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## **Pakistan: Amnesty International's comments on the Lahore High Court judgment of December 2004 revoking the Juvenile Justice System Ordinance**

*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.* Convention on the Rights of the Child, Article 3(1)

### **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<sup>2</sup> 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>3</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>4</sup> Amnesty International's latest report<sup>5</sup> published alongside the present report looks at the implementation of the JJSO pointing to areas in which implementation is less than adequate, building on or updating the findings of Amnesty International's 2003 report. A special focus of the latest report 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

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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> *Farooq Ahmed v. Federation of Pakistan*, PLD 2005, Lahore 15.

<sup>3</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>4</sup> *Pakistan: Denial of basic rights for child prisoners*, AI Index: ASA 33/011/2003. 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.

<sup>5</sup> *Pakistan: Protection of juveniles in the criminal justice system remains inadequate*, AI Index: ASA 33/021/2005.

continues to be reported. It concludes with a set of recommendations for a more effective implementation of the JJSO.

The present report analyses the arguments of the Lahore High Court judgment on the basis of which it revoked the JJSO and presents Amnesty International's comments on each of these in the light of international human rights law and standards. Amnesty International considers the judgment a major setback for the protection of the rights of children in contact with the criminal justice system. The organization believes that while some of the High Courts' arguments point to a lack of clarity in the JJSO and to real problems of implementation, none of these constitute a sufficient ground to revoke the JJSO. The JJSO overrides and consolidates existing provincial and federal law on juveniles and protects child rights at a national level. Its promulgation results from an international obligation which Pakistan assumed when it ratified the CRC in 1990.<sup>6</sup>

It is pertinent to note that the Lahore High Court judgment which revoked the JJSO occurred at the end of 2004 – which the Pakistan government had declared the Year of Child Welfare and Rights. Of particular concern to Amnesty International is the lifting of the ban of the death penalty for juveniles contained in the JJSO by the Lahore High Court ruling. Amnesty International regards this as a retrograde step that flies in the face of a worldwide movement towards the abolition of the death penalty generally and of the death penalty for juveniles in particular. Worldwide there is virtual consensus that a child should not be sentenced to death. The prohibition of the death penalty has become a norm of customary international law.<sup>7</sup> More specifically, the death penalty for juveniles violates Article 37 (a) of the CRC according to which “*States Parties shall ensure that: (a) 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 persons below eighteen years of age.*”

## **2. The context of the Lahore High Court judgment**

The judgment arose in response to an application by Farooq Ahmed whose eight-year-old son had been sodomized and murdered. Two of the accused took the plea that they were juveniles as defined in the JJSO and should be treated in accordance with its provisions. This was challenged by Farooq Ahmed and a medical examination reportedly established that the accused were in fact 22 years old. Farooq Ahmed then filed a revision petition against declaring the accused to be juveniles and subsequently on 8 November 2002 moved a writ

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<sup>6</sup> Dr Faqir Hussain, Secretary of the Pakistan Law and Justice Commission noted during a seminar held in Islamabad that the revocation of the JJSO “creates a somewhat embarrassing position for the state. After ratification of the CRC, its provisions have become binding on the state”. He pointed out that the identification of shortcomings of the JJSO was an insufficient basis from which to argue for its revocation rather than amendment. *Dawn*, 1 February 2005.

<sup>7</sup> In August 2000 the UN Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution affirming that “the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law” and inviting the UN Commission on Human Rights to confirm the affirmation (resolution 2000/17 of 17 August 2000). In April 2003 the UN Commission on Human Rights “reaffirmed” the Sub-Commission’s resolution 2000/17 “on [in the Commission’s words] international law and the imposition of the death penalty on those aged under 18 at the time of the commission of the offence” (resolution 2003/67 of 24 April 2003, para. 2). See also the decision of the Inter-American Commission on Human Rights in *Michael Domingues v. United States*, Case 12.285, Merits, Report No. 62/02, 22 October 2002, paras. 84-85, 112. See also: International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.), *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: Cambridge University Press, 2005), p. 482.

