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# PAKISTAN

## Protection of juveniles in the criminal justice system remains inadequate

*“Childhood is entitled to special care and assistance.”* UN Convention on the Rights of the Child, preamble.

### 1. Introduction

The slow progress towards protection of child rights in Pakistan initiated by the ratification of the United Nations (UN) Convention on the Rights of the Child (CRC)<sup>1</sup> in 1990 and the introduction of the Juvenile Justice System Ordinance, 2000 (JJSO) came to an abrupt halt when, on 6 December 2004, the Lahore High Court revoked the JJSO with effect for the whole country. The JJSO was promulgated on 1 July 2000 and focuses on the child in the criminal justice process. It defines the child in line with international standards as a person below 18 years of age<sup>2</sup>; provides for the establishment of special juvenile courts exclusively to try juveniles under special procedures suitable for children; regulates the arrest of children by police as well as bail and probation; provides for the appointments of special panels of lawyers to assist children free of charge in court; and prohibits the death penalty and the use of fetters and handcuffs for children.

The ratification of the CRC and passing of the JJSO were major landmarks for the protection of child rights in Pakistan. However, the implementation of the JJSO has been very slow in the five years following its promulgation. Some of its provisions were not implemented at all, others only very haltingly and partially. The law was only enforced in select parts of the country leaving the criminal justice system in other areas without any child rights protection. The conclusion reached by Amnesty International in 2003 in its report on juveniles that “despite the promulgation of the JJSO the rights of young people accused of criminal offences continue to be denied” stands unaltered.<sup>3</sup>

The present report looks at the implementation of the JJSO pointing to areas in which implementation was less than adequate, building on or updating the findings of Amnesty International’s 2003 report. A special focus of this section is the death penalty for juveniles which Amnesty International hopes will be permanently abolished in law and practice in Pakistan – one of the last countries where this blatant violation of the CRC and of customary international law outlawing the death penalty for juveniles continues to be reported. The

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<sup>1</sup> The CRC comprises a wide range of rights including civil and political as well as social, economic and cultural rights of the child, defined as a person below 18 years of age.

<sup>2</sup> In this report the terms “child” and “juvenile” are used interchangeably as any person below 18 years of age. Nearly 51% of the population of Pakistan are under 18 years of age.

<sup>3</sup> *Pakistan: Denial of basic rights for child prisoners*, ASA 33/011/2003, 23 October 2003. The report examined the situation of children caught up in the criminal justice system and described continuing neglect of the rights of such children by all sectors of the criminal justice system in violation of provisions of the JJSO.

section concludes with a set of recommendations for a more effective implementation of the JJSO.

The arguments of the Lahore High Court judgment on the basis of which it revoked the JJSO are analysed in a separate document.<sup>4</sup> The Lahore High Court held that the JJSO unduly privileges juveniles but ignored that the Constitution of Pakistan explicitly allows special provisions for the protection of women and children without diminishing the rights of others. It further claimed that other laws adequately protect juveniles and that courts take a lenient attitude to juveniles making the JJSO redundant. An analysis of existing law and a review of specific cases shows both claims to be untenable. The Lahore High Court also pointed to the fact that in practice many of the provisions of the JJSO have been ignored and that people have made false statements to gain the benefits of protection under the JJSO. It concluded that it was not worthwhile retaining a law that presents a “nightmare of impracticality”. Amnesty International believes that the difficulties of implementation should have been analyzed and constructively addressed to ensure adequate protection of children in contact with the criminal justice system rather than served as a pretext to revoke a valuable piece of legislation protecting children. Lastly, the Lahore High Court argued that the death penalty for juveniles needed to be retained to deter crime. Scientific studies have, however, consistently failed to find convincing evidence that the death penalty deters crime more effectively than other punishments. Amnesty International believes that none of the arguments adduced by the Lahore High Court provide a sufficient basis for revoking the JJSO. They indicate practical problems in implementation and a lack of clarity in the JJSO both of which urgently need to be addressed.

More importantly, the organisation believes that the Court failed to appreciate the spirit of the JJSO and its intention, that is, to pay special attention to the needs of children caught up in the criminal justice system. It also ignored that Pakistan entered international commitments when it ratified the CRC which emphasizes the best interest of the child and its right to special care and assistance. Instead, in several of its arguments, the Lahore High Court set the protection of child rights as being in contradiction to the pursuit and delivery of justice for all. The judgment of the Lahore High Court appears to indicate a lack of care for, even hostility towards children that seem to characterise some sections of the criminal justice system which have imposed disproportionately long prison terms and heavy fines on juveniles and continue to ignore the age of alleged offenders when imposing sentences of death.

In February 2005, the Supreme Court of Pakistan which had admitted appeals against the Lahore High Court judgment, stayed the Lahore High Court judgment. While the appeals are pending in the Supreme Court and the JJSO has been temporarily restored pending a decision, Amnesty International urges the Government of Pakistan forcefully to make the case for child rights when the appeal comes up for hearing. In the hope that the JJSO will be fully reinstated in Pakistan, Amnesty International also calls on the Government to make its provisions a reality for all children in all parts of the country and urges the government to consider bringing into domestic law other areas of child rights protection contained in the CRC.

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<sup>4</sup> *Pakistan: Amnesty International’s comments on the Lahore High Court judgement of December 2004 revoking the Juvenile Justice System Ordinance*, AI Index: ASA 33/026/2005

## 2. Implementation of the JJSO

The JJSO provides important protection for children and should be permanently reinstated and strengthened. However, its implementation requires attention. In particular, the geographical coverage of the JJSO and the establishment and jurisdiction of juvenile courts need to be addressed. Despite the JJSO stipulating otherwise, Amnesty International continues to receive reports of children receiving very long prison sentences, high fines and the death penalty.

In April 2004, the Adviser to the Prime Minister on Women Development, Nilofar Bakhtiar reportedly announced that a plan had been prepared to implement the JJSO “in letter and spirit this year”. She admitted that “unfortunately” this could not be done earlier, without giving any reason for the failure. She added that from then on nobody below the age of 18 would be sentenced to death – despite a legal ban on the death penalty for juveniles having been in place for almost four years and commitments in that regard having been made when the CRC was ratified 10 years earlier. She also announced that a survey of all the prisons would be undertaken to prepare a list of juveniles in detention.

The non-governmental Human Rights Commission of Pakistan (HRCP) has pointed out in successive annual reports that the JJSO remains “extremely poorly implemented”.<sup>5</sup> Amnesty International agrees with this assessment. Most provisions of the JJSO are at best partially implemented. The death penalty continues to be imposed on children; the mandatory separation of trials of juveniles from those of adults is routinely ignored and the JJSO has not been extended to large areas of the country where children are tried and held under laws that entirely ignore the specific rights and needs of children.

The UN Committee on the Rights of the Child discussing Pakistan’s second periodic report on the CRC at its 34th session in October 2003 expressed its concern at the “*poor implementation [of the JJSO] and that many of the authorities in charge of its implementation, particularly within provincial governments and tribal areas, are unaware of its existence. The Committee is also deeply concerned at the high number of children in prisons who are detained in poor conditions, often together with adult offenders and thus vulnerable to abuse and ill-treatment. The very low minimum age of criminal responsibility (7 years) is also of concern. Further, the Committee is deeply concerned about reports of juvenile offenders being sentenced to death and executed, which have occurred even after the promulgation of the Ordinance.*”<sup>6</sup> It recommended a range of measures to improve Pakistan’s child rights record, including the setting up of an independent and effective mechanism to monitor the implementation of the CRC and receive and address complaints from children in a child-friendly and expeditious manner; scrutiny of existing laws including the Hudood Ordinance with a view to bringing them in conformity with the CRC; and the implementation of child rights protection in the Northern and tribal areas. It also expressed concern about persistent discriminatory social attitudes towards children which are evident even in the criminal justice system. The Committee also noted that a very significant number of children are not

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<sup>5</sup> Most recently in Human Rights Commission of Pakistan, *The State of Human Rights 2004*.

<sup>6</sup> UN doc CRC/C/15/Add.217, 27 October 2003.

registered at birth which has negative consequences on the full enjoyment of fundamental rights and freedoms of children.

### **A. The JJSO – an important step towards child rights protection in Pakistan**

Despite the slowness in implementation and the lack of awareness amongst members of the criminal justice system of the JJSO, some progress has no doubt been made, largely thanks to several child rights organizations in Pakistan which have formed the Juvenile Justice Network, lobbied for the full implementation of the JJSO and undertaken awareness training programs for staff of the criminal justice system.

In some cases, courts have begun to function effectively as juvenile courts and taken into account children's best interests. For instance, in August 2003, a juvenile court in Peshawar convicted two boys of drug trafficking and sentenced them to five years' imprisonment but released them on probation after their guardian gave an undertaking for their future good behaviour. The court ordered that the boys be admitted to schools and that the guardian report to the probation officer regularly on the boys' progress.<sup>7</sup>

In a number of cases, provincial high courts have ordered that juveniles sentenced to death by trial courts be retried by juvenile courts. The Peshawar High Court acquitted a child offender who was below 12 years old at the time of the alleged offence. **Farman Ali**, was accused of killing another boy in April 2000. He made a confessional statement but claimed that the pistol he was carrying had gone off accidentally. The Swat *qazi* court<sup>8</sup> had convicted him under section 319 of the Pakistan Penal Code (PPC) (unintended murder) and sentenced him to five years' imprisonment and payment of *diyat* (compensation) for murder. In his appeal to the Peshawar High Court, Farman Ali's counsel argued that the boy had been under 12 years, of immature understanding, could not be held criminally responsible for the killing and should have been treated in accordance with the protection of the JJSO. His confessional statement could not be relied on for the same reason. The High Court agreed and acquitted him on account of his age.

Amnesty International was concerned for the safety of two boys held along with convicted adults in a small cell in Much prison. In 2003, **Ziauddin**, a handicapped 13-year-old boy, and 16-year-old **Abdul Qadir** were sentenced to death by an anti-terrorism court in Balochistan province. Though court documents clearly recorded their being minors at the time of the offence, the court failed to refer the accused to a juvenile court. A child rights activist visited the two boys in 2004 and reported that they shared a cell measuring 6x8 feet in Much prison with six adult men who have been convicted and sentenced to death. The appeal of the boys was then pending in the Quetta High Court. An activist told Amnesty International of his fears that the boys may be subjected to abuse, including sexual abuses by fellow prisoners. The Much Prison is heavily overcrowded with some 68 men under sentence of death. In May 2005, the High Court of Balochistan set aside the court order and remanded the case to a juvenile

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<sup>7</sup> The boys had been arrested on 10 June 2002 on Bara Road, Peshawar, and drugs were found on them. They were charged under section 9 of the Control of Narcotic Substances Act, 1997

<sup>8</sup> For explanation see under laws in PATA.

court for a new trial. Amnesty International members who had appealed to the Governor of Balochistan on the boys behalf were informed in mid-August 2005 that the boys were now held in a separate room for juveniles and that they had no complaints.

