, the Federal Government can assume for itself or direct the Governor of a Province to assume, on behalf of the Federal Government, any or all of the functions of the Government of the Province¹⁰.

The executive is also entrusted with the additional power to take any decision in contravention of the fundamental rights of the citizens inscribed in Articles 15, 16, 17, 18, 19 and 24 of the Constitution¹¹ relating to rights of freedom of movement, of assembly, of association, of trade, business or profession, of speech and of protection of property.

Powers of the Legislature under a State of Emergency

Under the emergency provisions, the Parliament is granted the power to extend the life of the National Assembly by one year. By virtue of clause (1) of Article 233 the State also acquires the power to make any law (or to take any executive action) in deviation of the Fundamental Rights contained in Articles 15, 16, 17, 18, 19 and 24 of the Constitution, but any law so made will, to the extent of inconsistency, cease to have effect as soon as the Proclamation is revoked.

It must be noted, however, that only the legislation enacted *during the period of emergency* can contain provisions in contravention of the Fundamental rights. All laws made prior to this period are immune from this emergency provision and Article 233(1) will not legally cover violation of these laws. Furthermore, only those rights expressly stated in the Constitutional provision will be suspended during the period of emergency whereas all other rights will still stand enforceable.

The Courts have very narrowly interpreted Article 233(1) as it is an absolute deviation from the normal Constitutional system and stands in contradiction to Article 8 of the Constitution, which guarantees that the State will not make laws that violate or limit the fundamental rights of citizens¹².

Emergency Powers and the Courts in Pakistan

The suspension of constitutional provisions relating to the operation of the High Courts is not allowed during emergency measures¹³ but in terms of protecting fundamental rights and questioning the Proclamation itself¹⁴, even the courts' powers are restricted. According to clause (2) of Article 233, the enforcement of the fundamental rights through the courts stands suspended during a state of emergency, hence, not only are the citizens denied their fundamental rights but the courts' power to enforce the same is also temporarily suspended. However, this constitutional bar on the courts to exercise jurisdiction can be mitigated by virtue of the power of judicial review. The superior courts can use the tool of judicial review to examine the circumstances justifying the proclamation of emergency as necessary and determine if the State's actions were proportional to the alleged security threat. They can ascertain whether the prerequisites provided in the relevant provisions of the Constitution for the exercise of the emergency provision were in place when the Proclamation of Emergency was issued¹⁵.

It is pertinent to mention that courts are considered to be the custodians of the constitution and it is their duty to ensure that the constitution is held in abeyance only during exceptionally difficult circumstances, where the integrity of the country is at risk or in a case of external aggression against the State¹⁶.

The state of emergency declared in Pakistan on November 3, 2007 was declared unconstitutional and illegal by the Supreme Court of Pakistan¹⁷. The Court held that the Constitution could not be suspended in a manner save as authorized by the Constitution itself and declared President Musharraf as a usurper of power. Thus, all amendments introduced in the Constitution and other statutes during the period of emergency were held unlawful and void.

Revocation of a State of Emergency

Once a Proclamation of Emergency is approved by a joint session of the Parliament, in accordance with clause (7) of Article 232, there is no mechanism provided in the Constitution for revocation except through the issuance of subsequent Proclamation to the contrary¹⁸ as and when the government in power deems fit.

Case Study - State of Emergency November 3, 2007

A fatal erosion of fundamental rights occurred during the most recent proclamation of emergency issued in Pakistan in November 2007. The proclamation was justified on the basis of an alleged threat to security

described as “*an unprecedented level of violent intensity posing a grave threat to the life and property of the citizens of Pakistan*”. Musharraf laid the blame for the Proclamation at the doorsteps of the judiciary and stated that the action was imperative to end judicial activism and the hurdles the Supreme Court was creating in the government’s efforts to create a civilian rule. The Proclamation stated that the judiciary was “*working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the Government and the nation’s resolve and diluting the efficacy of its actions to control this menace.*” The Proclamation further stated the situation required “*emergent and extraordinary measures*” due to which General Pervez Musharraf suspended the Constitution and replaced it with a Provisional Constitutional Order (PCO)¹⁹ and the Oath of Offices (Judges) Order, 2007.

The new Order stipulated that the country will be “*be governed, as nearly as may be, in accordance with the Constitution,*” which gave the President considerable leeway to take radical measures at his own discretion. PCO suspended the fundamental rights, permitting the head of the State to amend the constitution at his will without the consent of the parliament and also prohibited the courts from taking any measures against the President, Prime Minister or any person under their control. As the alleged security threat was held to be originating from the judiciary, the superior court judges were decreed to take a new oath²⁰ under the PCO in order to continue in office. Many judges refused to take fresh oaths, which resulted in the majority of superior court judges, including nearly half of the Supreme Court Bench, being removed from office and put under house arrest. This step was a serious encroachment on judicial independence²¹ and violated the fundamental rights of freedom from arbitrary detention.

This emergency declaration was unconstitutional on two basic grounds. Firstly, the power to declare emergency in the country lies only with the democratically elected president and not an army chief who had come into power through a coup. Secondly, once emergency has been declared it has to be regulated by the provisions of the Constitution itself as opposed to an ad hoc constitutional replacement issued by the State such as the PCO in this case. The Constitution does not permit the president to hold the Constitution in abeyance even during a validly declared emergency.

Amendment to Laws during the Emergency Rule²²

Musharraf exploited the emergency rule for his own personal benefit by amending the constitution and the laws in such a manner that would not only justify the erosion of fundamental rights during the emergency rule but would also relieve him of accountability after the emergency rule was lifted. On November 11, 2007, the Army Act 1952 was amended to allow the military to try civilians for a wide range of offences, such as treason, sedition and “*statements conducive to public mischief*”, which previously only the judiciary could adjudicate on. This amendment enjoyed a retrospective effect and the civilians charged since January 2003 could now be tried by the military courts. The amendment also included provisions preventing these military trials from being public, authorizing military officers to

conduct investigations, and granting immunity to the ensuing trial from rules of evidence and procedures as prescribed by the law and constitution.

The retroactive nature of the amendment allowed the army to decriminalize all its illegal detentions and abuses carried out since 2003. Furthermore, this amendment exacerbated the myriad of enforced disappearances. At the time the Chief Justice was removed from office, the Supreme Court was investigating over 400 cases of disappearances and while the reason alleged for the dismissal of the Chief Justice was his misuse of public office, the actual reason was that the court's overt demonstration of independence from the executive was posing to be a threat for Musharraf's political survival and hence he sought to curtail its independence.

On November 27, 2007, Musharraf modified the Constitution to acquire absolute immunity for his actions, even after the emergency was lifted, through the addition of a new clause in the Constitution which validated all laws, orders and constitutional amendments introduced from November 3 until the Constitution came back into effect²³. What this essentially meant was that all actions of the State taken while the Constitution was held in abeyance would be granted legal indemnity. Moreover, the imperative power of judicial review was retracted from the courts and they could no longer examine any of the actions taken by the State while the PCO was in operation. This clearly violated the constitutional guarantee of maintenance of judicial independence at all times²⁴.

Freedom of Expression Targeted

During the emergency rule, the government also amended two major laws regulating the media in Pakistan in an attempt to curtail the right to freedom of expression²⁵. These amendments prohibited broadcasters from airing any material that *defames or brings into ridicule the Head of State, or members of the armed forces*. The law prohibited news channels from broadcasting events such as bombing and militant activity and programs covering judicial activities. The amended law empowered the government to interrupt broadcasts considered inappropriate while journalists were prevented from expressing opinions that might undermine the ideology or integrity of Pakistan or defame the president, military, or state offices. The amendments also prohibited the broadcasting of foreign programmes without prior approval of the government. Violation of the said law was punishable by three years imprisonment and a fine of 10 million (Rupees 165,000) as well as forfeiture of equipment²⁶. During the emergency rule, many private news channels and radio stations were shutdown. Stations were not allowed to resume service until they agreed to act in accordance with the code of conduct designed by the government while the issuance of new television licenses were contingent upon obedience to the government's demands. The journalists who expressed their discontentment or protested against these restrictive laws were arrested and some were even charged under the Anti-Terrorism Act.