petition stating that the JJSO was unconstitutional, its object discriminatory and conducive to corruption and crime. He believed that the JJSO unduly protected minor suspects and argued that legal provisions existing prior to the promulgation of the JJSO, including sections 82, 83 and 299 of the Pakistan Penal Code, 1860 (PPC)<sup>8</sup> and section 399 of the Code of Criminal Procedure, 1898 (CrPC)<sup>9</sup>, were sufficient to protect child offenders. The petitioner also argued that the JJSO usurped the right of the family of a murder victim to “compound” an offence, i.e. pardon the offender and cease criminal proceedings, and that it provided a lesser punishment without the consent of the heirs of the victim. This, he stated, contradicts the provisions of the *qisas* and *diyat* law.<sup>10</sup>

After eight hearings, a full bench of the Lahore High Court on 6 December 2004 announced its unanimous judgment which declared the JJSO to be “unreasonable, unconstitutional and impracticable” and revoked it with immediate effect and for the whole country. Consequently, juvenile courts in the whole of Pakistan set up under the JJSO stood abolished. The Court ordered that cases pending before such courts be transferred to regular courts. Juveniles could once again be tried in the same courts as adults and be sentenced to death. Cases concluded while the JJSO was in force, were not to be affected, the court ruled.

On 11 February 2005, the Supreme Court which had admitted appeals by the Federal government and a child rights organization, Society for the Protection of the Rights of the Child (SPARC) against the December 2004 judgment, stayed the Lahore High Court judgment pending a decision on the case. The JJSO is thereby temporarily restored pending a decision. The Supreme Court issued notice to the respondents, namely Farooq Ahmad and the Federation of Pakistan, through the Secretary Law and Parliamentary Affairs, to file their comments. To Amnesty International’s knowledge the case has been pending since, with no hearings reported to have taken place.

### **3. Amnesty International’s general observations in relation to the Lahore High Court judgment**

Amnesty International 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

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<sup>8</sup> Section 82 PPC: “Nothing is an offence which is done by a child under seven years of age.” Section 83 PPC: “Nothing is an offence which is done by a child above seven years of age and under 12 who has not attained sufficient understanding to judge the nature and consequences of his conduct on that occasion.” Section 299 PPC contains the definition of an adult as a person above 18 and the corresponding definition of a child.

<sup>9</sup> Section 399 deals with the confinement of youthful offenders in reformatories.

<sup>10</sup> The law of *qisas* and *diyat*, which replaced sections of the PPC originating in colonial times and conceptualizes the offences of murder, manslaughter and bodily injury in Islamic terms, allows the victim in the case of physical injury, and the heirs of the victim in case of murder, to pardon the offender and to accept compensation. In such cases there is no criminal prosecution. The Council of Islamic Ideology (CII) in 2001 reportedly also took exception to some of the provisions of the JJSO on the grounds that they contradict Islamic provisions. It held that the provision of separate trial courts for juveniles had no precedent in Islamic injunctions and could cause hardships to family members tried in different courts and that the JJSO lacked reference to an appropriate court of appeal. It also pointed out that better facilities for juveniles might encourage people to use juveniles for crimes. To Amnesty International’s knowledge, no action has been taken on the points raised by the CII.

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.