## **B. Failings in the implementation of the JJSO**

### **a. The JJSO was not extended to the entire country**

Although the JJSO states unequivocally in its first section that it “*extends to the whole of Pakistan*”, it was initially only applied in the four provinces, Sindh, Punjab, Balochistan and the North West Frontier Province (NWFP). It did not extend to other areas of Pakistan, including the Northern Areas, Azad Jammu and Kashmir and the designated tribal areas.<sup>9</sup>

Extension of the JJSO to these areas appears still incomplete. The JJSO was adopted in Azad Jammu and Kashmir in January 2003. It is not known to Amnesty International if Juvenile Justice Rules have meanwhile been notified there.

The Governor of the NWFP directed on 20 October 2004 that the JJSO be extended to the Provincially Administered Tribal Areas (PATA)<sup>10</sup>. To Amnesty International’s knowledge, the NWFP Juvenile Justice System Rules, 2002 which lay down procedures to make the JJSO operational, have not yet been extended to PATA and accordingly no juvenile court has been set up by the NWFP government nor have regular courts been authorized by the High Court of the NWFP to assume functions of a juvenile court. As a result, the JJSO is not in operation in that region and children continue to be deprived of the protection available under the JJSO. Child rights groups have also lobbied for the appointment of a sufficient number of probation officers and panels of lawyers in the PATA to extend free legal assistance to juvenile accused or victims of crimes. This measure does not appear to have been taken in PATA either.

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<sup>9</sup> The Constitution of Pakistan of 1973 lists two sets of designated tribal areas, the Provincially Administered Tribal Areas (PATA) and the Federally Administered Tribal Areas (FATA).

<sup>10</sup> The PATA have had a chequered legal and judicial history. Regular courts set up in 1973 continued to function in the PATA until the Governor in 1975 promulgated PATA Regulations No. 1 and 2 under which tribunals, which in 1976 gained enhanced functions and were called *jirgas*, were to adjudicate criminal and civil matters. The *jirgas*, however, only had recommendatory functions, with the Deputy Commissioner, an officer with vast administrative, executive and judicial functions, alone being able to make judicial decisions. In 1990 the Peshawar High Court declared the PATA Regulations unconstitutional; appeals against this ruling were dismissed by the Supreme Court in 1994. The ensuing legal and judicial vacuum was filled in 1994 by a body of Islamic laws, the *Nizam-e-Shariat* passed by the Pakistan People’s Party government. This law was replaced in 1998 by the *Nizam-e-Adal* regulations passed by the Muslim League government. Under it, Islamic nomenclature was adopted such the judges are now called *qazi* and it was made obligatory for the *qazi* to consult an Islamic legal advisor, a *muaven*, before any ruling. In substance, the PPC and Code of Criminal Procedure (CrPC) remain applicable without change.

In the Federally Administered Tribal Areas (FATA), the JJSO was notified on 22 November 2004 but as none of the required infrastructure was made available in the region and the prevailing law was not amended to allow the JJSO to be enforced, its formal extension to FATA remains without effect. (For details of the law governing the FATA see below) Under section 4(1) of the JJSO, the relevant provincial government in consultation with the Chief Justice of the relevant High Court should establish one or more juvenile courts for the area within its jurisdiction. However, neither a High Court nor a provincial government has jurisdiction over the FATA. Similarly section 4(2) under which the relevant High Court may confer powers of a juvenile court on a sessions court or judicial magistrate is unenforceable in FATA as no High Court has jurisdiction in the region, nor do the FATA have sessions courts or judicial magistrates. The FATA do not have a probation department, hence no probation officers into whose care a child accused can be released, nor required Borstal Institutions. Section 13(1) of the JJSO which provides that an appeal against an order of a juvenile court can be filed in the relevant High Court is unenforceable as there are no High Courts in FATA.<sup>11</sup> Juvenile Justice Rules have not been formulated for the region and applied to it. In short, the JJSO remains unenforced and, pending changes in the law governing the region, unenforceable in FATA. Child rights protection available under the JJSO remains absent in FATA and a wide range of abuses of child rights is reported.

The Frontier Crimes Regulation (FCR) of 1901 is the basic law in force in the FATA.<sup>12</sup> It comprises substantive and procedural law relating to criminal and civil matters. Passed in the colonial era, the law was intended to administer the strategic border region by allowing the tribes to retain elements of traditional justice but subject to colonial executive control. The FCR has remained unchanged in independent Pakistan.

In case of any offence committed in the FATA, a tribal council or *jirga* tries the offender and recommends a verdict of guilt or innocence to the Political Agent. The Political Agent is appointed by the federal government and in turn appoints members of the *jirga*. He is not bound by the *jirga* recommendations and may decide the verdict and the punishment irrespective of such recommendations. Appellate and revision powers lie with the executive as well.

The Constitution of Pakistan while declaring in Article 1 that the FATA are part of Pakistan, lays down a rigorous separation in terms of law, institutions and human rights protection between the FATA and the rest of Pakistan. The criminal code of Pakistan does not apply to the tribal areas and Article 247(7) of the Constitution debars the jurisdiction of the country's high courts and the Supreme Court from the tribal areas. This means that offences are to be dealt with exclusively under the FCR and no access or appeal to independent judicial authority outside the FATA is permitted.<sup>13</sup> All executive, administrative and judicial functions for the region exclusively lie with the Political Agent.

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<sup>11</sup> Chairman of the non-governmental organisation Voice of Prisoners in Peshawar, Noor Alam Khan has pointed out that "the federal government only fulfilled a formality and did not take into account those provisions of the law which could not be applied to FATA". *Dawn*, 4 July 2005.

<sup>12</sup> The FATA include seven Tribal Agencies and four Frontier Regions.

<sup>13</sup> The latest case in which the Peshawar High Court has stated that it had no jurisdiction with regard to offences committed in the FATA is that of Laiq Khan, reportedly only 10 years old at the time of a car

Human rights protection in the FATA is grossly inadequate. Fundamental rights are guaranteed in the Constitution for all people in the whole of Pakistan, hence including those living in the tribal areas. However, the enforcement of fundamental rights through the higher judiciary under Article 199<sup>14</sup> and 184(3)<sup>15</sup> is debarred in FATA, creating a paradoxical situation in which fundamental rights in the FATA are available but unenforceable.

One of the positive features of the FCR is that it does not provide for the death penalty. However, several other provisions of the FCR are incompatible with a whole range of constitutional human rights guarantees given to everyone in Pakistan as well as international human rights law and standards. The higher judiciary of Pakistan has on several occasions acknowledged this discrepancy and recommended the repeal of the FCR. President Musharraf in 2002 promised reform of the FATA including the FCR and a blueprint was reportedly prepared but not implemented. The amendment or repeal of the FCR is also advocated by many people living in the tribal areas; some people have also pointed out that a gradual transition may be preferable to abrupt change of the legal regime in the tribal areas.<sup>16</sup>

The FCR conflicts with international fair trial standards as it *inter alia* fails to provide for a separation of the judiciary from the executive, ignores the presumption of innocence, the right to be represented by legal counsel of one's choice and to appeal against conviction and sentence. In so far as these and other fundamental rights are assured to people living outside the tribal areas, the FCR violates the right to equality before law and equal protection of law guaranteed in Article 25 of the Constitution of Pakistan. The provisions of the FCR relating to collective criminal responsibility and punishment violate the presumption of individual responsibility contained in the Constitution of Pakistan and statutory law. In so far as the Constitution of Pakistan in Article 8 declares that any law, custom or usage having the force of law, in so far as it is inconsistent with the fundamental rights recognized in the Constitution is void, many provisions of the FCR appear to possess a doubtful legal status.

The FCR is blind to child rights. There is no mention of children in the entire act and consequently no provision for proceedings and punishment which take into account the vulnerability of the child. It has no provisions limiting the criminal responsibility of children or protection against harsh punishments. As a result children are treated on par with adults.

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theft. Despite the JJSO being at that time formally extended to FATA, he was tried by a Political Agent in Kohat as an adult. On 31 May 2005, the High Court said it had no jurisdiction to deal with his petition seeking to be tried under the JJSO as the offence had been committed in FATA.

<sup>14</sup> Article 199 lays down the powers of the provincial high courts to ascertain the legality of detention and to make any order for the enforcement of fundamental rights.

<sup>15</sup> Article 184(3) lays down the powers of the Supreme Court to enforce fundamental rights.

<sup>16</sup> The federal government in 2003 set up a National Assembly and a Senate Standing Committee to review the FCR and recommend changes; a group of legislators from the FATA is also preparing a bill to replace the FCR with Islamic law. A further committee to examine the FCR was set up by the NWFP government; the Tribal Lawyers Forum in May 2005 expressed its support for the committee and stated that the *jirga* system as the "oldest and pure form of democracy" should be retained as it was in accordance with tribal traditions but urged the government to curb the vast powers of the Political Agents, separate the judiciary from the executive and establish an appellate court in the FATA. *The News*, 6 May 2005.

The FCR is also gender blind. It takes no cognizance of crimes against women, does not allow for representation of women during criminal proceedings and makes no allowance for the deprived status of women in the tribal areas which sometimes forces them into crime.

International human rights treaties ratified by Pakistan are binding on the state in respect of all regions and all persons under its jurisdiction. It is therefore obligatory for the state to take all necessary legislative, administrative and other measures to ensure that the rights contained in the ratified treaty are enjoyed by all within the state. Among the very few international human rights treaties ratified by Pakistan is the CRC and some of its provisions were brought into domestic law through the JJSO. Amnesty International urges the Government of Pakistan to fully enforce the JJSO forthwith in the FATA by developing and notifying Rules for its application as a further step towards ensuring the full enjoyment of all the rights of the CRC by all children in Pakistan.

Currently more than 70 juveniles, including at least 15 children below the age of 10, are held in jails of the NWFP under the FCR, either convicted and sentenced in their individual capacity or under collective responsibility provisions for the offences of others. Under section 40 FCR, collective punishment can be imposed on anyone in the tribal areas, including children, for a crime committed by his or her extended family members, including anyone from their *khel* (clan) or tribe. Some juveniles are reportedly held in chains and blindfolded. The children's imprisonment under the FCR is conditional. After completion of their sentences, detainees are to be brought before the Political Agent who can determine under the FCR if they are to be released or to be held for a further three years. People held under the FCR have no right to appeal against their sentences to a higher court outside the FATA. Appeals go exclusively to the FCR Tribunal which consists of the provincial Home Secretary and Law Secretary; in case of difference of opinion, the case can be referred to the provincial Chief Secretary. There is no possibility to challenge the FCR Tribunal decision.

Several juveniles were sentenced under the FCR to long prison terms without regard to their young age, their socio-economic status and their need for, and right to, rehabilitation and re-integration into society. Several of the sentences are grossly disproportionate to the offences for which they are imposed, indicating a clear lack of understanding of child's needs on the part of Political Agents.