Lawyers and Political Activists Targeted

The rights to freedom of expression, association and assembly were trampled during the emergency rule of 2007. Under the Maintenance of Public Order (MPO) 1960, numerous lawyers, civil society members and political activists were arrested and detained without charges. One notable incident occurred on November 4, when a large police contingent raided the Human Rights Commission of Pakistan (HRCP) in Lahore, arresting more than 50 human rights activists and intellectuals, under Section 16 of the MPO²⁷, who had gathered at the premises to hold a discourse on the validity of the emergency declared in the country. During the mass protests condemning the state of emergency, many were detained for alleged breach of Section 144 of the Code of Criminal Procedure, which prohibits the gathering of more than four persons in public without police authorization. The police extensively used its power of “blind” First Information Reports (FIRs) to threaten to arrest or arrest protestors. Under such FIRs, the police could register cases against groups of people without naming the suspects in their reports. As a deterrence measure, security forces also used disproportionate levels of force against the protesting lawyers, journalists, members of civil society, severely injuring many.

Conclusion

The leaders have used the emergency provisions in the Constitution of Pakistan as a ploy for gaining enormous powers. This stands in absolute contradiction to the true spirit of the provision that is to safeguard the security of the country. Limited range of measures exists to control emergency powers and hence, it has proved to be a major threat to the democracy of Pakistan. Therefore, the powers granted to the executive during emergency rule need to be reexamined and it needs to ensure that the fundamental rights are only deviated from in exceptional circumstances and not at the whim of a Chief Executive who desires to expand his powers.

B. Security Laws for Curbing Terrorism in Pakistan

In Pakistan, anti-terrorism law/policies have been devised for addressing ethnic conflicts, suppressing political opponents and, till very recently, in response to the global war against terror. The objective of curbing terrorism has been used as a justification to deviate from certain standard legal norms, especially setting up of special courts where the burden of proof of innocence lies on the accused. Civil liberties have often been compromised in the name of a larger good of securing the country or its citizens against internal or external aggression. According to an Amnesty International Report issued in September 2006:

In the "war on terror", Pakistan has violated a wide array of human rights, including the right to life, to the security of the person, to freedom from arbitrary arrest and detention,

to freedom from torture, other ill-treatment and enforced disappearance, and to legal remedies and reparations. All these rights are protected in the Constitution of Pakistan and international human rights law...(Pg.1)

Introduction of Anti-Terrorism Legislation in Pakistan

The National Assembly of Pakistan passed the first anti-terrorism legislation on February 1, 1975 titled Suppressing of Terrorist Activities Act 1975. This legislation was enacted “for the purposes of suppressing acts of sabotage, subversion and terrorism and to provide for speedy trial offence committed in furtherance of or in connection with such acts”. However, the rise in sectarian and ethnic violence over the years demanded a strategic plan of action against terrorism and it paved the way for the Anti-Terrorism Act (ATA) 1997 introduced during the regime of Prime Minister Nawaz Sharif. In support of this law, Mr. Sharif is quoted to have said that it was his desire that the courts should impart timely and inexpensive justice and that unless the law prescribes severe sanctions for criminals and terrorists, the violence and growing rate of crime cannot be controlled²⁸. This law was widely condemned for granting excessive and disproportionate powers to the authorities, such as shoot to kill on sight, and for violating constitutional provisions and international humanitarian law. It defined a terrorist act as:

Whoever, to strike terror in the people, or an any section of people, or to alienate any section of the people or to adversely affect harmony among different sections of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substance, or firearms, or other lethal weapons or poisons or noxious gases or chemical or other substances of a hazardous nature in such a manner as to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or display firearms, or threaten with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act²⁹.

By virtue of this broad definition, nearly any type of violence could attract this provision. In order to attain the objective of speedy trials, this law also provided for the creation of special anti terrorism courts under the control of the executive, which was a major deviation from the regular judicial framework. The law further provided that the designated officers had to complete investigations of offences within seven days, however, the court could extend the period where a case warranted extension³⁰, the trial had to commence within seven days of submission to court³¹, the judges were barred to give more than two consecutive adjournments³² and that the special courts were authorized to try any accused in his absence provided that the court first appointed an advocate for his defence and concluded the trial of the case within seven days. ATA was severely denounced by human rights organizations and political parties. Pakistan People’s Party went to the extent of referring to the Act as “black law” as it opened avenues for the government in power to victimize the opposition parties.

One case, which is pivotal in highlighting idiosyncrasies of ATA and paved way for its first ever amendment, was the Mehram Ali case³³. In this case, the court declared that certain provisions of this act

were unconstitutional and needed to be amended. The courts did not object to taking special measures to address the pressing needs of the government, however, it stated that they must be within the confines of the established judicial structure. The court proposed that the newly constituted anti-terror court should be subject to the rules and procedures of the constitutionally established judicial system and accordingly made specific recommendations.

The Nawaz Sharif government revised the law according to the Supreme Court's recommendations expressed in its judgment dated October 24, 1998, promulgating the Anti-Terrorism (Amendment) Ordinance 1998. The amended law retained the anti-terrorism courts but the judges of such courts were granted tenure of office for two years that could be extended up to two and a half years, the special Appellate Tribunals ceased to exist and appeals against the decision of the anti-terror courts could now be submitted to the respective High Courts. The Ordinance also limited the special courts' powers to try an accused in absentia and stipulated that before trying an accused in his absence the court must publish a proclamation in at least three national daily newspapers, of which at least one must be in Urdu. The same government also strived to establish military courts for trying terrorists, however, the law sanctioning the same was short-lived and soon came under the scrutiny of the full bench of the Supreme Court (SC) of Pakistan in the well-known case of Sheikh Liaquat Hussain v. Federation of Pakistan³⁴. The SC declared the military courts *ultra vires* of the fundamental rights guaranteed to citizens of Pakistan under the Constitution.

Following the Mehram Ali case, the ATA passed through a series of amendments. The second amendment to ATA came in 1999³⁵, while Nawaz Sharif's government was still in power, that inserted "civil commotion" within the purview of terrorism. Civil commotion was described as:

creation of internal disturbances in violation of law or intended to violate law, commencement or continuation of illegal strikes, go-slows, lock-outs, vehicles snatching or lifting, damage to or destruction of State or private property, random firing to create panic, charging bhatta, acts of criminal trespass (illegal qabza), distributing, publishing or pasting of a handbill or making graffiti or wall-chalking intended to create unrest or fear or create a threat to the security of law and order or to incite the commission of an offence punishable under Chapter VI of the Pakistan Penal Code (Act (XLV of 1860)).³⁶

The punishment for civil commotion was rigorous imprisonment up to seven year or with fine or both³⁷. This amendment ordinance also made provisions for the creation of anti terrorism courts at provincial level.

Anti-Terrorism Legislation during President Pervez Musharraf's Regime

The first two set of amendments to ATA came in force during the regime of Nawaz Sharif. However, the dynamics of the anti-terrorism law substantially changed following his removal via a military coup headed by General Pervez Musharaff on October 12, 1999. The anti-terrorism movement continued to evolve

during the new regime and the focus of the law shifted from merely curbing sectarian and ethnic violence to fighting the global war against terror. The initial two amendments during the new regime further broadened the definition of terrorism and enhanced jurisdiction of the courts over issues that were previously within the exclusive domain of criminal courts such as waging or attempting to wage war against Pakistan, collecting arms with the intent of waging war, kidnapping and abetment to offence. However, despite the amendments, the law and order situation continued to deteriorate and ethnic/sectarian violence further intensified. Therefore, Musharraf decided to bring about yet another amendment in the ATA to redefine *terrorist act*, expand the powers of the court and incorporate specific provisions against the operation of militant organizations³⁸. So henceforth, an act was categorized as terrorist if³⁹:

a) it involves the doing of anything that causes death; b) it involves grievous violence against a person or grievous bodily injury or harm to a person; c) involves grievous injury to property; d) involves the doing of anything that is likely to cause death or endangers a person's life; e) involves kidnapping for ransom, hostage taking or hijacking; f) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance; g) involves stoning, brick-battling or any other form of mischief to spread panic; h) involves firing on religious congregations, mosques, imanbargahs, churches, temples and all other places of worship, or random firing to spread panic, or involve any forcible takeover of mosques or other places of worship; i) creates a serious risk to safety of the public...; j) involves the burning of vehicles or any other serious form of arson; k) involves extortion of money [bhatta] or property; l) is designed to seriously interfere with or seriously disrupt a communications system or public utility service; or n) involves serious violence against a member of the police force, armed forces, civil and armed forces, or a public servant.