Amnesty International is particularly concerned that the Federation of Pakistan though it was a respondent in the petition before the Lahore High Court did not appear to take much interest in the issue. The Attorney General did not attend any but the first hearing and was then represented by the Deputy Attorney General.<sup>11</sup> In the province of Punjab, equally a respondent in the petition, the provincial Advocate General was similarly represented by his Assistant who in court did not defend the JJSO at all. Instead, the Punjab Assistant Advocate General expressed reservations about the validity and propriety of the JJSO and stated that legal provisions existing prior to the promulgation of the JJSO were sufficient to safeguard the rights of juveniles. She referred to sections 306 and 308 of the Pakistan Penal Code (PPC)<sup>12</sup> and cited an earlier judgment which ruled that the question of the maturity of an accused had to be ascertained by the court before conviction and sentence. This, she argued, made relevant provisions of the JJSO redundant. She further held that the JJSO had created confusion in the criminal justice system and was replete with practical difficulties. It is unclear if the Assistant Advocate General here represented the government or if she presented her own opinion which would have been inappropriate. If she represented the government, she ought to have defended the existing law which incorporates important segments of Pakistan's international obligations under the CRC in domestic law.

Amnesty International believes that the specific arguments of the judgment of the Lahore High Court provide insufficient and flawed grounds for striking down internationally protected rights of children by revoking the JJSO. Most importantly, the judgment fails to appreciate the spirit of the JJSO and its intention, that is, to protect the legal and constitutional rights of juveniles in the criminal justice system by paying attention to the special needs of accused children. The emerging international consensus is that child offenders, due to their immaturity, impulsiveness and vulnerability as well as their capacity for rehabilitation should be given special attention and care, no matter how serious the offence. This is explicitly recognized in the Preamble to the CRC which emphasizes children's needs for "*special safeguards and care, including appropriate legal protection*" on account of their "*physical and mental immaturity*". By striking down the JJSO, the Lahore High Court denies juveniles such special protection.

The judgment's argues that the socio-legal situation in Pakistan cannot be changed with "one quantum leap" or "at the stroke of a pen". While Amnesty International acknowledges that in ensuring certain rights provided in the CRC, such as some social, economic and cultural rights, states are only required to "*undertake such measures to the maximum extent of their available resources*"<sup>13</sup>, states cannot rely on social and other factors in denying children their rights to fair trial as provided in the CRC. The judgment mentions that social perceptions of rights take a long time to change but this points to the necessity for human rights education to accompany legislative measures so that widely held perceptions of child rights may evolve. It does not mean that the law itself becomes redundant.

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<sup>11</sup> The judgment states that the Deputy Attorney General "wholeheartedly" supported the Ordinance and argued that the Constitution permitted affirmative action for children and that despite impracticalities in the law, the court should "be extremely slow in striking down a law duly enacted or promulgated by the legislature". The court found the legal cases cited by the Deputy Attorney General "quite illuminating" but "hardly relevant to the issues involved in the present petition". (para 5)

<sup>12</sup> Section 306(a): Murder not liable to be punished with death as *qisas* (punishment equal to the offence) if the offender is minor or insane; Section 308(1): An offender guilty of murder, not liable to *qisas* under section 306, is liable to *diyat* (compensation), provided that when the offender is minor or insane, *diyat* is payable either from his property or by such person as may be appointed by the court.

<sup>13</sup> Article 4, CRC.

While Amnesty International believes that the Lahore High Court judgment is a setback to human rights protection in Pakistan generally and to children in particular, the organization acknowledges that the judgment pointed to some real ambiguities and lacunae in the JJSO to which there are no easy answers. The JJSO is indeed silent on the conflicting jurisdictions of court. Separate trials of juvenile and adult accused as required by the JJSO indeed add to the strain on a judiciary already overworked with four million pending cases. Conflicting judgments arrived at by different courts trying adults and juveniles for the same offence may present a problem. However, rather than revoke the JJSO on these grounds, every effort should be made to address and remedy these problems in efforts to ensure adequate and thorough protection of juveniles in the criminal justice system in accordance with provisions of the CRC. A very vulnerable group of the population - children - should not be made to bear the consequences of problems with the JJSO.