**Qismat Khan** was 15 years old when he was arrested on 20 April 1995 in Jamrud, Khyber Agency, for allegedly obstructing government employees in the performance of their official duties, rioting, instigating people to riot and carrying weapons. He was sentenced to 45 years' imprisonment as were his brother **Milat Khan** and cousin **Ali Mohammad** (both adults), who had come from the remote Tihar valley to meet Qismat on the latter's return from Karachi where he had been studying. Qismat Khan and his two relatives were released on 21 May 2004 after an appeal to the President through the offices of the Society for the Protection of the Rights of the Child (SPARC) and on the intervention of the then NWFP Governor. Qismat

Khan's appeal to the provincial High Court in Peshawar had been dismissed earlier as it has no jurisdiction over cases tried under the FCR.<sup>17</sup>

Similarly **Aqal Deen** from North Waziristan was 17 when he was arrested on several charges, including murder. On 17 November 2003 he was convicted and sentenced to 42 years' imprisonment by the Assistant Political Agent in Miranshah who decided that the sentences for different charges should run consecutively, not concurrently. **Rasool Khan** was 13 when the Khyber Agency Assistant Political Agent in 1996 convicted him and sentenced him to 17 years of imprisonment with a Rs. 20,000 fine for allegedly stealing a car. After the benefit of various remissions on religious and national holidays he completed his term of imprisonment but was not released as he could not pay the fine imposed on him. He then had to serve another two years' imprisonment in place of the fine.

The FCR also permits the Political Agent to impose high fines regardless of the alleged child offender's ability to pay. On 19 June 2000, then 16-year-old **Shakeem Gul** was arrested in Wana Bazaar in the South Waziristan Agency on suspicion of being a member of a gang of robbers. The Assistant Political Agent convicted him in exercise of his powers under the FCR in June 2000 and sentenced him to 10 years' rigorous imprisonment (i.e. imprisonment with labour) and stipulated that on completion of his sentence, Shakeem is to furnish a security bond of Rs. 300,000 (1\$ = 43 Rupees) with three reliable sureties in the same amount. Failure to pay would result in a further three years' imprisonment. Child rights activists in the NWFP have informed Amnesty International that Shakeem Gul is the only now adult male member of his family as his father and elder brother have been killed by their tribal enemies and his mother and two younger brothers economically depend on him. In this situation it is highly unlikely that he will be able to provide a security bond of such a high amount and that anyone will provide sureties for him. Shakeem has not received any visits in Central Prison Haripur since his arrest and is reportedly depressed.

A team of SPARC during a visit in 2004 to the Central Prison of Dera Ismail Khan found 13 children of the family of a wanted criminal suspect, Aarsal Khan of the Betani clan, serving three year prison sentences under section 40 of the FCR. Such sentences are imposed on individual named children. They included the five children of Shireen Bibi - Farzana (12

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<sup>17</sup> Upon his release, Qismat was reported in the newspaper *Dawn* to have stated that he and his two relatives had not been involved in any offence; rather they were arrested when their family elders refused to hand over land to the now defunct Peshawar Development Authority for expansion of the Hyatabad township in April 1995 and had demanded compensation from the Hyatabad Housing Scheme and the Khyber Agency political administration in Jamrud. On the night of 20 April 1995, when all male members of the family were away to attend a funeral, a tribal police unit had come to their home and arrested the two young men and the boy. The women of the family were then evicted and the house bulldozed. Qismat reported that the Assistant Political Agent Jamrud had ordered the three detainees to be tied to iron fences, hand-cuffed, blindfolded and with their legs shackled. They were not allowed to sleep for three nights and the tribal police had made them sign blank papers. They were held in Jamrud for 17 days, then transferred to the prison in Dera Ismail Khan where they were told what the charges against them and their punishments were. They were later transferred to Haripur Prison. He reported that after their release, they were brought before the Assistant Political Agent in Jamrud who required that each of them bring six guarantors to vouch for their good conduct and that they should give assurances that they would not speak to anyone about their arrest and imprisonment.

years old), Siyal Bano (7), Zahir Jan (6), Gul Bano (4) and Khyal Bano (2). Another woman of the Betani clan, Gul Sahiba, was detained along with her six children, Gul Hira and Gul Zaram Jan, both in their early teens, Ghulam Hussain (9), Shah Hussain (6) and Mohammad Hussain (4). Their elder brother, Eid Badshah (13) was being detained in the juvenile section of the prison along with four other minor boys of the same clan. The group also includes several older clan members, including 70-years-old Darmeena and 80-year-old Wazir Khan Kaka. Several women and children are reportedly in detention under section 40 FRC simply for being neighbours of Aarsal Khan.

According to SPARC, at least 24 other members of the same family are also currently held in Central Prison Haripur, including children as young as one year old. They were reportedly arrested in April 2004 in the vicinity of Tajori police station in Lakki Marwat district of NWFP - where the FCR is not applicable - and were shifted to Miramshah in North Waziristan Agency where the FCR is applicable. The Assistant Political Agent of North Waziristan then sentenced them each to three years' imprisonment under section 40 FCR; they were subsequently transferred to Haripur prison.

On 22 October 2004, a meeting of the Senate Human Rights Committee was requested by opposition members to discuss the FCR and the sentencing of juveniles under it. When Senator Farhatullah Babar showed a report in the newspaper *Dawn* of 4 October 2004 about a three-year-old girl being sentenced to three years imprisonment under the FCR, the Secretary (Security) FATA dismissed this and similar reports as fabrications. He said, "a Political Agent would be out of his mind to sentence three-year-olds under the FCR."<sup>18</sup> Upon these categorical assurances by a state official, the Senate Human Rights Committee did not pursue the matter but recommended that if such reports were found to be true, women and children sentenced under the collective responsibility clause should be released forthwith. However, Senator Babar in a letter published on 24 November 2004 in the daily *Dawn* stated that he had since then received an official list of convicted persons under the FCR, including the names of at least 17 small children between two and nine years held under the FCR.

A SPARC coordinator during a public function on Human Rights Day 2004 stated that according to official prison statistics, 49 children were in detention in different jails in the NWFP under the FCR. Officials present at the function dismissed this assertion with the then Governor reportedly publicly accusing the SPARC coordinator of lying.

Amnesty International considers the detention of children held under the collective responsibility clause of the FCR as unlawful under Pakistan's commitments under the CRC and rules of customary international law and calls on the Government of Pakistan urgently to amend or repeal the law to ensure that no child (or any adult) is detained for offences he or she has not committed. All children currently held under the FCR should be released and appropriately rehabilitated and compensated. The government should also ensure that pending the amendment or abolition of the FCR no further juveniles are detained under the collective responsibility clause or other provisions which contravene provisions of the CRC.

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<sup>18</sup> Senator Farhatullah Babar, "Child rights: lip service", *Dawn*, 24 November 2004.

## **b. Juvenile courts: slow establishment and operationalisation**

The process to operationalize the JJSO is lengthy and requires adequate resources. It begins with the notification of the JJSO in the official gazette. The Rules of procedure have to be developed and notified in the area where the JJSO was notified. Lastly, all staff of the criminal justice system, including police, judiciary and prison staff, have to be appropriately trained in the provisions of the JJSO and the rules of procedure.

In the provinces where the JJSO was notified, it was only slowly operationalized and in the PATA and FATA notified but not operationalized. In the years immediately following the promulgation of the JJSO, sporadic relief measures for children including remission of prison sentences on religious occasions and on Independence Day were reported and some juveniles accused of petty offences were released, partly to ease the burden on prisons. However, while leading to the release of several hundred children, these measures had only a limited impact and did not amount to systematic implementation of the JJSO.

In September 2001, the Supreme Court of Pakistan directed that the provinces set up juvenile courts within six months. On 10 May 2002, then Minister for Women Development, Social Welfare and Special Education reportedly informed the Special Session of the UN General Assembly on Children that in line with article 40 of the CRC, juvenile courts had been set up to try cases involving juveniles.<sup>19</sup> To date this is not the case. There is only one juvenile court functioning in Karachi. In other parts of the country, provincial high courts have conferred the powers of juvenile courts on district and sessions courts as the provincial governments have failed to set up dedicated juvenile courts.

The four provinces notified similar Juvenile Justice Rules at different times in 2002, two years after the JJSO had been promulgated, thus delaying the process by which the JJSO became operational by almost two years. Trials of juveniles in the regular courts authorized to

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<sup>19</sup> In her address to the General Assembly on 10 May 2002, Dr Attiya Inayatullah said: "Pakistan is a child friendly nation; its ownership rests with fifty million children, a vibrant civil society and child empathetic government. ... Children in conflict with law have the right to proper treatment under Article 40 of the CRC. We have made significant progress to ensure this basic right. Under our new law, the Juvenile Justice System Ordinance, 2000, juvenile courts have been set up and rules are being finalized. Number of borstal jails is being increased and facilities for free legal aid are in the pipeline. Concerted efforts to provide relief have resulted in the reduction in the number of the juveniles confined in jails. The policy to give amnesty in minor cases has continued. Prosecution has also been withdrawn in cases where trials have been delayed due to no fault of the juvenile accused. We are also happy to report that all the provincial governments are committed to providing special borstal institutions for juvenile convicts, allowing them opportunities for education and recreation and to be away from the harmful influences of jails. Punjab and Sindh Provinces lead in these initiatives with others following closely behind."

function as juvenile courts are separate from those of adults as required in the JJSO. However, they may be held in the same court where, and on the same days when, adults are tried, heard by the same judges and in the same adult environment without sufficient regard to their specific needs as children. As noted in the Lahore High Court judgment, in cases where juveniles and adults are tried separately for the same offence, evidence gathered in one trial is often unlawfully transferred to the other. Trials of juveniles are also usually not concluded within four months, as required in section 4(6) of the JJSO.

Under article 3 of the JJSO child accused have the right to legal assistance at the expense of the state and corresponding articles in the Juvenile Justice Rules notified in the provinces obligate juvenile courts or district and sessions courts functioning as juvenile courts to establish panels of legal practitioners to assist the juvenile accused. This rule has only been partially implemented, leading to delays in hundreds of cases of juveniles. Concern has repeatedly been expressed by the Juvenile Justice Network, without much effect.

The lack of access to free legal assistance coupled with the inability of many children and their families to pay lawyers' fees has also contributed to juveniles not being able to avail of bail provisions. According to SPARC and other child rights activist groups, over 80% of juveniles charged with bailable offences remain in prison due to a lack of or inadequate legal assistance.

Article 9 of the JJSO provides that probation officers would assist the juvenile court by making a confidential report on the child's character and social and economic background and supervise the child offender if released on probation under provisions of the Probation of Offenders Ordinance, 1960. The JJSO provides in article 11 that that juvenile courts may

*“(a) direct the child offender to be released on probation for good conduct and place such child under the care of a guardian or any suitable person executing a bond with or without surety as the Court may require, for the good behaviour and well-being of the child for any period not exceeding the period of imprisonment awarded to such child. Provided that the child released on probation be produced before the Juvenile Court periodically on such dates and time as it may direct; ...; (c) reduce the period of imprisonment or probation in the case where the Court is satisfied that further imprisonment or probation shall be unnecessary.”*

The release of children on probation has been severely hampered by the absence of an adequate number of probation officers, in particular separate probation officers for juveniles. Between December 2002 and December 2004, the number of probation officers for juveniles has increased from 166 to 245, leading to more juveniles being released on probation, but many districts still remain without a probation officer. While this shortage negatively impacts on all juvenile detainees, the severe shortage of female probation officers has been particularly harsh for girl detainees as under section 22(3) of the Probation Rules, women and girl detainees should not be placed under the supervision of male probation officers. In the whole of Pakistan there are reportedly only two women probation officers, both in Punjab province. The other provinces have failed to recruit women probation officers, despite urgent demands by child rights groups. For instance SPARC has urged that the NWFP government

appoint at least five women probation officers for the province, so far without success.<sup>20</sup> SPARC has also pointed out that women and children, particularly girl prisoners are usually first time offenders and would be able to avail of probation provisions if there were female probation officers.<sup>21</sup>

The JJSO provides for the mandatory setting up of Borstal Institutions but there remains a severe shortage of such institutions which has further hampered the release of juveniles on probation as no institutional care can be provided to juveniles who cannot be released to their families.