Moreover, the amended act empowered the Federal government to ban an organization:

"if it has a reason to believe that organization is concerned in terrorism." "Concerned in terrorism" is defined as an organization that: (1) commits or participates in the act of terrorism; (2) prepares for terrorism; (3) promotes or encourages terrorism; (4) supports and assists any organization concerned with terrorism; (5) patronizes or assists in the incitement of hatred or contempt on religious, sectarian or ethnic lines that stir up disorder; (6) fails to expel from its ranks or ostracize those who commit acts of terrorism and presents them as heroic persons; or (7) is otherwise concerned with terrorism.⁴⁰

Consequences of the Incidents of September 11, 2001 on Anti-Terrorism Legislation

The measures employed to curb terrorism in Pakistan radically changed after September 11, 2001. The rationale behind creating anti-terrorism legislation was given another dimension pursuant to the recent change in events, necessitating a new wave of amendments to the law. Pakistan's geo-strategic position made it an essential player in the global war against terrorism initiated by the USA. Therefore, now in addition to battling internal sectarian violence, Pakistan had to take legislative measures to curb extremist

groups present within its borders that were carrying out terrorist activities internally and outside Pakistan. Musharraf had pledged complete cooperation with USA in the war against terror and had agreed to take extensive measures against terrorists and for locating and shutting down terrorist camps within Pakistan.

The first step taken by the government in the war against terror was to increase the number of Anti-Terrorism Courts⁴¹, followed by other measures to strengthen the anti-terrorism mechanism. On January 30, the Anti-Terrorism (Amendment) Ordinance 2002 came in to force, according to which the single-member bench of the Anti-Terrorism Court was upgraded to a three-member bench. The newly constituted bench would comprise of a judge of the High Court, a Judicial Magistrate First Class and a third member who would be a member of the Pakistan Army not below the rank of Lieutenant Colonel⁴². The change in the size and composition of the bench was intended to achieve speedy disposal of cases and all cases were required to be transferred to these newly composed courts⁴³. Overall, this amendment was targeted to dismantle the entire terrorist network; it prescribed death penalty even for aiding and abetting terrorists.

Continuing the efforts to create a terrorism free state, the federal cabinet promulgated yet another amendment to the legislation in November 2002⁴⁴. Besides minor changes, this Ordinance incorporated radical new provisions. One of them was the insertion of the Fourth Schedule to the Anti-Terrorism Act 1997. This Schedule was a list of activists, office-bearers or associates of organizations concerned or suspected to be concerned with terrorism or sectarianism based on information received from any source by the federal or provincial government⁴⁵. Those recorded in this list were liable to furnish *security for good behavior* and the police were granted exceptional powers to ensure this. The police could arrest and detain anyone on the list for up to one year without being required to file criminal charges while previously the maximum time for detention could not exceed three months.

Though this law succeeded in controlling militant organization to some extent, these organizations found new and innovative ways to survive and expand. For instance Jammāt-ud-Daawa (JuD)⁴⁶, placed on the Watch List under the Fourth Schedule on November 15, 2003, invested in legitimate business interests, including public services, such as health, education and real estate to gain popularity among the masses. They also received foreign donations through Forex Exchange or Hawala channels to help sustain themselves. According to the analysis of M.Amir Rana "*JD (Jamaat-ud-Daawa) properties in Pakistan have been estimated worth sixty million rupees and it aims at achieving a target of 120 million rupees more during the next five years. Apart from these, the number of students in its model schools has reached ten thousand approximately and in madrassahs it has touched six thousand. It is also establishing health centers and dispensaries*"⁴⁷. The Punjab Government has also been reported to have supported JuD linked charities such as schools and hospitals and the Punjab Government's 2009-2010 spending figures show that Rupees 80 million had been allocated for the institutions linked to JuD⁴⁸.

In order to curtail the growth of such terrorist organizations, a stream of amendments were introduced that increased the penalties for persons assisting terrorists in any manner, enhanced the maximum punishment for those found guilty of such assistance from 14 years to life imprisonment, provided a right of appeal to the accused⁴⁹ and the government officials were granted additional powers to seize the passport of any person charged under the ATA.

During the regime of Musharraf, the last set of amendments⁵⁰ to the ATA were brought on January 10, 2005. The amendments mainly comprised of changing the maximum and minimum punishment for terrorist activities, it provided for the creation of special benches constituting of at least two judges for hearing appeals and allowed the transfer of cases from one province to another. Also, it restricted the power of the court to grant adjournments (previously given for the sake of speedy justice), while at the same time also enhancing the power of the court to deal with issues such as abduction and kidnapping for ransom, finding and use of explosives in the places of worship, and court premises to be exclusively used as Anti-terrorism Courts⁵¹

President Zardari's Stance on ATA 1997

On October 1, 2009, President Asif Zardari promulgated the Anti-Terrorism (Amendment) Ordinance 2009, currently in force. By virtue of this Ordinance, the onus of proof has been transferred to the accused, violating Article 11(1) of the Universal Declaration of Human Rights which asserts that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' Additionally, the definition of terrorism now encompasses suspects arrested with explosives, lethal weapons, or found operating radio channels as tools of anti-state activities. The Ordinance also provides that suspects can be placed in "preventive detention" for a period of 90 days without having the right to bail and judicial review (but the detainee has to be produced before a presiding officer of the Anti Terrorism Court (ATC) or a District and Sessions Judge within 24 hours)⁵². The same provision also makes it the legal duty of banks and monetary institutions to provide information on transactions and accounts having links with crimes or providing financial assistance to terrorists. It has been made mandatory for the investigating officer to forward an interim report no later than 3 days after expiration of the 90 days remand⁵³. Moreover, 'extrajudicial confessions' made before security personnel are admissible as evidence despite the fact that torture is commonly used by the personnel to extract any sort of information from the suspect⁵⁴. It may be noted that according to the Law of Evidence in Pakistan (Qanun-e-Shahadat) a confession made before a police officer cannot be used in court as valid evidence against the accused. Lending greater legal weight to confessions and putting pressure on police to speedily resolve crime may indirectly contribute to the continued, and perhaps increased, use of torture.

Additionally, the current law bars courts from granting bail to suspected terrorists liable to the death sentence, life imprisonment or a 10-year prison term. Section 21-D of the Anti Terrorism Act 1997 has

also been amended, under which no court, including the High Courts and the Supreme Court, can grant bail to a person liable to these punishments. The portrayal of terrorists as heroes, spreading religious, sectarian or linguistic hate, or promoting extremism through radio, wall-chalking and other means have been declared as criminal offences. Any person found involved in portrayal of terrorists as heroes is liable to a sentence of up to six months and a fine⁵⁵.

Conclusion

It is conceded that the constantly evolving anti-terrorism legislation in Pakistan is essential for the government to adapt to the every-changing phenomenon of terrorism, however, it has to be ensured that its implementation does not encroach upon the fundamental rights of the citizens. While this law has been described as a necessary measure to curb the spate of terrorist activities and commission of heinous activities in Pakistan, it has opened the door to grave violations of human rights including the right to life, the right to liberty and security and the right to fair trial, for instance by creating anti-terrorist courts and giving wide powers of arrest and interrogation to the police and army, among other provisions. Amnesty International categorized this law, when it was first introduced, as legalizing the impermissible and contravening several legal safeguards engraved in Pakistan's Constitution and laws and international human rights standards. In continuation of the stream of amendments, Anti-terrorism Bill 2010 has been tabled in the National Assembly, proposing significant amendments to the current law and it is feared that its promulgation will result in further human right violations, particularly the right to privacy, as it allows the federal government to intercept calls and messages and trace calls of any person through the telecommunication system.