#### **4. Analysis of the arguments of the Lahore High Court judgment**

The following analysis outlines Amnesty International's specific concerns with the Lahore High Court judgment which presented the following arguments for its decision to revoke the JJSO:

##### a. Argument that the JJSO is incompatible with constitutional provisions

The Lahore High Court argued that the JJSO was “inconsistent with and violative of Articles 4, 9 and 25 of the Constitution besides being replete with incompatibilities with other laws”. It also declared that the “so-called ‘rights’ of children” are not laid down in the Constitution of Pakistan and any “special provisions” giving “additional advantages” to women and children “cannot be allowed to have the effect of denying others their own rights under the said or other provisions of the Constitution”.<sup>14</sup>

The judgment does not explain the nature of the alleged violation by the JJSO of the constitutional safeguards contained in Article 4 (rights of the individual to be dealt with in accordance with law), Article 9 (security of the person) and Article 25 (equality of citizens before the law). The petitioner had argued that Articles 25(3)<sup>15</sup> and 26(2)<sup>16</sup> of the Constitution “do not envisage extending protection to children in a manner that leaves others unprotected at the hands of such children”. The misuse of the protection against the death penalty afforded under the JJSO, the petitioner also argued, had led to adults misusing children to carry out murders which had denied the right to life of the victims, guaranteed under Article 9. The Lahore High Court did not regard as relevant the argument of the Deputy Attorney General of Pakistan to the effect that special provisions can be made to protect women and children under these Articles and that existing law should not be struck down for providing such additional protection.

Amnesty International notes that the Constitution's provision in Article 25(3) which allows special provisions for the protection of women and children without diminishing the rights of others is in full accordance with international treaties to which Pakistan is a state party. The CRC does not, contrary to what may be implied by the Lahore High Court judgment, provide that persons under 18 cannot be held criminally responsible or be punished. While Article

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<sup>14</sup> Para 22.

<sup>15</sup> Article 25: (1) All citizens are equal before law and are entitled to equal protection of law ... (3) Nothing in this Article shall prevent the State from making any special provisions for the protection of women and children.

<sup>16</sup> Article 26: (1) In respect of access to places of public entertainment or resort not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth. (2) Nothing in clause (1) shall prevent the State from making any special provisions for women and children.

40(3)(a) provides that states must establish “*a minimum age below which children shall be presumed not to have the capacity to infringe the penal law*”, the CRC obviously does not leave states without means of defending their citizens against child offenders.

Denying necessary special protection for children contravenes the Declaration of the Rights of the Child<sup>17</sup> which states that “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*” and is in violation of the CRC which in Article 4 states that “*State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.*”

#### b. Argument that the JJSO is superfluous as child rights are adequately protected by other laws

The Lahore High Court also argued that the JJSO was superfluous as legal provisions on the statute books of Pakistan prior to its enactment were sufficient to protect child accused. It lists amongst pre-existing provisions the “*sympathetic and concessionary treatment of minor accused persons and offenders in the matters of capacity to commit a crime, bail and custody as is evident from the provisions of sections 82 and 83 of the Pakistan Penal Code and sections 29-B, 497<sup>18</sup> and 399 of the Code of Criminal Procedure*”. It also holds that “*the concept of Borstal Institutions and Reformatory Schools for young prisoners already stood recognized and put into practice by various legislative amendments*” prior to the promulgation of the JJSO.

Amnesty International believes that provisions in the statute books of Pakistan with regard to the protection of juvenile offenders before the promulgation of the JJSO did not provide for the full protection of children’s human rights as required by the CRC. Two provinces, Sindh and Punjab, had laws protecting juveniles in some areas while two provinces, Balochistan and the North West Frontier Province (NWFP), and other territories, including the Northern Areas, Azad Jammu and Kashmir and the designated tribal areas had no child specific laws at all. The special laws relating to children in Sindh and Punjab were in many ways inadequate to protect children in the criminal justice system and differed with regard to the ages of criminal responsibility and the ages at which the death penalty could be imposed. The Hudood laws<sup>19</sup> link criminal responsibility to physical maturity and provide different ages for maturity for males and females. These laws are neither in conformity with the definition of the child in the CRC nor do they provide the protection of child rights required in the Convention.