Taken together, the shortage of juvenile courts, of panels of lawyers and probation officers, including women probation officers, and of Borstal Institutions has meant that juveniles are in custody in circumstances which do not accord with provisions of the CRC. It provides in article 37 that children should be deprived of liberty “*as a measure of last resort and for the shortest possible period of time*”.

Training of personnel in the criminal justice system, including police, judiciary and prison wardens, in the spirit and letter of the CRC and the JJSO continues to be grossly inadequate.<sup>22</sup> Without training on child rights compulsorily imparted, many in the judicial system remain ignorant of the basic rights of the child suspected or convicted of breaking the law. Child rights activists in Islamabad, Lahore and Peshawar told Amnesty International in December 2004 that sentencing of juveniles is largely at the discretion of judges who do not always apply the relevant laws because of lack of knowledge. The National Commission for Child Welfare and Development reportedly prepared a training manual on the juvenile justice system for personnel of the criminal justice system in July 1999 but there is little evidence of its systematic use.

A recent workshop held by activists of SPARC in April 2005 in Nowshera, NWFP, with police personnel from all police stations in the district and the District Police Officer (DPO) clearly showed the need for further training of criminal justice personnel. Trainers outlined

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<sup>20</sup> In NWFP for instance, at the end of 2004, there were 477 boys and 30 girl detainees in the province; of these, 129 were released on probation. A consultation with juveniles on probation, the Probation Department and SPARC in August 2005 revealed that there were then 158 juvenile probationers in the province at that time. Girl detainees had had to be placed under the supervision of male probation officers as no female probation officers were available. The Deputy Director of the Probation Department on this occasion pointed out that probation officers were grossly under-resourced. They had no transport facilities and inadequate office equipment, including telephones. Several of the districts were without probation officers so that officers from other district had to look after cases there as well. During the consultation, juveniles on probation stated that they felt relieved to return to their families as they had been traumatized in prison where they had often been ill-treated. Juvenile probationers meet their probation officers and the judge who had ordered their release on probation once a month. According to SPARC, the number of juvenile probationers who re-offend is extremely low.

<sup>21</sup> SPARC *Discourse*, June 2005, p. 15.

<sup>22</sup> A UNICEF study in January 2005 which was carried out with the Central Staff Training Institute, the Interior Ministry’s central institution training jail staff in Pakistan, confirmed widespread ignorance amongst members of the criminal justice system

the duties of police under the JJSO including informing the guardians of a child after arrest and the probation officer to enable him or her to prepare a Social Investigation Report (SIR) and present it to the court. In the discussion, it emerged that none of the police staff had ever contacted a probation officer. In addition, police officers said that they found it difficult to register the proper age of child suspects as the children themselves were usually not aware of their actual ages and police officers had to go by their subjective appreciation of the children's appearance. The DPO admitted that policing in the area was complainant-led and that complainants put pressure on police not to treat child suspects in a "privileged" manner.<sup>23</sup>

Some judges appear to remain ignorant of regulations contained in the JJSO relating to the granting of bail. It provides in article 10(3): "... a child accused of a bailable offence shall ... be released by the Juvenile Court on bail, with or without surety, unless it appears that there are reasonable grounds for believing that the release of the child shall bring him into association with any criminal or expose the child to any danger, in which case, the child shall be placed under the custody of a Probation Officer or a suitable person or institution dealing with the welfare of the children if the parents or guardians of the child are not present, but shall not under any circumstances be kept in a police station or jail in such cases".

Activists have told Amnesty International that despite these provisions, courts routinely fail to allow bail without surety, though most children cannot provide surety due to poverty and inadequate support from families. All children denied bail were sent to prison, rather than into appropriate institutions or the care of probation officers. The JJSO provides for statutory bail in cases where a trial is not concluded in the stipulated period. This provision is regularly ignored as well.<sup>24</sup> That sections of the judiciary are unaware of the provisions of the JJSO is also evident from the continued imposition of the death penalty on juveniles (see below).

### **c. Juveniles and adults continued to be tried together**

Article 5 of the JJSO prohibits the joint trial of children and adults. It provides: "... no child shall be charged with or tried for an offence together with an adult" and that "the court taking cognizance of the offence shall direct separate trial of the child by the Juvenile Court".

The UN Committee on the Rights of the Child (CRC Committee) has consistently proposed a distinct and separate system of juvenile justice for all under-18-year-olds. Rule 2(3) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), also emphasises that: "[e]fforts should be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed: (a) To meet the varying needs of juvenile offenders, while protecting

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<sup>23</sup> SPARC press release, 5 April 2005.

<sup>24</sup> Exceptions to this were the cases of Naimat Khan and Sajjad Gul, who along with three adult men were charged with murder and tried by a District and Sessions Court in Peshawar. Naimat Khan was granted bail in February 2004 against two sureties after his counsel had argued he was a juvenile and entitled to bail as the trial had not concluded within a year. Sajjad Gul had been released on bail earlier. Both were around 16 years old at the time of the offence in April 2002.

*their basic rights; (b) To meet the needs of society; (c) To implement the following rules thoroughly and fairly.”*

Amnesty International believes, like the CRC Committee, that for the human rights of children suspected of breaking the law to be fully protected, they should always be tried in separate juvenile courts where their specific needs and sensibilities are understood and provided for.

The judiciary is well aware of the insufficient separation of trials of juveniles and adults. The Lahore High Court judgment of December 2004 pointed to the fact that courts frequently ignore this provision or use evidence brought in the trial of an adult to the trial of a child charged in the same offence and tried separately, though often by the same judge. As the Lahore High Court also noted, the provision contained in article 6(2) of the JJSO that “*a juvenile court shall not ordinarily take up any other case on a day when the case of a child accused is fixed for evidence on such day*” is routinely ignored as the vast number of cases heard in courts does not permit such a separation.

Numerous reports of joint trials of adults and juveniles continue to be received. In some cases judges were indeed lenient towards juveniles but fell far short of treating them in conformity with the terms of the JJSO, especially with regard to the mandatory separation of trials. **Bashir Ahmed**, who had only been 15 at the time of the alleged offence, was convicted on 28 August 2002 by an anti-terrorism court for allegedly kidnapping a child for ransom. He was tried along with two adult accused. While the adults were sentenced to death, the judge, reported as “taking a lenient view”, sentenced Bashir to 10 years’ rigorous imprisonment (imprisonment with labour). In March 2004, the Anti-Terrorism Appellate bench of the Sindh High Court commuted the death sentences of the adults to life imprisonment and set aside the sentence given to the boy on grounds of his age. The High Court, however, did not take cognisance of the fact that Bashir should not have been tried along with adults.

#### **d. The jurisdiction of the JJSO remained unresolved**

The JJSO in section 4(3) provides that “*the juvenile court shall have exclusive jurisdiction to try cases in which a child is accused of commission of an offence*”. As the Lahore High Court judgment of December 2004 pointed out, the JJSO fails explicitly to extend the jurisdiction of juvenile courts to cases where special courts exist exclusively to try the specific offences with which a juvenile may be charged. As a result juveniles may be tried by special terrorist courts whose procedures do not fully comply with internationally agreed fair trial standards or by special courts authorized to try drug offences.

Another area of unclear jurisdiction relates to the state of a trial. The JJSO provides in article 4(4) that “*... on commencement of this Ordinance, all cases pending before [a] trial court in which a child is accused of an offence shall stand transferred to the Juvenile Court having jurisdiction*”. It fails to state if cases relating to juveniles which have reached the appeal stage should be transferred to juvenile courts for retrial or if appeal courts are to have juvenile benches.

As a result of the lack of clarity in the formulation of the JJSO, courts have had to resolve the question of jurisdiction. This has led to juveniles being held for extended periods of time pending a resolution of the issue.

The issue of the jurisdiction of juvenile courts has arisen in several cases where both anti-terrorism courts and juvenile courts appear to have jurisdiction to try a juvenile accused of offences for which anti-terrorist courts established under the Anti-Terrorism Act (ATA) of 1997 have exclusive jurisdiction. This dilemma arises from legislation which in one act defines the exclusive jurisdiction of a group of courts to try a particular group of offences and in another defines the exclusive jurisdiction of another group of courts to try a group of offenders, namely juveniles.

This question arose in the case of **Muhammad Jahangir** and another minor boy, who were tried by an Anti-Terrorism Court in Lahore, Punjab province, for “terrorist” offences including murder allegedly committed in Sheikhpura in February 2000. Both boys applied to the presiding judge to be tried by a juvenile court set up under the JJSO; the judge in 2002 allowed the applications and continued to try them as a Juvenile Court, separate from the adult accused in the case. When the judge was transferred, his successor at the Anti-Terrorism Court in Lahore in March 2003 passed an order transferring the case against the two boys for trial to a sessions court in Sheikhpura acting as a juvenile court. At this stage the complainant in the original case approached the Lahore High Court challenging the transfer of the case to a juvenile court. The Lahore High Court in its ruling of 28 June 2004 stated that “an offence of terrorism can be tried only by an ATC [Anti-Terrorism Court] constituted under the ATA, 1997 and the age of the offender has no relevance to the question of such jurisdiction.” It cites several sections of the ATA which allow for the trial of juveniles by a court set up under it. The Court also pointed out that section 32 of the ATA provides that the Act has overriding effect over all other laws, whereas the JJSO in section 14 expressly provides that its “provisions shall be in addition to and not in derogation of any other law for the time being in force”. It also argued that the legislature had on several occasions amended the ATA but had not amended its application to juveniles; “this ... act of omission of the legislature had practically reinforced the fact that a child, accused of committing an act of terrorism ... was still to be tried by an ATC ... and not by a Juvenile Court”. Moreover, since all sessions courts in Punjab had been notified as juvenile courts and since ATCs have all the powers of a sessions court, the Court saw “no difficulty in the way of an ATC trying a “child” as a Court of Sessions when all Courts of Sessions in the Province of Punjab have already been notified as Juvenile Court”. It concluded that the two juveniles could be tried competently by the ATC “while following the relevant provisions of the JJSO ... as nearly as possible”.<sup>25</sup>

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<sup>25</sup> *Muhammad Din vs. Muhammad Jahangir and 4 others*, PLD 2004 Lahore 779. The judgment itself acknowledged that the Peshawar High Court had in *Ghulam Mustafa Shah alias Papa vs. the State and another*, PLD 2003 Pesh. 138 come to a different conclusion with regard to these conflicting jurisdictions. Another earlier judgment of the Lahore High Court, *Mst. Azra Bibi vs. The State through special judge, Anti-Terrorism Court, Faisalabad and another*, 2004 P Cr. LJ 1967, decided on 8 April 2002 had come to the same decision, i.e. that the jurisdiction of ATCs overrides the jurisdiction of Juvenile Courts.