C. Role of the Military in Pakistan

The National Security Council

Introduction of the National Security Council in Pakistan⁵⁶

The formation of a first ever National Security Council⁵⁷ in Pakistan was proposed by General Zia-ul-Haq during his long military regime spanning from 1977 to 1985. This was an important phase in the military's rise to power, which began in the 1950s in Pakistan. General Zia sought to expand the role of the top brass military in governance and political management. Military's prime responsibility under the Constitution is to defend and safeguard the country's territorial integrity and not its ideological frontiers save when consulted by the civilian government⁵⁸. Despite the Constitution of Pakistan expressly prohibiting the military from acting independently of the elected political leadership in domestic matters, the military has routinely intervened in various national level issues, especially on security matters. Pakistan has been embroiled in multifaceted security threats since its independence due to which

involvement of the army was unavoidable and critical for its survival. Hence, the top brass of the military has, over the years, assumed a direct role in policy making especially on security issues. Political parties, however, have constantly opposed the excessive interference of military in policy matters and have incessantly lambasted the NSC as being an attempt to legitimize this interference.

Taking no cognizance of the opposition, General Zia-ul-Haq inserted Article 152–A in the Constitution of Pakistan in 1985⁵⁹, forming the first ever National Security Council in Pakistan. According to this Article, the NSC was empowered to “*make recommendations relating to the issue of a Proclamation of Emergency under Article 232, security of Pakistan and any other matter of national importance that may be referred to it by the President in consultation with the Prime Minister*”. Its members included the Joint Chiefs of Staff Committee, the Chiefs of Staff of the Army, the Navy and the Air Force. However, the life of NSC was short-lived as it was unwelcomed in all political circles and eventually had to be removed from the Constitution in October 1985.

Due to the recurring military rules in Pakistan, it did not take long for the NSC to come into existence for a second time. Through an executive order issued during the regime of General Pervez Musharraf, the NSC was once again constituted in October 1999. It was created to provide non-binding advice to the Chief Executive on issues such as national security, foreign affairs, law and order, corruption, accountability, recovery of bank loans and public debts from defaulters, finance, economic and social welfare, health, education, Islamic ideology, human rights, protection of minorities and women development. The NSC, however, was unable to play an effective role. The Chief Executive took most decisions independently, without consulting the NSC - a quality inherent to most military rulers - making NSC a redundant body. In an added attempt to legitimize the role of the armed forces, Musharraf reinserted Article 152-A in the Constitution in 2002, whereby the NSC was made a constitutional body. Once again, the political parties did not approve and as result of their pressure Article 152-A was removed through the Seventeenth Amendment to the Constitution.

In April 2004, during the Prime Ministership of Mir Zafarullah Khan Jamali, the NSC was established again but this time it was through an act of the Parliament. In order to safeguard democracy in the country, the Prime Minister established the NSC to check the abuse of powers by the President, especially the power to dissolve the National Assembly. In the Act, the functions of the NSC were to serve as a forum for consultation to the President and the government on matters of national security, including the sovereignty, integrity, defence, security of the state and crisis management and to formulate and make recommendations to the President and the government in accordance with these consultations⁶⁰. The NSC comprised of 13 members including the Leader of the Opposition in the National Assembly, Chairman, Joint Chiefs of Staff Committee, and Services Chiefs of the Army, the Navy and the Air Force. However, the opposition parties once again did not share his vision to include top brass of the military as members of a legislatively formed council.

In the words of Pervez Musharaff the reasons of establishing the NSC were that, "*this forum would avert martial laws in the future*". He argued that this body was necessary in the Pakistani environment as it represented all power centres. More recently, former Interior Minister Faisal Saleh Hayat, in support of such a body, said, "the NSC was not a supra-constitutional body but a consultative forum to promote harmony on national security issues and to avert extra-constitutional take-overs. With the NSC in place", he said, "no army chief would feel the need to impose martial law since he would be voicing his opinion in this forum"⁶¹.

Current Status of the NSC

On November 28, 2010 President Yousaf Raza Gillani announced that the NSC would be dissolved, after consulting with President Asif Zardari⁶². When making this announcement, he said "*the government believed in strengthening institutions instead of individuals*". No meeting of the NSC has been held since the new government has come in to power. The Council was established under an Act of the Parliament and a parliamentary vote with a simple majority would be needed to repeal it. The Prime Minister has instructed the Law Minister to table a bill for the dissolution of the NSC though Gilani believes that the NSC has been abolished in principle⁶³.

Conclusion

The role of apex bodies such as the NSC depends hugely on the political environment of a country. It plays a useful but secondary role in established democracies such as the United States where the NSC only advises the President and respects the supremacy of the civilian government. In Pakistan, however, the military has always attempted to usurp the role of civilian leaders, hence the formation of army-dominant councils is not feasible. The NSC, as seen above, has not been able to render any effective advice on policy matters and is normally formed during an army rule to give legitimacy to the army's role in national affairs. The civilian government's inability to deal with complex security affairs has been used as a justification for the formation of the NSC and to provide the military an excuse to intervene in all policy matters. Constitutionally, the government in power can consult the military whenever it feels the need to, without the formation of a formal mediating body.

Extra Judicial Killings and Detentions

The Pakistani army has been involved in committing hundreds of retaliatory/extrajudicial killings and other ongoing human rights abuses in Balochistan and Swat Valley of Khyber Pakhtunkhwa province, yet again acting in excess of its constitutional role. The Pakistan Military have vehemently denied these killings but sufficient evidence has been furnished by local and international human rights organizations to

corroborate these allegations⁶⁴. Section 39 of the ATA is an umbrella provision that grants impunity to the security forces and police for abuses such as extrajudicial detentions and killing. This section states: 'No suit, prosecution or other legal proceedings shall lie against any person in respect of anything which is in good faith done or intended to be done under this act'. To explicitly place any acts of security officials outside the purview and accountability of law encourages extreme force to be used by these officials as they are aware that the good faith criteria will absolve them of any liability. It breaches a basic requirement of the rule of law which requires the uniform application of laws to all citizens.

Balochistan

The uneven distribution of power and resources has been the root of antagonistic relations between the central government and Balochistan. The conflict and unrest worsened during the regime of President Pervez Musharraf as he openly opposed the anti-development stance of the tribal chiefs and was of the view that the ongoing militancy by the Baloch nationalists was hampering the government's development efforts in the region. Musharraf allegedly authorized the military to use excessive force to suppress the growing resilience of Baloch nationalists against the central government⁶⁵. The rampant military operations, that began in early 2005, only accentuated the ethnic tensions in the province and resulted in the deaths of several non-combatants including women and children. During this time, the Pakistani Military Intelligence and Inter Services Intelligence agencies also picked dozens of political activists and took them to unknown destinations. They were tortured whilst under military detention, after which their dead bodies were disposed off in desolate places. The government's adamancy to seek military solution for an essentially political problem only escalated conflict in the region.

Amnesty International and HRCP have provided substantial credible evidence of extrajudicial detentions and killings by the military in Balochistan. On 17 March 2005, in the Dera Bugti district in Balochistan, 70 innocent Balochs, including children, women and elderly, were reported to be killed and more than 200 were reported injured by bombardment and indiscriminate use of force by the Pakistani military. Alarmed by such blatant human rights abuses, the HRCP investigated the incident and based on its findings concluded that the armed forces were in fact responsible for the bloodshed⁶⁶. The unrest reached its peak in August 2006, when veteran Baloch leader Nawab Akbar Khan Bugti was killed by the occupation forces. Undeterred, the army continued its crackdown on insurgents, and in the process killing hundreds of unarmed civilians and political figures. In a recent interview with BBC in November 2010, Mr. Raisani, Chief Minister of Balochistan, admitted to the involvement of the security agencies in the killings and abductions in the province⁶⁷.

This past year has also witnessed the continued brutalities at the hands of the militants and armed forces. Most notable incidents were the killing of the Balochistan National Party leaders Habib Jalib Baloch and Liaquat Mengal in July, 2010. Furthermore, Human Rights Watch estimated that over 300 people were killed in 458 incidents of violence between January and September in 2010, and an additional 1,100

people were picked up by agencies, adding to the 'missing persons' list. Most recently, in January 2011, dead bodies of two student leaders, Qambar Chakar Baloch and Ilyas Nazar Baloch, were found near Pedark near Turbat. The Baloch National Movement and Baloch Student Organization have described their deaths as extrajudicial killings, blaming the security agencies and Frontier Corps of picking up Baloch students and killing them during their illegal detention.