The protection provided by other laws cited in the judgment is very limited, falls far short of international standards and therefore cannot be construed as making the JJSO superfluous. The PPC and the CrPC - which do not extend to the tribal areas - lay down the minimum age of criminal responsibility (sections 82 and 83 PPC) and provisions relating to the trial of juveniles by regular courts, confinement of juvenile offenders in reformatories and bail (sections 29B, 497 and 399 CrPC respectively) but many areas of protection of the child in the judicial process are clearly not covered by these laws. The form and procedure of trials of juvenile suspects was left unaddressed for some 10 years after Pakistan ratified the CRC. The JJSO defines the child as a person below the age of 18 years in accordance with the CRC and removes the discrimination on the basis of the gender of children. It provides for the establishment of special courts to exclusively try children under special procedures suitable to

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<sup>17</sup> Adopted by the General Assembly on 20 November 1959.

<sup>18</sup> Section 29-B CrPC regulates the trial of children below the age of 15 years by a judge under the Reformatory Schools Act, 1897; section 497 CrPC regulates bail and makes it discretionary for courts to grant bail to children under 16 years of age.

<sup>19</sup> The Islamic Hudood Laws introduced in 1979 deal with the offences of *zina* (fornication), robbery, consumption of alcohol and the false accusation of *zina*.

their age. It provides for the appointment of special panels of lawyers to represent children free of charge and makes provisions for bail and probation. It prohibits the death penalty for children, the use of fetters and hand-cuffs on children and improves conditions of detention for children. The JJSO in covering more aspects of juvenile justice goes beyond the limited and inconsistent child protection of other laws. Arguments that it is superfluous are untenable and cannot serve as a basis for revoking it.

The Lahore High Court judgment refers to Borstal Institutions and Reformatory Schools legislation and to section 399 CrPC which lays down that children under the age of 15 are to be sent to reformatories established by provincial governments, not prisons. However, the JJSO lays down procedures for the protection of juveniles in court proceedings, not for the imprisonment of convicted juvenile offenders as regulated in the aforementioned laws. The legal provisions cited have no connection to the issue at hand: the trial of juveniles. Moreover, as child rights activists in Pakistan have pointed out, the regulations cited by the court as providing protection for juveniles in detention are only very inadequately implemented and hardly demonstrate conscientious care given by the state to juvenile offenders.

### c. Argument that the JJSO is superfluous as courts take a lenient attitude to children

The High Court observed that the JJSO was superfluous as courts generally deal leniently with juvenile suspects.

Amnesty International notes that juveniles have been sentenced to death even after adoption of the JJSO, which prohibits the death penalty for juveniles. Moreover, courts frequently fail to note the age of defendants before them or to make efforts to ascertain their ages thereby undermining efforts to treat them in accordance with their ages. Similarly the reported refusal of courts to accept evidence of the age of juveniles when the possible commutation of their death sentences is at stake, undermines the general statement that courts are lenient to juveniles. Courts are also reported to have imposed excessively long imprisonment and heavy fines on juveniles in disregard of their ages and economic status. The fact that **Sher Ali** was executed in November 2001 for a murder committed when he was only 13 years old; that nine-year-old **Nadeem** is serving a sentence of 273 years' imprisonment in Faisalabad prison; and that dozens of young children in the tribal areas are held in jail for offences with which relatives are charged, clearly point to the absence of understanding, let alone leniency, for child offenders. (For these specific cases see above.)

Special laws to protect vulnerable sections of society, such as the JJSO, take their protection out of the subjective discretion of judges. Such laws lay down that members of given vulnerable groups have specific rights which the state must guarantee.