The Peshawar High Court has provided different solutions to the competing jurisdictions of anti-narcotics courts and juvenile courts. It ruled in 2003 that a conviction of a juvenile by a special court set up under the Control of Narcotic Substances Act should be set aside and that the accused be retried by a juvenile court. **Ikramullah** was arrested on 14 May 2001 for possessing drugs. He was tried by a special court in Kohat, NWFP, set up under the Control of Narcotic Substances Act and sentenced on 2 October 2001 to life imprisonment and a fine of one million rupees (1 US\$ = 43 Indian rupees). He was 15 to 16 years old at the time of the alleged offence. The public prosecutor had argued during the appeal hearing that the Control of Narcotic Substances Act gave the special narcotics court the exclusive power to try offences falling under the Act. The Peshawar High Court disagreed and on 12 June 2003 ruled that a juvenile could only be tried by a juvenile court. His case is now pending in a juvenile court.

In a similar case the court found a different solution which reflected its concern for the best interest of the accused. **Bukhtiar Gul** was arrested on 15 April 1997 when travelling in a bus with three adults. The Anti-Narcotics Force recovered hashish from the bus and arrested all occupants. A special narcotics court on 24 June 2004 convicted Bukhtiar Gul and one co-accused and sentenced them both to life imprisonment; his other co-accused were sentenced to four years' imprisonment. In August 2004, Bukhtiar Gul filed an appeal in the Peshawar High Court challenging the conviction and arguing that at the time of the alleged offence he had been a minor, yet had been tried together with the three adult accused in a special narcotics court, in violation of the JJSO. This point was not touched on by the bench which decided that remanding the case for retrial would not be in his interest as it might take a long time to retry and decide the case. Instead it upheld Bukhtiar Gul's conviction but set aside his sentence of life imprisonment and released him on probation for four years.

The Lahore High Court on 13 February 2004 ruled that a juvenile under sentence of death, whose case had been decided before the promulgation of the JJSO is still entitled to the protection of the JJSO. It asserted the retrospective effect of the JJSO in all cases, even those where the death sentences had been confirmed by a high court and the Supreme Court. The judgment related to the case of **Sikander Hayat** and **Jamshed Ali** who were both under 18 at the time of the alleged murder and whose death warrants had been issued. The district and sessions judge in Jhelum where the juveniles had originally been tried had refused to commute the death sentences, as the Supreme Court had confirmed them.

Amnesty International urges the legislature and judiciary of Pakistan to clarify these jurisdictional problems to maximise protection of children in line with international standards, that is to grant juvenile courts exclusive jurisdiction over all accused children as per the provisions of the JJSO. While higher courts in cases of competing claims to jurisdiction have in most cases eventually ruled in favour of juveniles, this has meant long delays during which juveniles were detained along with adults and in some cases has led to juveniles having to undergo further trials.

### **e. Lack of “special care and assistance” in the sentencing practice**

The CRC states in its Preamble that “*childhood is entitled to special care and assistance*” and in Article 3(1) provides: “*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration*”. The Lahore High Court judgment of December 2004 asserted that special laws were not needed to protect the rights of children as existing courts took a lenient attitude to juveniles.

There is, however, little evidence of “special care and attention” shown to children in the courts of Pakistan. Not only is the treatment in court far from child-friendly, sentencing practices betray a lack of concern as well. A number of cases are known to Amnesty International where sentences of extraordinary length and fines of extraordinary size were imposed on children. While extreme, the cases listed below indicate a general tendency to harsh punishments for juveniles that flies in the face of any rhetorical statement of judicial leniency towards the young.

The case of children sentenced to disproportionately long prison terms and unaffordable fines under the FCR have already been noted (see above). Two young children are currently held in the Faisalabad Borstal Jail on very long sentences. **Mohammad Nadeem** was on 16 March 2000 sentenced by an Additional Sessions Court in Lahore to 273 years’ imprisonment for allegedly aiding and abetting murder and causing the disappearance of the bodies of murder victims. According to medical assessments carried out on the instruction of the court, he was between 9 and 10 years old at the time of the alleged offences. His co-accused **Sabir** was, according to medical assessments, between 11 and 12 years old at the time of the alleged offences. Sabir was sentenced to 63 years’ imprisonment in the same case. The two children come from poor families, had run away from home and were employed as domestic help by Javed Iqbal who along with another adult, Sajid, gave themselves up to police in January 2000 after Javed Iqbal had confessed the murder of some 100 children and destroying their bodies in tubs of acid. In March 2000, the two men were sentenced to death. Both men were in October 2001 found dead in their prison cells in Kot Lakpat Jail, Lahore; according to prison authorities they had hanged themselves. Human rights activists have questioned this statement but the cause of their deaths was never clarified. Rumour circulated that prison staff had “encouraged” their suicide. The two children were allegedly not asked to give any statements during the trial and both claim their innocence.

Lack of leniency is also apparent in the sometimes excessively high fines imposed on juveniles. The case of a boy without any support or resources, Shakeem Gul, sentenced to a fine of Rs. 300,000 has been outlined above, as has the case of Ikramullah, sentenced to life imprisonment and Rs. 1,000,000.

Contrary to the Lahore High Court’s assertion of the leniency of judges towards children, some judges callously ignore the needs and rights of children and deny them the relief, including bail, to which they have a right under the JJSO. It has already been noted that many judicial officers appear ignorant of provisions of the JJSO, including section 10(3) which

allows for bail. Further, in some cases, bail appears to be deliberately withheld from a child. The HRCP in its *State of Human Rights 2001* describes the case of a 13-year-old boy, **Shehzad** who had been arrested and charged with theft. When his bail application came before a bench of the Lahore High Court, the judge observed that the child was neither too small to commit theft nor too immature to understand that his act was unlawful. When the child's defence lawyer argued that Shehzad was studying and was likely to acquire bad habits in jail, the judge ignored the issue and committed him to jail.<sup>26</sup>

#### **f. The death penalty continued to be imposed on juveniles**

Article 12 of the JJSO states unequivocally that “*no child shall be awarded punishment of death*”. This is clearly in line with Article 37 of the CRC which provides: “*No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by person below eighteen years of age.*”

Amnesty International opposes the death penalty unconditionally as the ultimate cruel, inhuman and degrading punishment and a violation of the right to life, as proclaimed in Articles 3 and 5 of the Universal Declaration of Human Rights. Article 3 states that “*Everyone has the right to life, liberty and security of the person*” and Article 5 lays down that “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”. However, the organization does not argue that child offenders or others who have committed violent crimes should not be held criminally accountable or subjected to severe penalties where appropriate. International standards and treaties forbidding the death penalty for child offenders were developed in recognition of the fact that the death penalty – which denies any possibility of rehabilitation or reform – is a wholly inappropriate penalty for individuals who have not attained full physical, intellectual or emotional maturity at the time of their criminal action.

The total number of juveniles under sentence of death in Pakistan is not known to Amnesty International. The then federal Minister of the Interior in May 2004 in response to a query by Senator Farhatullah Babar stated that 13 juveniles were then under sentence of death, with four held in Punjab, seven in NWFP, two in Balochistan and none in Sindh province.<sup>27</sup> This statement did not contain details as to whether these death sentences had been imposed after the introduction of the JJSO or if cases of juveniles were included who had been sentenced earlier.

Amnesty International is aware of the cases listed below while acknowledging that there may be others that have not come to the attention of the organization. The cases described below were either pending before a trial court at the time of the promulgation of the JJSO or came to

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<sup>26</sup> The HRCP reports that the judge asked the boy in court to translate “woh jata hai” (he is going) into English. When the boy said “he is go”, the judge was reported as commenting: “He is go and you will go to jail”. The HRCP commented “it was not clear what weighed more on the judge's mind – the nature of the crime or the accused's deficiency in English. Nor was any comment on the boy's teachers reported.”

<sup>27</sup> SPARC, *The state of Pakistan's children 2004*.

trial after its promulgation. The cases were neither transferred to a juvenile court as required in the JJSO nor were proceedings suspended pending the setting up of a juvenile court if none existed in the province at the time. Judges either did not accept that the accused were juveniles at the time of the alleged offence or ignored this fact. In all cases the death penalty was imposed despite the prohibition of the death penalty for juveniles in the JJSO. In some of the listed cases relief under the JJSO was belatedly provided after appeals were filed. To Amnesty International's knowledge, no juvenile was sentenced to death in the period during which the JJSO was not in force as a result of the Lahore High Court judgment, i.e. between 6 December 2004 and 11 February 2005. As a result of the age of the juvenile accused being ignored by the courts, the juveniles were during trial and after conviction detained along with adults in violation of the mandatory separation of juveniles and adults in detention provided in Article 37c of the CRC. (See section on conditions of detention below.)

The last juvenile known to have been executed in Pakistan was **Ali Sher**. He was executed on 3 November 2001, a month before President Musharraf directed that the death sentences handed down before the promulgation of the JJSO in 2000 be commuted to life imprisonment. Ali Sher had been sentenced to death for a murder committed in 1993 when he was only 13 years old. Defence arguments related to his age and the inapplicability of the death penalty in the PATA where Ali Sher lived, were rejected both by the Peshawar High Court and the Supreme Court of Pakistan. A mercy petition had also been rejected by the President.

Just three months after the promulgation of the JJSO, **Irshad Ali** was convicted on 25 October 2000 by an Anti-Terrorism Court in Larkana, Sindh province, of having kidnapped for ransom a 6-year old child on 8 August 1999 in Sukkur, Sindh province and sentenced to death. Irshad's sister and another woman, in whose house in Karachi the abducted child was found, were also convicted and sentenced to life imprisonment. In court, Irshad retracted his confession claiming it had been extracted under torture. The trial court rejected this retraction and held that the confession was adequately corroborated by other evidence including the voice identification by the complainant who had been a former employer of Irshad Ali's. An appeal was filed in November 2000, citing *inter alia* Irshad Ali's age. An additional statement was submitted to the Sindh High Court on 20 November 2003 which stated that he had been 14 years old at the time of the offence and enclosed a copy of Irshad's birth certificate<sup>28</sup>. Irshad Ali was arrested on 30 August 1999 and has been in detention with adults in Central Prison in Sukkur since. His appeal is pending in the Sindh High Court. To Amnesty International's knowledge, the last hearing of Irshad Ali's case took place on 11 November 2004 but no decision has been given by the court to date.

**Saifullah Khan** was 16 years old at the time of allegedly murdering another boy on 15 April 2001 in Chardassa, NWFP. In 2002, he was sentenced to death by a District and Sessions Court. On appeal in October 2004, the Peshawar High Court set aside the conviction and death penalty and said the trial court had erred when trying the juvenile. It directed that he should be tried again by a juvenile court under the terms of the JJSO. The case has since been pending in a juvenile court.