Swat Valley

Extrajudicial killings and illegal detentions have also perpetrated the Swat Valley by security forces as counterterrorism measures. Ever since the military operation began in the Valley to control the Taliban insurgencies, numerous reports of such killings and abductions have been received by the Human Rights Watch (HRW) and Human Rights Commission of Pakistan. On denial of such killings by the security agencies in Swat, the HRCP has issued a statement in August 2009 that "*The Commission reiterates that it has come across credible accounts of extrajudicial killings and complaints of reprisal attacks by the security forces during the operation in Swat*". The HRCP furnished a list of 249 suspected extrajudicial killings from in the region and also reported that 282 bodies were found dumped in Swat during the first several months following the termination of the militancy operation in July 2009⁶⁸. Similarly, in April 2010, the HRW, reported on the basis of "mounting evidence" that more than 200 such killings had occurred during the same period. The HRW also reported that even the police have been involved in the killings⁶⁹.

The widespread human rights atrocities being committed in Balochistan and Swat Valley seriously violate the articles of the Universal Declaration of Human Rights. The continuation of the atrocities throughout 2010 are even more alarming since Pakistan's President ratified the International Covenant on Civil and Political Rights and the Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment this very year. Proper implementation of these obligations, which a country voluntarily assumes onto itself, hugely depends on the political will of the government and the lack thereof is manifested in the large-scale violations occurring in the two provinces of Pakistan. Furthermore these alleged military operations also fall short of the international proportionality and necessity tests, as directly targeting Taliban, political leaders and activists at the risk of the lives of hundreds of civilians, is both excessive and unwarranted.

D. Enforced Disappearances

An enforced disappearance takes place when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law⁷⁰.

While Pakistan has not ratified the UN Convention for the Protection of All Persons from Enforced Disappearance, it is still bound by customary international law to proscribe enforced disappearances from

its land. However, in blatant disregard of international law, incidents of disappearances are rampant in Pakistan and the victims have mostly been suspected terrorists and activists from Balochistan and Sindh fighting for greater socio-political and economic rights. In fact, these disappearances are not only against international law but against the law of the land by denying people to exercise their fundamental human rights of association, freedom of speech and recourse to legal aid in case of being implicated in any case.

In connection with the war on terror that Pakistan has valiantly decided to fight, thousands of people have been arrested without warrant and kept in detention in undisclosed places without any formal charges and without any access to lawyers, family and court. Some have even been surrendered to foreign intelligence agencies investigating cases of terrorism, in contravention of Pakistan's Extradition Act and often in defiance of the principle of non-refoulement. In certain cases, these intelligence agencies have transferred persons to other third world countries for detention where they are subjected to torture and maltreatment⁷¹. The former President General Musharraf has acknowledged in his book titled 'In the line of fire' that 689 persons were captured during his regime and 369 were handed over to the United States, and for this people have earned bounties totaling millions of dollars⁷².

The clandestine nature of these arrests and detentions makes it very difficult to estimate the exact number of the disappearances. According to the HRCP, approximately 4,000 people have "disappeared" in Pakistan since the beginning of the US-led war on terror in 2001⁷³. However, four years after this report of HRCP, different estimates by non-government sources such as nationalist groups, fundamentalist religious organizations and human rights organizations, show that as many as 8000 cases of missing persons have been reported since the start of the war on terror from different parts of the country⁷⁴.

One such case is of Masood Janjua, a 45-year-old businessman, who was apprehended by the Pakistani security forces while on a bus in July 2005 with his friend Faisal Faraz, a 25-year-old engineer from Lahore. The government has not admitted that it is holding Janjua, despite testimonies from several former detainees. Another similar case is of Dr. Abid Sharif, who has been missing since 2005. His family was told by the police in Peshawar that he had been picked up by a Frontier Constabulary, a government agency, however, the family has not heard from him ever since. Many political leaders, activists and innocent bystanders have disappeared from Balochistan for voicing their concerns about their unequal treatment by the state and the Baloch people have blamed the Inter Services Intelligence (ISI) responsible for these abductions. During HRCP's fact-finding mission to Balochistan in 2005, it discovered widespread instances of disappearances. One of the most alarming cases was the disappearance of 18 union leaders of Pakistan Petroleum Limited while they were on a work trip to Karachi. HRCP has estimated that over 600 persons are missing from Balochistan, whereas the Baloch leaders state the number to be in thousands. The Balochistan Home Department issued a list of 992 people in early 2010 who were believed to be missing as their relatives claim they were picked up by security forces. The situation continues to worsen and HRCP considers the state of affairs in the region

very close to a civil war. In a recent report it states that security has further deteriorated and 45 decomposed bodies have been found since July 2010, while 298 persons have gone missing.

In 2006, the Supreme Court took up regular hearings of petitions filed on behalf of Pakistan's 'disappeared' or missing persons. However, in November 2007, Pervez Musharraf imposed a state of emergency and deposed a majority of judges who were hearing cases of missing persons. The SC resumed court hearings of these cases in November 2009, but a report of Amnesty International stated that new incidents of such disappearances continued to be reported during the period following the resumption of the cases⁷⁵. To strengthen its efforts, in 2010 the government formed a Judicial Commission to probe cases of disappearances, comprising of Justice (R) Kamal Mansoor Alam (Chairman), Justice (R) Fazlur Rehman and Justice (R) Nasira Iqbal,. According to the Commission, since its conception in March 2007, 134 persons have been traced and recovered⁷⁶. The Commission has vowed to focus on resolving the unending cases of missing persons like Masood Ahmed Janjua, Faisal Faraz and Dr. Abid Sharif.

On January 13, 2011, the Commission submitted its long awaited report on missing persons to the government and directed the government to furnish a response to the findings of the report. One of the most alarming findings of the report was *"that the Commission received 203 new cases during the period of eight months from April 30 to December 30, 2010, at an average of about 25 cases per month, mostly pertaining to Punjab, Khyber Pakhtunkhwa and Balochistan,"*. This reflected that the practice of enforced disappearances was on a rise and required immediate action at state level.

In light of this scenario, the report has strongly recommended that the government should develop a mechanism through which the intelligence agencies share information with the police and restrain from arbitrarily arresting and detaining anyone without due process of law. They can work in collaboration by forming Joint Investigation Teams (JIT) as provided under the ATA. The Commission expresses in its report that the JIT and Task Force can play a vital role in tracing missing persons and in this regard, it has also stipulated a list of instructions that may be issued to the concerned authorities. Special emphasis has been laid on the enactment of appropriate legislation that grants specific powers of arrest & detention to the Army and law enforcement agencies but only for a limited period and that also under exceptional circumstances. This has been considered especially relevant for preventing new cases of enforced disappearances. Concerning victims of enforced disappearances, the report has recommended the provision of appropriate/reasonable compensation to the victims and various methods of calculating compensation have also been extrapolated in the report.

To sustain the pace of recovery/tracing of missing persons and to implement the recommendations of this Commission, the report also proposes that a person not less than the rank of a sitting/retired High Court judge may be appointed as a Commissioner for Missing Persons.

Furthermore, the report has made certain pertinent observations regarding the irregular practices adopted by the police during investigation. Firstly, it has observed that the local police, and in some cases the Elite Force, assist the intelligence agencies in picking up persons from their homes and work places which is beyond their scope of duties. It has also observed that in some cases the concerned police officers of the level of City Police Officer (CPO)/District Police Officer (DPO)/Senior Superintendent of Police (SSP) were aware of the identity of the person apprehended and kept under custody by the intelligence agencies. However, they avoided disclosing it before the courts or the Commission. On the contrary, those persons who appeared before this Commission, after release from illegal detention bravely recorded in their statements the identities of the persons who were also confined with them on the same premises. In a few cases, it has also been observed that police officers commit intellectual dishonesty by registering fake FIRs against the persons who are picked up by the intelligence agencies and handed over to the police after a long time. When the courts set them free, false propaganda is made that the courts are acquitting the culprits. It made special reference to the case of Abdul Khaliq Awan, who went missing from Rawalpindi on March 20, 2010. He was shown as having been arrested in case FIR No 330 dated November 23, 2010 u/s 11-V-W ATA 1997, PS Saddar, Mianwali. It was such a weak and fabricated case that the relevant court acquitted Abdul Khaliq Awan at the very first hearing.