The attitude towards children shown by the Lahore High Court in the December 2004 judgment itself is the strongest argument against the supposed leniency of courts towards children. It fails to appreciate the spirit of the JJSO which is to protect the legal, constitutional and human rights of juveniles in the criminal justice system by paying special attention to those accused who deserve special attention because they have not yet attained the maturity of the adult.<sup>20</sup>

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<sup>20</sup> The judgment stands out for its unsympathetic approach to children and those who defend child rights. In the very opening paragraph it notes the concern of "sages down the ages" for the rights of the accused then adds, "if such an accused person happens to be a child then the romance about him usually receives a further sympathetic boost". The judge continues, "a young person who has already lost his childhood virtue, innocence and incorruptibility and who understands the nature or the normal consequences of his conduct, no matter what his age, may cease to qualify for such special handling as a child." Para 1.



The judgment observes that criminal trends in “the West” differ from those in Pakistan such that “it is not uncommon for young persons [in Pakistan] to be involved in serious and heinous crimes like murder, gang-rape, terrorism and trafficking in narcotics, and that those in the West are involved in petty crime”.<sup>21</sup> Proceeding from this assumption of a greater penchant for crime amongst Pakistan’s children, the High Court goes on to suggest that children in Pakistan cannot catch up with the more “advanced West” in one “quantum leap” by means of the JJSO. Human rights lawyers in Pakistan have pointed out that such statements clearly contradict any claim that the judiciary has appropriate regard for children and their rights.<sup>22</sup>

#### d. Argument that the JJSO is incompatible with other laws with regard to the age of majority

The Lahore High Court judgment argued at length that the determination of adulthood at 18 years of age is “fixed arbitrarily, randomly and whimsically”, does not adequately reflect cultural differences and fails to differentiate between the ages at which the two sexes attain adulthood. It asserts that majority is reached earlier in Pakistan than elsewhere: “[g]rowing up in close proximity and interaction with adults due to social and economic conditions, doing odd jobs and getting employed at a relatively young age due to general poverty, hot climate and exotic and spicy food all contribute towards a speedy physical growth and an accelerated maturity of understanding of a child in our society.”<sup>23</sup> It also argues that the “unreasonableness” of considering 18 as the age of attaining majority is “confounded” in that no study was undertaken to determine adulthood in Pakistan before the promulgation of the JJSO.

The judgment refers to different definitions of the child in different Pakistani laws. The CrPC in section 29-B defines a juvenile as a person under the age of fifteen years; the Sindh Children’s Act of 1955 defines a child as a person below 16 years of age and the Punjab Youthful Offenders Ordinance 1983 defines a child as someone who has not attained the age of 15 years. Section 2(a) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 defines an adult as “a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty”. Similarly, Article 2(a) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979 and Article 2(a) of the Prohibition (Enforcement of Hadd) Order, 1979 define an adult as “a person who has attained the age of eighteen years or puberty”.<sup>24</sup> The Lahore High Court concludes that since the JJSO definition of a child differs from these, the latter should be struck down as it fixed the age of adulthood arbitrarily and differs from existing definitions.

Pakistan’s ratification of the CRC in 1990 and subsequent promulgation of the JJSO indicate commitments to abandon varying national laws and definitions of adulthood, including those that discriminate between the sexes and confuse physical with mental maturity in favour of a single and internationally accepted definition and protection of the child. The court’s decision entirely ignores the importance of such commitments.

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<sup>21</sup> Para 28.

<sup>22</sup> A leading human rights lawyer in Pakistan commented: “To take this line of reasoning to its logical end would lead us to conclude that an unfortunate child who is deprived of social, economic and political rights deserves the death penalty, while those who have had the advantage of education, eating McDonalds and enjoying fine weather are less brutalised and therefore more innocent in the eyes of the law.” Asma Jahangir, “Bang, bang, hang, hang”, *The News*, 7 January 2005.

<sup>23</sup> Para 12.

<sup>24</sup> The Supreme Court decided that a female attains puberty when she begins to menstruate (*Farrukh Ikram v. The State*, PLD 1987 SC 5) and a male when he starts secreting semen (*Abdul Jabbar v. The State*, PLD 1991 SC 172).