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<sup>28</sup> The birth certificate states his date of birth as 15 June 1985.

Two boys from Swat, **Mohammad Rafiq** and **Sohail Fida**, were on 23 July 2002 sentenced to death by a Swat Additional District and Sessions judge (called a *qazi* court) for allegedly killing another boy on 25 May 2000. Their appeals were first filed in the Peshawar High Court then transferred to the Federal Shariat Court (FSC) where they are pending to date.

In several cases, juveniles were sentenced to death not only in violation of provisions of the JJSO but also of provisions of the PPC barring the death penalty for juveniles. **Mohammad Zaman** was sentenced to death on 12 November 2002 by a *zilla qazi* (Additional District and Sessions Court) in Mardan, NWFP, for the murder, allegedly carried out with two male relatives, of his uncle and nephew over a property dispute on 23 March 1995 in Mardan. The Peshawar High Court on 4 June 2003 set aside the death penalty on the ground that Mohammad Zaman was only 17 years old at the time of the alleged offence and imposed a sentence of five years' imprisonment along with the payment of *diyat*, compensation, to the heirs of the victim.<sup>29</sup> The counsel for Mohammad Zaman had also pointed out during the High Court hearings that under section 306 PPC, a juvenile cannot be sentenced to death as *qisas* (punishment equal to the offence) for murder. The High Court did not respond to this specific legal point.

In a similar case, the Peshawar High Court in a decision in 2003 confirmed that a juvenile could not be sentenced to death as *qisas* for murder. **Jehangir Shah** was sentenced to death on 1 July 2002 by a Swat *qazi* court for allegedly killing his sister-in-law in 2000. At the time of the offence Jehangir was, according to his school certificate, 16 years old. On appeal against his sentence, the High Court on 25 April 2003 commuted his death sentence to the payment of *diyat* on the ground of his age and decided that the time he had already served in jail should be treated as his prison sentence.

The most recent case reported to Amnesty International is that of **Shahzad Hameed**, a 17-year old student, who was sentenced to death on 19 February 2004 by a Sessions Court in Sheikhpura, Punjab province, for the alleged abduction and murder of a class mate over a school rivalry. Three of his class mates, also juveniles, were sentenced to 32 years' imprisonment each and fine. The court refused to accept that Shahzad Hameed was a juvenile at the time of the alleged offence.

## **g. Conditions of detention of juveniles remained inadequate**

### i. Conditions of detention in general in Pakistan prisons

Conditions of detention in general in Pakistan are appalling. Most detainees live in cramped, overcrowded and unhygienic conditions. According to a report of the Interior Ministry released in June 2004, the 89 prisons of Pakistan with a capacity of 35,365 detainees in fact held 81,449 detainees. Of these, 55,949 prisoners were under trial and 25,511 had been convicted. The HRCP has repeatedly pointed out that many detainees have been in prison

<sup>29</sup> According to the law of *qisas* and *diyat*, introduced into the PPC in 1991, the death sentence can be imposed for murder as *qisas* (punishment equal to the offence committed), if specified evidentiary requirements are fulfilled.

awaiting trial or the completion of their trials for periods longer than the term they would have served if they had been convicted.<sup>30</sup>

International legal standards provide that all persons deprived of their liberty must at all times be treated humanely, and “*with the respect due to their inherent dignity and value as human beings.*”<sup>31</sup> In practice this means that the authorities must provide detainees and prisoners with, among other things, adequate accommodation, hygiene, clothing, food, exercise, medical care and contact with the outside world, and in particular family and counsel.<sup>32</sup>

The conditions of prisoners under sentence of death are particularly appalling. While the law in Pakistan prescribes that prisoners under sentence of death are to be held separately from each other and from other prisoners, this rule is ignored, in conditions of serious prison overcrowding. According to the HRCR there were 5,260 prisoners under sentence of death in Punjab province alone in 2004 but the 30 prisons of that province have only 812 death cells. A death row cell measures usually some 9x12 feet and has an attached toilet; cells are required to be cordoned off to prevent any contact between regular detainees and those sentenced to death. However, due to the overcrowding of prisons generally, these requirements are routinely ignored. In some cases, as many as 12 prisoners under sentence of death have to crowd into each of these cells, while most often the number of prisoners under sentence of death held in the same cell is reported to be between three and six. In some prisons, regular prisoners have been placed in death cells while those under sentence of death were crowded in even larger numbers into the few remaining death cells. For instance in Dera Ghazi Khan prison, half the number of death cells were occupied by other prisoners and up to five persons under sentence of death were crowded into each remaining death cell.

Complaints from prisoners of abuse and corruption of poorly trained, under resourced and underpaid jail staff, inadequate food, poor sanitation and lack of or inadequate medical care are common. Physical and mental abuse is rife for all prisoners in Pakistan, both at the hands of wardens and by fellow prisoners. The HRCR annual report for 2003 stated that “torture and brutality remained endemic at jails, with a large number of incidents going unreported” and several deaths in custody as a result of torture are reported every year. Rape and other forms

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<sup>30</sup> The HRCR in the annual report for 2004 said that the “acute problem of overcrowding and poor conditions in jails came under more frequent discussion than before at official level during the year [2004]. However, the measures taken to alleviate the problems remained inadequate”. It identified the long periods for which criminal cases were pending in courts and the serious backlog of cases in the country’s courts as key reasons. It quoted the report of the Law and Justice Commission for 2003, released in October 2004, according to which 27,000 cases were pending in the Supreme Court and over four million cases in subordinate courts on 1 January 2003. The HRCR also said the arrest of hundreds of foreign “terrorists” had compounded the problem of overcrowding. Many prisoners also continued to be held after they had served their prison terms as they were unable to pay the fines imposed by courts. Prison riots and jail breaks, a high number of suicides and violence amongst prisoners were linked to the harsh conditions of detention, routine violations of the Jail Manual, use of torture and lack of concern for the health and welfare of prisoners.

<sup>31</sup> Principle 1 of Basic Principles for the Treatment of Prisoners (1990).

<sup>32</sup> See, for instance, the ICCPR, especially Articles 7 and 10(1); Standard Minimum Rules for the Treatment of Prisoners (1977); Basic Principles for the Treatment of Prisoners (1990); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).

of sexual abuse in prisons are widespread; its victims include women, men and children, including boys. Prison authorities mostly ignore abuses perpetrated by prisoners on their fellow prisoners and in some cases help cover them up.

#### ii. Conditions of detention of juveniles

While prison conditions for adult detainees are generally stark in Pakistan, the conditions under which juvenile detainees are held are particularly harsh given their vulnerability and special needs for care and rehabilitation. The particularly important provision of detention of juveniles separate from adults is routinely ignored.

The CRC and the JJSO contain safeguards to ensure that imprisonment of juvenile offenders facilitates their return to society after their release. Article 37(c) of the CRC provides: *“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances...”* Article 40 of the CRC provides: *“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”* In the spirit of commitment to the best interest of the child, the JJSO provides in article 11(b) that juvenile courts may *“make an order directing the child offender to be sent to a Borstal Institution until he attains the age of eighteen years or for the period of imprisonment whichever is earlier”*.

The JJSO also contains detailed provisions for the appointment of lawyers to represent children in court free of charge and of probation officers to ensure that children are not unnecessarily imprisoned (see above). In both areas considerable shortages have been reported resulting in children remaining in prison for long periods pending trial for lack of legal support. Lack of probation arrangements and Borstal institutions have resulted in excessively long periods of imprisonment for children. The increase of the child prison population has also been fuelled by many courts' lack of understanding of the requirements and rights of child offenders and unwillingness to grant them all the relief possible under the JJSO, including bail and appropriately short prison terms.

Provisions of the CRC and the JJSO with regard to conditions of detention of juveniles are very poorly implemented, if not ignored in Pakistan. The national coordinator of Pakistan's leading child rights advocacy group, SPARC said in September 2004, “one would be hard pressed to identify any noticeable change in the conditions of juvenile offenders” since the promulgation of the JJSO, resulting from the fact that its safeguards for children are routinely ignored.

In addition, the capacity of special child-appropriate detention facilities falls far short of need. The Rules made under the JJSO by the provincial governments of Pakistan spell out clearly that at least one Borstal Institution is to be set up in every district which is to provide adequate education “for their mental, moral and psychological development”<sup>33</sup> as well as technical training and medical care. To date this has not happened. SPARC in 2004 reported that hundreds of juvenile prisoners are held in adult jails in NWFP, Balochistan and Sindh due to the failure of the provincial governments to provide juvenile detainees with separate detention facilities and Borstals as required under the JJSO. To date there are only three separate juvenile institutions in Pakistan, two Borstal Institutions in Punjab (Faisalabad and Bahawalpur) and a juvenile prison in Karachi. There are no juvenile prisons in Balochistan and NWFP. Conditions in some of the juvenile detention centres are appalling. According to the 2003 HRCP report, the barracks in which juveniles in Bahawalpur, in Punjab province, and Karachi prisons were held were in “extremely poor condition with the children having to sleep either on the floor or on raised cement blocks”.

In September 2004, the Punjab government approved the construction of two juvenile jails in Rawalpindi and Faisalabad. Similarly, in August 2003, the Inspector General of Prisons of NWFP stated that work on Borstal Institutions in Peshawar and Bannu had begun. Some regular jails have a wing for juvenile offenders but most juveniles prisoners are held in regular barracks along with adults.

According to press reports in July 2004, quoted by the HRCP in its annual report for 2004, some 3,163 juveniles were held in the 86 jails of the country; these were 2,137 children in 29 jails in Punjab, 483 children in 16 jails of Sindh, 490 in 21 jails in NWFP, and 87 in 11 jails of Balochistan. Of the detained children, 18% were under 11 years old, 19.6% were between 11 and 14 years old and the rest between 15 and 20 years old.<sup>34</sup> The child rights organization SPARC has pointed out that the number of girl detainees is unclear as prison authorities hold and count them along with adult women detainees.

As a result, many juvenile prisons and juvenile wards were seriously overcrowded. The HRCP annual report said that conditions of detention for juveniles were worst in Punjab province on account of serious overcrowding. A SPARC team visiting the Borstal Institution in Faisalabad in April 2003 found that it had 377 inmates against a capacity of 151. Of these 178 were convicted and 199 were undergoing or awaiting trial. Many of the imprisoned children are in poor health, caused or exacerbated by living in cramped and unhygienic conditions, lacking ventilations, clean drinking water, nutritious food and adequate medical care. Little or no attention is paid to the mental health of child prisoners. Indoor recreational facilities are non-existent except where provided by NGOs.

### iii. Conditions of detention of girl detainees

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<sup>33</sup> Sindh Juvenile Justice Rules, 2002, section 4. Similar provisions exist in the Rules of the other provinces.

<sup>34</sup> For comparison, HRCP reported that in 2003, some 3,995 male juveniles under trial were in detention in Pakistan, including 3,025 in Punjab, 470 in Sindh, 446 in NWFP and 54 in Balochistan. In addition, there were 927 convicted juveniles, 678 in Punjab, 65 in Sindh, 81 in NWFP and 103 in Balochistan. All 48 under trial and nine convicted girls were held in Punjab.