Conclusion

Enforced disappearances are a complex phenomenon and involve violation of multiple human rights such as right to freedom, the right to life, the right to bodily integrity, the right to safety and the right to free trial. Pakistan is a signatory of the International Convention for the Protection of All Persons from Enforced Disappearances, however, the situation articulated hereinabove manifests absolute disregard of the Convention. The Judicial Commission on Missing Persons has proposed pertinent recommendations that aim at curbing the root causes giving impetus to the practice of enforced disappearances. At the time of writing this report, the Commission was awaiting response from the government on its report.

E. Recommendations

1. Proclamation of emergencies must be issued strictly in accordance with the Constitutional provisions in Pakistan. These provisions are by nature protective and necessary to limit the human rights abuses during a state of emergency as opposed further repress the rights of the citizens. The emergency measures should ideally also meet the threshold principles of legitimacy laid out in the final report⁷⁷ of Leandro Despouy as UN Special Rapporteur on State of Emergency namely principle of legality, principle of proclamation, principle of notification, principle of time limitation, principle of exceptional threat, principle of proportionality, principle of non-discrimination and principle of compatibility, concordance and complementarity of the various norms of international law.

In brief, the extent, duration and scope of proclamation of emergency must be proportional to the exigencies of the situation. The Constitution of Pakistan should specifically state that no state of emergency could remain in force for longer than it is strictly necessary, to prevent the needless continuation of states of emergencies for political gains. Perhaps, an impartial monitoring authority can be formed that periodically reviews, if the factors compelling a state of emergency continue to exist or not.

2. To curb terrorism, a cohesive anti-terror strategy needs to be developed and sustained which does not compromise on the promotion and protection of human rights. The broad powers given to the police and military contravene major international standards of human rights and it is strongly urged that the legislation and practices must be brought in line with these standards. Some of the important ones are enlisted below:
 - i. Principle 2 of the UN Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions states that: 'In order to prevent extra-legal, arbitrary and summary executions, governments should ensure strict control, including a clear chain of command over all officials responsible for the apprehension, arrest, detention, custody and imprisonment as well as those officials authorized by law to use force and firearms.'
 - ii. Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR) states: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be deprived of his life.'
 - iii. Article 3 of the UN Code of Conduct for Law Enforcement Officials provides that, 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.'
 - iv. Principle 19 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions expressly states: 'In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.' Further, Principles 9 and 18 respectively call for all such violations to be investigated and for the perpetrators to be brought to justice. In addition, Principle 23 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Personnel reaffirms: 'Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process.'

- v. Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: 'No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.'
3. Acts of enforced disappearance in Pakistan violate international law and several provisions of Pakistan's constitution, including freedom from arbitrary detention, the right to judicial overview of detentions and the prohibition of torture. The government must take corrective measures as recommended in the Judicial Commission's report to deal with the crisis of disappearances.
 4. The government's objective must be to protect the rights of the civilians who are most affected by human rights abuses resulting from terrorist activities or extremists' insurgencies in the country. The government policy of employing military and counterterrorism objectives causes further injury to the rights of the civilians.

F. Conclusion

An upsurge of terrorist activities, intensification of cross border terrorist activities and insurgent groups in different parts of the country proffers a significant challenge for Pakistan to reconcile protection of human rights with counterterrorism strategies. Striking the right balance between national security and human rights is critical for the success of Pakistan's counter-terrorism strategies. The threat of terrorism does not justify the indiscriminate rejection of the democratic rights and freedoms embedded in the Constitution, hence anti-terrorism laws must be developed after giving due consideration to its potential human rights implications. As the United Nations Secretary General Kofi Annan has observed:

...compromising human rights ... facilitates achievement of the terrorist's objective - by ceding to [them] the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.⁷⁸

The protection of human rights is not an antithesis to preserving national security, and in fact international human rights law was developed during a time of extreme global conflict. These laws are meant to balance the security concerns of a country with fundamental rights of human beings. There are instances where the states are allowed to restrict human rights but only if it is a necessary and proportionate measure to meet the gravity of the threat. For example, Article 12 of the ICCPR which protects the right of freedom of movement can be subject to restrictions to protect national security if the restriction in question is the least intrusive means of effectively protecting national security. Hence, the ultimate test for

human rights infringement in the face of national security threats is proportionality and necessity. Upholding human rights principles should enjoy utmost importance in developing strategies to counter terrorism and shielding the country against security threats originating from within our outside its borders.

Pakistan faces multifarious problems in maintenance of its internal security. The incessant intermingling of political aspirations with strategic defence policies has led to excessive powers being placed in the wrong hands. While it absolutely crucial to have laws and constitutional protections to safeguard the country against security threats and insurgents, strict measures need to be put in place which will prevent the misuse and abuse of the laws by the state and law enforcement officials.

Main References

1. Laws

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- ii. Anti-Terrorism Act, 1997 (and ensuing amendments)
- iii. National Security Council Act, 2004
- iv. Universal Declaration of Human Rights

2. Academic Articles/Books

- i. *Emergency Powers and Courts of Indian and Pakistan* by Imtiaz Omar (2002)
- ii. *Responding to Terrorism: Pakistan's Anti-Terrorism Laws* by Dr. Shabbana Fayyaz (May, 28, 2008)
- iii. *The Creation and Development of Pakistan's Anti-terrorism Regime, 1997–2002* by Charles H. Kennedy
- iv. *Fatal Erosion of Human Rights Safeguards under Emergency* - Amnesty International (2007)
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- vii. *Human Rights Watch – Pakistan: Extra Judicial Killings by Army in Swat* July 16, 2010
- viii. *Anti Terrorist Laws in Pakistan* – Kellie Ortega 2002

3. Newspapers

Online Editions of Daily News International, The Dawn, The Nation, Daily Times and New York Times

Appendix

Constitution of Pakistan, 1973

PART X

Emergency Provisions

232. Proclamation of emergency on account of war, internal disturbance, etc.

- (1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.
- (2) Notwithstanding anything in the Constitution, while a Proclamation of Emergency is in force,
 - (a) Majlis-e-Shoora (Parliament) shall have power to make laws for a Province, or any part thereof, with respect to any matter not enumerated in the Federal Legislative List or the Concurrent Legislative List;]
 - (b) the executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority of the Province is to be exercised, and
 - (c) the Federal Government may by Order assume to itself, or direct the Governor of a Province to assume on behalf of the Federal Government, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any body or authority in the Province other than the Provincial Assembly, and make such incidental and consequential provisions as appear to the Federal Government to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending, in whole or in part, the operation of any provisions of the Constitution relating to any body or authority in the province:

Provided that nothing in paragraph (c) shall authorize the Federal Government to assume to itself, or direct the Governor of the Province to assume on its behalf, any of the powers vested in or exercisable by a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts.

- (3) The power of [Majlis-e-Shoora (Parliament)] to make laws for a Province with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties upon the Federation, or officers and authorities of the Federation, as respects that matter.
- (4) Nothing in this Article shall restrict the power of a Provincial Assembly to make any law which under the Constitution it has power to make but if any provision of a Provincial law is repugnant to any provision of an Act of [Majlis-e-Shoora (Parliament)] which [Majlis-e-Shoora (Parliament)] has under this Article power to make, the Act of [Majlis-e-Shoora (Parliament)], whether passed before or after the Provincial law, shall prevail and the Provincial law shall, to the extent of the repugnancy, but so long only as the Act of [Majlis-e-Shoora (Parliament)] continues to have effect, be void.
- (5) A law made by [Majlis-e-Shoora (Parliament)], which [Majlis-e-Shoora (Parliament)] would not but for the issue of a Proclamation of Emergency have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after

the Proclamation of Emergency has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

- (6) While a Proclamation of Emergency is in force, [Majlis-e-Shoora (Parliament)] may by law extend the term of the National Assembly for a period not exceeding one year and not extending in any case beyond a period of six months after the Proclamation has ceased to be in force.
- (7) A Proclamation of Emergency shall be laid before a joint sitting which shall be summoned by the President to meet within thirty days of the Proclamation being issued and,
 - (a) shall cease to be in force at the expiration of two months unless before the expiration of that period it has been approved by a resolution of the joint sitting; and
 - [(b) shall, subject to the provisions of paragraph (a), cease to be in force upon a resolution disapproving the Proclamation being passed by the votes of the majority of the total memberships of the two Houses in joint sitting.]
- (8) Notwithstanding anything contained in clause (7), if the National Assembly stands dissolved at the time when a Proclamation of Emergency is issued, the Proclamation shall continue in force for a period of four months but, if a general election to the Assembly is not held before the expiration of that period, it shall cease to be in force at the expiration of that period unless it has earlier been approved by a resolution of the Senate.

233. Power to suspend Fundamental Rights, etc., during emergency period.

- (1) Nothing contained in Articles 15, 16, 17, 18, 19, and 24 shall, while a proclamation of Emergency is in force, restrict the power of the State as defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall to the extent of the incompetency, cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.
- (2) While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any Court for the enforcement of such of the Fundamental Rights conferred by Chapter 1 of Part II as may be specified in the Order, and any proceeding in any Court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the Rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan.
- (3) Every Order made under this Article shall, as soon as may be, be laid before a joint sitting for approval and the provisions of clauses (7) and (8) of Article 232 shall apply to such an Order as they apply to a Proclamation of Emergency.

234. Power to issue Proclamation in case of failure of constitutional machinery in a Province.

- (1) If the President, on receipt of a report from the Governor of a Province or otherwise, is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution, the President may, or if a resolution in this behalf is passed at a joint sitting shall, by Proclamation,
 - (a) assume to himself, or direct the Governor of the Province to assume on behalf of the President, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, any body or authority in the Province, other than the Provincial Assembly;
 - (b) declare that the powers of the Provincial Assembly shall be exercisable by, or under the authority of, [Majlis-e-Shoora (Parliament)]; and
 - (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for

suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the Province:

Provided that nothing in this Article shall authorize the President to assume to himself, or direct the Governor of the Province to assume on his behalf, any of the powers vested in, or exercisable by, a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts.

- (2) The Provisions of Article 105 shall not apply to the discharge by the Governor of his functions under clause (1).
- (3) A Proclamation issued under this Article shall be laid before a joint sitting and shall cease to be in force at the expiration of two months, unless before the expiration of that period it has been approved by resolution of the joint sitting and may by like resolution be extended for a further period not exceeding two months at a time; but no such Proclamation shall in any case remain in force for more than six months.
- (4) Notwithstanding anything contained in clause (3), if the National Assembly stands dissolved at the time when a Proclamation is issued under this Article, the Proclamation shall continue in force for a period of three months but, if a general election to the Assembly is not held before the expiration of that period, it shall cease to be in force at the expiration of that period unless it has earlier been approved by a resolution of the Senate.
- (5) Where by a Proclamation issued under this Article it has been declared that the powers of Provincial Assembly shall be exercisable by or under the authority of [Majlis-e-Shoora (Parliament)], it shall be competent-
 - (a) to [Majlis-e-Shoora (Parliament)] in joint sitting to confer on the President the power to make laws with respect to any matter within the legislative competence of the Provincial Assembly;
 - (b) to [Majlis-e-Shoora (Parliament)] in joint sitting, or the President, when he is empowered under paragraph (a), to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties, upon the Federation, or officers and authorities thereof;
 - (c) to the President, when [Majlis-e-Shoora (Parliament)] is not in session, to authorize expenditure from the Provincial Consolidated Fund, whether the expenditure is charged by the Constitution upon that fund or not, pending the sanction of such expenditure by [Majlis-e-Shoora (Parliament)] in joint sitting; and
 - (d) to Majlis-e-Shoora (Parliament)] in joint sitting by resolution to sanction expenditure authorized by the President under paragraph (c).
 - (6) Any law made by [Majlis-e-Shoora (Parliament)] or the President which [Majlis-e-Shoora (Parliament)] or the President would not, but for the issue of a Proclamation under this Article, have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation under this Article has ceased to be in force, except as to things done or omitted to be done before the expiration of the said period.

235. Proclamation in case of financial emergency.

- (1) If the President is satisfied that a situation has arisen whereby the economic life, financial stability or credit of Pakistan, or any part thereof, is threatened, he may, after consultation with the Governors of the Provinces or, as the case may be, the Governor of the Province concerned, by Proclamation make a declaration to that effect, and while such a Proclamation is in force, the executive authority of the Federation shall extend to the giving of directions to any Province to observe such principles of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary in the interest of the economic life, financial stability or credit of Pakistan or any part thereof.
- (2) Notwithstanding anything in the Constitution, any such directions may include a provision requiring a reduction of the salary and allowances of all or any class of persons serving in connection with the affairs of the Province.

- (3) While a Proclamation issued under this Article is in force the President may issue directions for the reduction of the salaries and allowances of all or any class of persons serving in connection with the affairs of the Federation.
- (4) The provisions of clauses (3) and (4) of Article 234 shall apply to a Proclamation issued under this Article as they apply to a Proclamation issued under that Article.

236. Revocation of Proclamation, etc.

- (1) A Proclamation issued under this part may be varied or revoked by a subsequent Proclamation.
- (2) The validity of any Proclamation issued or Order made under this Part shall not be called in question in any court.

237. Majlis-e-Shoora (Parliament) may make laws of indemnity, etc.

Nothing in the Constitution shall prevent [Majlis-e-Shoora (Parliament)] from making any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan.

ENDNOTES

¹ *Emergency Powers and the Courts of India and Pakistan*, by Imtiaz Omar 2002

² National Security Council Act 2004

³ Article 234 Part X: Emergency Provisions Constitution of Pakistan 1973

⁴ Article 235 Ibid.

⁵ Proclamation of Emergency 1990 [Gazette of Pakistan, Extraordinary, Part III 6th August, 1990]

⁶ Proclamation of Emergency 1998 [Gazette of Pakistan, Extraordinary, May 28, 1998]

⁷ *Emergency Powers and Courts in India and Pakistan* by Imtiaz Omar (2002) (Chapter II Pg. 31-33)

⁸ 2007 CLC 923

⁹ PLD 1999 SC 57 *Farooq Ahmed Leghari versus The State*

¹⁰ Article 232(2) Part X Constitution of Pakistan 1973

¹¹ Article 233(1) Ibid.

¹² PLD 1999 Lahore 139

¹³ Article 233(2) and Article 234(1) Part X Constitution of Pakistan 1973

¹⁴ Clause 2, Article 236, Ibid.

¹⁵ 1999 SCMR 1598 *Shahid Orikzai versus President of Pakistan*

¹⁶ PLD 2008 Supreme Court 735

¹⁷ PLD 2008 SC 879 *Sindh High Court Bar Association versus Federation of Pakistan*

¹⁸ Clause 1, Article 236, Part X Constitution of Pakistan 1973

¹⁹ Provisional Constitution Order No. 1 of 2007, 3 November 2007

²⁰ The Oath prohibited judges from exercising any judicial authority " *against the President, Prime Minister or any person exercising powers or jurisdiction under their authority* ",

²¹ Constitution of Pakistan, 1973: Article 2(A) *This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan; ...Wherein the independence of the Judiciary shall be fully secured;*

²² Human Rights Watch *Destroying Legality (Part V)* December 18, 2007

<<http://www.hrw.org/en/reports/2007/12/18/destroying-legality>>

²³ Article 271AAA (1) The proclamation of emergency of November 3, all President's orders, ordinances, Chief of Army Staff orders, including the Provisional Constitution Order No 1 of 2007, the Oath of Office (Judges) Order 2007, the amendments made in the Constitution through the Constitution (Amendment) Order, 2007 and all other laws made from November 3, 2007 to the date on which emergency is revoked, are accordingly affirmed, adopted and declared to have been validly made by the competent authority and, notwithstanding anything contained in the Constitution, shall not be called in question in any court or forum on any ground whatsoever;