The Juvenile Justice Rules clearly provide that girls are to be “*detained in a separate enclosure of the Borstal Institution exclusively established for the purpose and where there is no such enclosure the matter shall be reported to the concerned court for transfer of such child offender to any care home*”. The Rules also stipulate that no girl offender shall be kept in a police lock up or prison”.<sup>35</sup>

According to official statistics, 27 girls were in detention in Pakistan at the end of the year 2003. Girl suspects are routinely held with women prisoners in women’s jails or women’s wards as no special institutions have been built for them nor have the stipulated separate enclosures been provided in Borstal Institutions. Separate juvenile sections maintained in some jails are exclusively for boys. An indication of the neglect of girl detainees is the fact that only in Punjab province are girls detainees recorded separately from women in prison statistics. In the other provinces such records are conflated, reflecting the reality of joint detention of girls with adults in violation of the JJSO. The lack of an adequate record of girl prisoner data leads to authorities failing to acknowledge the need for separate facilities for them.<sup>36</sup> Girl prisoners face the additional problem that on completion of their sentences, they can often not be released as their families disown them. In the absence of shelter facilities, such girls remain in detention.

The conditions of child suspects is further affected by the fact that “staff of the police, prison and probation departments are not familiar with juveniles laws. They have no idea of rehabilitation and reformation of a child coming into conflict with the laws.”<sup>37</sup> Educational facilities, including technical training are non-existent except where provided by NGOs. Staff of Borstal Institutions are, according to child rights activists, not adequately trained to deal with young offenders and some abuse is suspected to take place even in places intended specifically for the protection of juveniles. Child rights activists have told Amnesty International that child detainees often show fear of reporting abuses even if their physical state indicates that they have suffered ill-treatment. Many of the detained children are abandoned by their families but the borstals and juvenile jails reportedly take no measures to rehabilitate these children and provide counselling to them.

#### iv. Abuses in detention

Human rights and child rights organisations report abuse, including sexual abuse of juveniles in detention, mostly by other prisoners but most point out that many such instances of abuse must be assumed to go unreported. A medical team which interviewed 200 children at the Youthful Offenders Industrial School in Karachi in March 2003 found that almost 60% of the boys had been subjected to torture and ill-treatment, including severe beating, electric shock and hanging by the feet. The HRCP reported in 2003 that many juveniles were held in

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<sup>35</sup> Sindh Juvenile Justice Rules, 2002, section 7. Similar provisions are contained in the Juvenile Justice Rules of the other provinces.

<sup>36</sup> The NWFP authorities for instance said that there was no need for separate girl detention facilities as there were no girl prisoners in the province. According to SPARC, its jail visitors had come across at least 30 girls in the province’s prisons. SPARC *Discourse*, June 2005.

<sup>37</sup> A spokesman of the Prisoners Programme of the Dost Welfare Organization, December 2004.

shackles, including boys attending classes in Bahawalpur Juvenile Jail. On 3 August 2003, a 15-year-old detainee, **Nasir Mehmood** was allegedly pushed by another prisoner from the roof of the Adiala Jail in Rawalpindi after the boy refused to agree to have sex with the prisoner. Rather than investigate the incident and punish the prisoner, prison authorities allegedly covered up the case and claimed that the boy with trying to escape from prison.

The conditions of children under sentence of death are particularly harsh given their immaturity and special needs. As the criminal justice system fails to acknowledge their age they are invariably held together with adults. Child rights activists have expressed their particular concern to Amnesty International at the plight of the two boys under sentence of death held in Much Jail, Ziauddin and Abdul Qadir (see above). They feared that the boys may be subjected to rape by adult men sentenced to death with whom they are made to share a cell. In May 2005 they were finally transferred to a juvenile section of the prison.

### **3. Inadequate implementation of President Musharraf's commutation order**

During a meeting with President Musharraf in December 2001, Amnesty International's Secretary General Irene Khan urged that the death sentences of all those juveniles imposed before July 2000 when the JJSO came into force, be commuted. President Musharraf agreed to this request and issued an order to commute all death sentences passed on juveniles before July 2000. The exact number of juveniles under sentence of death at the time was never officially confirmed and estimates range between 125 and 350.<sup>38</sup> Amnesty International urges the Pakistan government to make publicly available details of child detainees, including girls, and particularly the number of children under sentence of death.

The HRCP added in its report on the situation of child offenders after the President's commutation order that "indifference to this directive on the part of jail authorities meant that these prisoners faced death, with officials claiming in many cases despite the provision of documents such as matriculation certificates or birth certificates, that a medical examination of the prisoners to determine their age was awaited."<sup>39</sup>

Many juveniles under sentence of death have faced great difficulty and long delays when seeking to obtain the benefit of the commutation order. In many cases, neither the accused children themselves, their families, legal representatives nor the courts had taken note of the age of the accused as it was not relevant for the pursuit of legal redress, prior to the

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<sup>38</sup> In August 2001, the Punjab Bar Council had stated that 125 juveniles, some as young as 12 years old, were under sentence of death in the country. Child rights organisation SPARC in its petition of early 2005 challenging the Lahore High Court judgment mentions that more than 200 children were then under sentence of death throughout Pakistan. The HRCP quoted reports that in November 2002 some 350 juveniles were under sentence of death in Punjab province alone.

<sup>39</sup> HRCP. *The state of Human rights in 2002*. The HRCP report for 2003 stated government officials had stated that in Punjab alone in July 2003 over 300 cases were pending in which the age of the accused was contested.

promulgation to the JJSO. Even after the JJSO was introduced, many judges failed to address the issue of age of the accused and generally accepted the age arbitrarily recorded by police.

Delays in attempts to determine age at the time of an offence, often many years after it was committed, further complicate the correct application of the juvenile protection law. As the Lahore High Court judgment noted, the obligatory registration of births is often neglected and the reported resort to fake documentation of age has rendered all such documentation, including legitimate documentation, suspect. The most reliable method of determining age is the ossification tests of bones by x-ray. However, this method ceases to be of use when a person reaches around 20 years of age. If the age of a juvenile was not ascertained immediately after arrest, a juvenile may be tried and convicted in a process spanning many years so that at the time when age determination is sought, the detainee may be well into his 20s. Despite the assertion of leniency towards juveniles in the Lahore High Court judgment, courts have not been notably lenient in deciding these cases and have not chosen to err on the side of possible juveniles.

Despite these obstacles, some juveniles have no doubt benefited from the commutation order while others have not. In October 2002, the Peshawar High Court commuted the death sentence of a juvenile, **Atif Zaman** to life imprisonment. Despite the prohibition of the death penalty for juveniles then in force, Atif Zaman had been sentenced to death by an anti-terrorism court in Abbotabad on 24 July 2002 for the murder of a boy in April 2002. It should be noted, however, that Article 37(a) of the CRC prohibits the imposition of “*life imprisonment without possibility of release*” on child offenders.<sup>40</sup>

**Muhammad Hayat**, alias Taddy, was sentenced to death for murder in 1995. His brother Zulfiqar Ali pleaded before the Lahore High Court that Muhammad Hayat had been a minor at the time of the offence but that this point had not been raised in the trial court on account of the defendant’s ignorance of the law. The Lahore High Court on 1 February 2005 ruled that the convict had not raised this point at the trial court, nor the High Court or the Supreme Court, so it could not be taken into consideration at this late stage. He remains in a death cell.

Similarly the case of **Tahir Khan**, sentenced to death on 4 May 1999 for armed robbery and murder along with an adult offender is still awaiting a resolution of his appeal. It was pending up to February 2002 in the Peshawar High Court and was then transferred to the Federal Shariat Court (as the original charge had been formulated under the Islamic Offence against Property (Enforcement of Hudood) Ordinance, 1979) where it has been pending since. In December 2004, hearings were adjourned and no new dates of hearing are known to have been set. Neither his relatives, his legal counsel nor the trial court had taken account of his age at the time as the law did not then make any allowance on the basis of age. Tahir Khan was reportedly 16 years old at the time of the alleged offence but according to reports has no documentary evidence for his age. Tahir Khan has remained in a death cell in Haripur Central Prison since 1999.

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<sup>40</sup> The Supreme Court of Pakistan in 2003 issued notices to the federal and provincial governments to help clarify the meaning of “imprisonment for life”. The court noted that a life term was generally construed as imprisonment for 25 years although the practice is not supported in law.

**Jawed Khan**, resident of Shrengal Tehsil in Upper Dir district, was sentenced to death by an anti-terrorism court in Faisalabad on 20 February 1998 after being charged with murder. The complaint had been filed on 29 July 1996 in Faisalabad. His appeals against the conviction and death sentence were rejected by the Lahore High Court on 20 May 2001 and by the Supreme Court on 8 November 2001. Having exhausted all legal options, he filed a mercy petition to the President of Pakistan to which no reply has been received yet. In 2003, he filed in addition an application in the Faisalabad District and Sessions court raising the issue of his age. He asserted that his counsel had not raised his age either in the trial or the appellate court and that the trial court had not properly recorded his age. His father provided copies of his school and birth certificate, according to which he was born on 3 April 1982, making him 14 years old at the time of the alleged offence. On 11 March 2004, the sessions judge dismissed the application stating that the applicant had submitted photocopies of certificates which appeared to be fake. The judge also reportedly argued that the applicant had not raised the issue of age when the case was before the High Court or the Supreme Court of Pakistan. Jawed Khan's father has told the media that his village was remote and backward where there was no practice of obtaining birth certificates for children. The birth certificate which he had submitted to the court had been obtained after the conviction of his son and so was believed by the court to be fake. Jawed Khan has meanwhile requested that the Supreme Court and the President direct that an ossification test be undertaken. However, he is presently 23 years old and it may not help in reliably establishing his age. To date, he has not had any response. He continues to be held in a death cell in Faisalabad Central Prison.

Another juvenile who was sentenced to death after the ban of the death penalty for juveniles in July 2000 and who has in vain sought the benefit of the presidential commutation order is **Mohammad Ameen**. Mistakes about Muhammad Ameen's age in court decisions and confusion of records resulted in both the death penalty being awarded and in the Supreme Court rejecting a review of his case.

Mohammad Ameen was sentenced to death by an Anti-Terrorism Court in Rawalpindi on 31 January 2001 which found him guilty of involvement in a robbery and killing in February 1998 along with two men both aged around 30. One of the co-accused was acquitted, the other was sentenced to seven years' imprisonment. While the trial court recorded Mohammad Ameen's age as 17 or 18, the judge hearing his appeal in the Rawalpindi bench of the Lahore High Court confused a medical report on Mohammad Ameen with one of the victims of the crime and understood that Mohammad Ameen was 30 years old at the time of the offence and rejected his appeal. A further appeal to the Supreme Court in March 2002 was dismissed on the ground that Mohammad Ameen's lawyer had not raised the issue of his age before the trial court. In its decision, the Supreme Court mistakenly reported that the Anti-Terrorism Court in Rawalpindi had recorded Mohammad Ameen's age to be 30. Mohammad Ameen's birth certificate and high school certificate stating that he was born on 5 June 1981, hence 16 at the time of the offence, were presented as evidence both in the Lahore High Court and the Supreme Court but not believed. A review petition filed in the Supreme Court questioning this decision was rejected by the Supreme Court in June 2003.