(2) All orders made, proceedings taken, appointments made and acts done by any authority, or by any person in exercise of powers derived from any proclamation, PCO order No 1 of 2007, president's orders, ordinances, enactments, including amendments to the Constitution or sentence passed by any authority in exercise of these powers, notwithstanding anything contained in the Constitution or any judgment of any court, be deemed to always to have been

validly made, taken or done, and shall not be called in question in any court or forum on any ground whatsoever;

(3) All proclamations, president's orders, ordinances, Chief of Army Staff orders, laws, regulations, enactments, including amendments to the Constitution, notifications, rules, orders or bye-laws in force immediately before the date on which the emergency was revoked, will continue in force until altered, repealed, or amended by the 'competent authority

²⁴ The Constitution of Pakistan, Objective Resolution and Article 2(A)

²⁵ Pakistan Electronic Media Regulatory Authority (Amendment) Ordinance 2007 (Ordinance No. LXV of 2007, November 3, 2007) and Press, Newspapers, News Agencies, and Books Registration (Amendment) Ordinance 2007 (Ordinance No. LXIV of 2007 November 3, 2007)

²⁶ Human Rights First *Pakistan's Court and Constitution Under Arrest – Reversing the Damage* (Page 6) Published in February 2008

²⁷ Section 16 of the Maintenance of Public Order Ordinance prohibits speech that "*causes or is likely to cause fear or alarm to the public*" or any section thereof, or which "*further or is likely to further any activity prejudicial to public safety or the maintenance of public order.*" MPO allows detention without trial for upto six months for suspected offences

²⁸ The Dawn, *Nawaz Vows to Fight till Victory*, Bureau Report November 27, 1997

²⁹ Anti-Terrorism Act, 1997, Comment (6)

³⁰ Section 19 (1) ATA 1997

³¹ Section 19 (7) ATA 1997

³² Section 19 (8) ATA 1997

³³ PLD 1998 SC 1445 *Mehram Ali versus Federation of Pakistan*

³⁴ PLD 1999 SC 504

³⁵ Anti-Terrorism (Amendment) Ordinance, 1999 (27 April, 1999)

³⁶ Ibid. Section 7A

³⁷ Ibid. Section 7B

³⁸ As a result of this provision, two militant groups were banned namely Lashkar-i-Jhangvi and Sipah-i-Mohammad and people working for these organizations were also traced.

³⁹ Anti-Terrorism (Amendment) Ordinance, August 15, 2001.

⁴⁰ Ibid Section 11(A)

⁴¹ Eleven new courts were set up in N.W.F.P (now referred to as Khyber Pakhtunkhawa) and four in Sindh.

⁴² The lawyers, other sections of the judiciary and international human rights organizations hugely condemned the involvement of military in the judiciary.

⁴³ The provision of the act regarding the transfer of cases contains an inherent injustice in that judges presiding over a transferred case have to decide the case to some extent based on a written transcript of evidence, if available. One of the fundamental principles of the judicial system of Pakistan is that cases are resolved based on presentation, wherever possible, of oral evidence directly to the court.

⁴⁴ Anti-terrorism (Amendment) Ordinance 2002 (November 16, 2002)

⁴⁵ Ibid Section 11EE (1)

⁴⁶ JuD is alleged to be involved in the Mumbai bomb attacks.

⁴⁷ Muhammad Amir Rana, "Changing Tactics of Jihad organizations in Pakistan", <www.pips.com.pk/JihadOrg.asp>

⁴⁸ BBC News 'Pakistan gave Funds to Group on UN Terror List ' June 16, 2010 <<http://www.bbc.co.uk/news/10334914>>

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- ⁴⁹ Section 25(4-A), (4-B) Anti-Terrorism (Amendment) Ordinance 2004
- ⁵⁰ Anti-Terrorism (Second Amendment) Act 2005
- ⁵¹ Ibid. Section 13
- ⁵² Anti-Terrorism (Amendment) Ordinance 2009, Section 21 E
- ⁵³ Ibid.
- ⁵⁴ Ibid Section 18
- Human Rights Watch 'World Report Chapter: Pakistan' <http://www.hrw.org/en/node/87399>
- ⁵⁵ Daily Times *No Bails for Terrorists under New Law* November 29, 2009 by Akhtar Amin <http://www.dailytimes.com.pk/default.asp?page=2009\11\23\story_23-11-2009_pg7_14>
- ⁵⁶ Background Paper *National Security Council – A Comparative Study of Pakistan and Other Selected Countries* Published by PILDAT (Pakistan Institute of Legislative Development and Transparency) August 2005
- ⁵⁷ A consultative body to advise on high-level security affairs of the country and to overlook the functioning of the civilian government.
- ⁵⁸ Article 245(1): Part XII: Chapter 2: Armed Forces, *Constitution Of Pakistan 1973*
- ⁵⁹ Revival of the Constitution Order (RCO) March 1985
- ⁶⁰ Section 5, National Security Council Act 2004 (Act No. I of 2004)
- ⁶¹ Dawn June 25, 2009
- ⁶² Daily Times *NSC Abolished: Gilani* Saturday November 29, 2008 <http://www.dailytimes.com.pk/default.asp?page=2008\11\29\story_29-11-2008_pg1_6>
- ⁶³ The Nation '*Bill to Abolish NSC Soon*' February 25, 2009 <<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Regional/25-Feb-2009/Bill-to-abolish-NSC-soon-says-Gilani>>
- ⁶⁴ BBC World Pakistan 'Army Accused of Extrajudicial Killings' July 16, 2010 <<http://www.bbc.co.uk/news/world-south-asia-10667545> >
- ⁶⁵ International Crisis Group 'Pakistan: The Worsening Conflict in Balochistan' September 14, 2006 <[http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/119_pakistan_the_worsening_conflict_in_balochistan.ashx](http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/119_pakistan_the_worsening_conflict_in_balochistan.ashx)>; HRCP Fact Findings Report 'Human Rights Violations – Conflict in Balochistan' December 2005 – January 2006 <<http://hrcp-web.org/pdf/Conflict%20in%20balochistan--%20Complete.pdf>>
- ⁶⁶ HRCP Fact Findings Report 'Human Rights Violations – Conflict in Balochistan' December 2005 – January 2006 <<http://hrcp-web.org/pdf/Conflict%20in%20balochistan--%20Complete.pdf>>
- ⁶⁷ BBC News 'Top Balochistan Minister Alleges Extrajudicial Killings' November 24, 2010 <<http://www.bbc.co.uk/news/world-south-asia-11832034>>
- ⁶⁸ Daily Times 'Army Accused of Extrajudicial Killings in Swat' April 6, 2010 <http://www.dailytimes.com.pk/default.asp?page=2010\04\06\story_6-4-2010_pg7_14>
- ⁶⁹ Ibid.
- ⁷⁰ Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance
- ⁷¹ Amnesty International *Pakistan: Human rights ignored in the "war on terror"*, AI Index: ASA 33/036/2006.
- ⁷² Page 237
- ⁷³ The News *4,000 people have simply disappeared: HRCP*, November 7, 2006,
- ⁷⁴ PAKISTAN: Thousands of Persons remain Missing amid Government Inaction - A written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization with general consultative status. August 27, 2010 <

<http://www.alrc.net/doc/mainfile.php/hrc15/636>> Also reported by Defence for Human Rights Pakistan (DHRP), a campaign group working for missing persons in Pakistan <www.dhrpk.org>

⁷⁵ Amnesty International Report - 2010 <<http://www.unhcr.org/refworld/docid/4c03a80cc.html>>

⁷⁶ Express Tribune <<http://tribune.com.pk/story/101712/missing-persons-judicial-commission-seeks-law-to-monitor-agencies/>>

⁷⁷ Leandro Despouy, Special Rapporteur per Economic and Social Council res. 1985/37, The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency, E/CN.4/Sub.2/1997/19

<http://www.derechos.org/nizkor/excep/despouy97en.html>

⁷⁸ United Nations Secretary General Kofi Annan, Address to the closing plenary of the International Summit on Democracy, Terrorism and Security, delivered in Madrid, Spain, 10 March 2005. Press Release, SG/SM/9757.