A mercy petition to the President filed in August 2003 has not been answered. Amnesty International has been informed that the family of the victim have indicated some readiness to

forgive Mohammad Ameen and accept high financial compensation of a sum which the family of Mohammad Ameen is unable to raise.

Similarly **Mutabar Khan** was arrested in 1996 and sentenced to death for murder by a court in Swabi district in 1998. His appeals in the Peshawar High Court and the Supreme Court were dismissed in 2000 and 2001 respectively. His mother again moved the high court in 2003 pointing to his age; after the dismissal of the petition, she filed a further petition in the Supreme Court seeking direction for a medical determination of his age, which was dismissed in August 2003. Mutabar Khan claims that he was held in the juvenile section of Peshawar Central Jail after his arrest in 1996 as he was only 16 at that time. This appears the strongest proof of his age at the time of arrest. Despite this, he was not given the benefit of the JJSO or the commutation order of 2001. A mercy petition has been pending since the autumn of 2003. He remains in a death cell in Haripur Prison.

In several cases known to Amnesty International, juveniles under sentence of death have not benefited from the commutation order of December 2001 on account of confusion about the process to be followed and the institution authorized to enforce the commutation order. As a result the juveniles concerned have remained on death row held along with adult convicts.

In some cases, relief was provided by prison officials only to be overturned on account of procedural mistakes. **Sher Khan**, whose appeal against his death sentence was pending in the Supreme Court of Pakistan when the presidential commutation order was issued, was released by prison authorities in Adiala Jail, Rawalpindi, without awaiting the outcome of the appeal in the Supreme Court. The Supreme Court took exception to his release and ordered his re-arrest. On 12 February 2004, a full bench of the Supreme Court reprimanded the NWFP and Punjab police for failing to find and arrest the boy. The Court had already suspended the jail superintendent and brought contempt of court charges against him. Sher Khan was re-arrested in 15 February 2004 in Dera Adamkhel district and handed over to Punjab police and transferred to Adiala Prison where he is again in a death cell. On 27 February 2005 police brought Sher Khan before the Supreme Court; it announced that a decision on his case would be made on 16 March. However, no decision is known to have been taken and the case remains pending.

In the case of **Alahamdulillah**, prison officials also misread the commutation order. He was sentenced to death on 6 July 2000, days after the ban of the death penalty for juveniles came into force, for allegedly murdering a boy at Umerzai on 9 January 1995. Alahamdulillah was arrested shortly after the offence. According to his school certificate, he was 15 at the time of the alleged offence but the trial court had erroneously recorded his age as 35 years. His appeal was pending in the Peshawar High Court in December 2001 when President Musharraf announced the commutation of death sentences for juveniles sentenced to death before the JJSO came into force. The Superintendent of the Peshawar Central Jail converted the death sentence into life imprisonment in April 2002 in the light of the presidential order but in 2003 the Peshawar High Court dismissed the appeal and upheld the death sentence. The Superintendent then approached the High Court for direction and in October 2004, the Peshawar High Court finally upheld the commutation of the death penalty to life imprisonment. It ruled that a person sentenced to death whose appeal was pending in a provincial high court was entitled to benefit from the presidential commutation order of

December 2001.<sup>41</sup> Alahamdulillah is currently in Peshawar Prison. According to reports received by Amnesty International, the complainants in this case are planning to move the Supreme Court to have the death penalty restored for Alahamdulillah on the ground that the commutation order is discriminatory and unduly favours juveniles.

The confusion about powers to determine age and decide on commutation issues is also manifest in the case of **Najeebullah**, reportedly below 18 years of age at the time of the alleged offence who along with his brother Ameenullah was sentenced to death for murder in 1999 by an Anti-terrorism Court in Sargodha, Punjab. In October 1999, a Lahore High Court bench confirmed Najeebullah's death sentence but acquitted his brother. In September 2000, the Supreme Court dismissed the leave to appeal petition filed by Najeebullah who then sent a mercy petition to the President which later was rejected. When the "black warrant" for his execution was issued, Najeebullah's family sought a stay of execution on the ground that they were negotiating with the victim's family about a pardon for Najeebullah under the Qisas and Diyat law. At this stage, the commutation order was issued in December 2001. Najeebullah then filed a petition in the High Court requesting commutation of his death sentence. The Lahore High Court disposed of the petition in April 2002 and directed that the "petitioner can approach the competent authority who shall conduct the inquiry regarding the age of the petitioner after his conviction and ... pass an appropriate order in accordance with law". The jail superintendent in Sargodha referred the matter to the Punjab Home Secretary who set up a committee under his chairmanship which included the Inspector General of Prisons in Punjab, the superintendent of the prison and a medical expert from the Punjab Health Department to determine Najeebullah's age and decide whether he was entitled to relief under the commutation order. When the family of the murder victim learned about this development, they filed a petition in the High Court which was dismissed in October 2002. The family of the victim then approached the Supreme Court arguing that failure to execute Najeebullah amounted to contempt of court, namely the High Court confirmation of the death sentence. The Supreme Court in 2003 ruled that the determination of the age of an alleged offender in terms of section 7 of the JJSO<sup>42</sup> was a judicial function and observed that "as far as executive authorities or any committee constituted by them is concerned, it enjoys no power to discharge the judicial function. If they are allowed to do so, it would be [a] negation of the concept of independence of [the] judiciary."<sup>43</sup> Consequently the committee set up by the Punjab government was deemed "without legal authority". Najeebullah's case was remanded to a sessions judge acting as a juvenile judge in Mianwali to determine his age. To Amnesty International's knowledge the case has not been decided yet.

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<sup>41</sup> The High Court had not only initially ignored evidence that Alahamdulillah was a juvenile but also that he was mentally ill. According to the assessment of an independent local psychiatrist, Alahamdulillah suffers from schizophrenia and upon intervention by a child rights group now receives treatment for his mental illness. The Peshawar Criminal Justice Coordination Committee on 12 October 2004 (World Mental Health Day) decided to fully implement the Mental Health Ordinance 2001 and directed police not to arrest or detain any mentally ill person, register any complaint against such a person and ensure that such a person was sent to a mental hospital for treatment.

<sup>42</sup> Section 7: "If a question arises as to whether a person before it is a child for the purposes of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child."

<sup>43</sup> *Ziaullah vs. Najeebullah*, PLD 2003 SC 656.

#### **4. Recommendations**

Amnesty International urges the Government of Pakistan to support unequivocally the reinstatement of the JJSO when the Supreme Court hears the petition appealing against the Lahore High Court judgment of December 2004. Such action would be in accordance with Pakistan's obligations under the CRC, including the obligation to bring CRC provisions into national law. Should the Supreme Court decide to uphold the Lahore High Court judgment, Amnesty International urges the Government of Pakistan to consider new legislation to protect children in the criminal justice system in line with Pakistan's commitments under the CRC.

If the JJSO is reinstated by the Supreme Court, Amnesty International urges that it be fully implemented and child protection be increased, in particular that

- the JJSO be made operational in all areas of the country, including the tribal areas and the Northern Areas;
- children currently sentenced and held under the Frontier Crimes Regulation of 1901 be released and rehabilitated forthwith. Any laws, ordinances or regulations allowing the sentencing of persons to imprisonment without trials which meet international standards of fairness should be suitably amended or abolished. All laws, ordinances or regulations allowing the detention, imprisonment or any other measures against children in particular and any persons in general for suspected offences by their relatives must also be immediately abolished.
- all cases of children be tried by juvenile courts, a sufficient number of which should be set up;
- a sufficient number of lawyers with relevant training and competence be assigned to represent children, an adequate number of probation officers, including women probation officers, be appointed to assist juvenile courts and a sufficient number of Borstal Institutions be set up to ensure that all children benefit from bail and non-custodial provisions of the JJSO;
- all children and their guardians are made aware of their rights, including the right to free legal assistance and the right to lodge a complaint if their rights are violated and to have their complaints investigated promptly;
- there be a review of all cases of children sentenced to imprisonment, especially to long terms with a view to implementing the provision in the CRC that imprisonment of a child must be in conformity with the law and used only as a measure of last resort and for the shortest appropriate period of time;
- there be a review of all cases of children detained pending trial with a view to implementing the provision in the CRC that the arrest and detention of a child must be in conformity with the law and used only as a measure of last resort and for the shortest appropriate period of time. Whenever possible, detention pending trial should

be replaced by alternative measures, such as close supervision, intensive care or placement within a family or an educational setting or home;

- all those working in the juvenile justice system be adequately trained in the provisions of the CRC and the JJSO, both of which should be translated into local languages and disseminated widely; the training should emphasise the practical implementation of international human rights standards and the roles and responsibilities of the various officials;
- non-custodial measures aimed at rehabilitating juvenile offenders be developed;
- the full and effective implementation of internationally accepted juvenile justice standards with regard to arrest and detention of juveniles be ensured, in particular relevant articles of the CRC and other United Nations standards in the field of juvenile justice, including
  - the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),
  - the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),
  - the United Nations Rules for the Protection of Juveniles deprived of their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System.
- children in custody are given prompt and regular access to relatives, legal counsel, medical care and educational facilities;
- police immediately inform parents or other guardians of the arrest of the child; that children are held at all times in separate police and judicial lockups apart from adult detainees and as close as possible to their families to facilitate contact with them;
- all children in custody are protected from torture and ill-treatment, including rape and sexual abuse, whether by officials or other detainees or prisoners and that remedies are made available for such abuses and perpetrators punished;
- police officers inquire immediately on arrest as to the age of any child accused. Births should be systematically and promptly registered in all parts of Pakistan;
- any death sentence passed on child offenders be commuted forthwith and no further death sentences should be imposed in view of the ban on the death penalty for juveniles under the JJSO, the CRC and customary international law;
- statistics about the number of children under sentence of death and the number of juveniles seeking commutation for their death sentences under the President's commutation order of December 2001 are fully disclosed;

- boys are held separately from men and girls are held separately from adult women detainees in separate detention facilities appropriate for their age and taking into account their vulnerability;
- all those suspected of human rights violations against children, including those who deny juvenile detainees their rights, are promptly brought to justice, in accordance with international standards of fair trial and without recourse to the death penalty;
- the government should embark upon educational projects to ensure increased general social awareness of the rights to the child;
- the government should encourage governmental and non-governmental bodies, such as human rights NGOs to undertake unannounced visits to places of detention with the aim of making recommendations on measures to improve conditions of detention and to prevent torture and other cruel, inhuman or degrading treatment or punishment of children and detainees in general;
- a professional and impartial body be set up to look into and overcome the problems which the Lahore High court identified as part of the process to make the JJSO a reality.

Amnesty International also calls on the judiciary in Pakistan to show leniency in those cases where juveniles have been unable adequately to prove that they were juveniles at the time of the alleged offence on account of their parents' failures to register their births or due to delays in the criminal justice system to ascertain their age.