#### e. Argument that the JJSO is impractical

The Lahore High Court argued that the JJSO is “impractical” in a variety of ways. Its provisions require that a child suspect should be tried separately from any adult who is accused of the same crime, that evidence obtained in one of these separate trials is not used in the other and that no other trials should be conducted on the same day when juveniles are being tried.

The court noted as a “nightmare of impracticality” the practice of holding separate trials for the same offence in different courts, the possibility of conflicting judgments and the absence of any mechanism to resolve such discrepancy. The court argued that in the case of such separate trials the findings in one court could prejudice those of the other and duplicate the court’s work. Moreover, holding separate trials of adult and juvenile accused in the same offence, it said, presents an “undue inconvenience and hardship for the complainant party” and involves issues of equality before law and equal protection of law.<sup>25</sup> Without examining the reasons for separating trials of juveniles from those of adult accused, the benefits of such separation for juveniles and international standards in this regard, the court concluded that “what is at stake is the interest of justice in the larger context. After all such serious questions of justice pertaining to adults cannot be lightly or conveniently sacrificed on the altar of interests of children or juveniles”.<sup>26</sup>

The court acknowledged the - unlawful - practice of the same judge conducting the separate trials of the adult and the juvenile accused of the same offence and transferring evidence recorded at the adult’s trial, at which the juvenile and his legal representative are not present, to the juvenile’s trial conducted under the JJSO and concluded that “it is better not to have a law rather than to have a law which is universally disregarded or flouted with impunity”.

The Lahore High Court similarly argued that since the provision of the JJSO that juvenile courts shall not “ordinarily take up any other case on a day when the case of a child accused is fixed for evidence” is routinely ignored by courts, “such a manner of protection for a child at the cost of complete paralysis or breakdown of the judicial system at the plenary level vis-à-vis the adult citizenry has appeared to us to be too big a price to be even seriously contemplated, considered or mulled over”.<sup>27</sup>

Amnesty International believes that the difficulties in implementing the JJSO should have been analyzed and constructively addressed by the Court to ensure that malpractices were stopped and solutions developed for a proper separation of trials in the best interest of the children involved without prejudicing any rights of adults. The Lahore High Court’s conclusion that “what is at stake is the interests of justice in the larger context. ... [S]uch serious questions of justice pertaining to adults cannot be lightly or conveniently sacrificed at the altar of interests of children or juveniles” reflects a view that basic human rights of the few -- and in this case the most vulnerable -- may be sacrificed for some “greater good” of “justice in the larger context”. This view clearly contradicts the very essence of international human rights law, namely that “all human beings are born free and equal in dignity and rights”<sup>28</sup> and that therefore the rights of the few may not be sacrificed in the interest of the many. To retract a law intended to protect juveniles on the grounds that it has been improperly implemented and as such leads to irregularities betrays a stark lack of commitment to the protection of juveniles. The Lahore High Court judgment ignores that juvenile courts operate in dozens of states around the world and while none is totally free of

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<sup>25</sup> Para 14.

<sup>26</sup> Para 14.

<sup>27</sup> Para 15.

<sup>28</sup> Article 1 of the Universal Declaration of Human Rights.

difficulties, the notion that such difficulties justify abrogating the whole system is unique to the Lahore High Court.

The Lahore High Court judgment also includes in its list of the “impracticalities” inherent in the JJSO the fact that the jurisdiction of juvenile courts may conflict with the jurisdiction of other courts designated exclusively to try specific offences. This highlights a lack of clarity in the JJSO which fails to address the issue of jurisdiction and has required the country’s judiciary to resolve such conflict. (See above.)

#### f. Argument that the JJSO was not adopted by a representative government

The Lahore High Court argued that the JJSO was passed in an undemocratic manner without public or parliamentary debate, promulgated by an unrepresentative government and under the pressure of Western governments and donor agencies.

Human rights activists in Pakistan have pointed out that this argument ignores the fact that a large proportion of legislative initiatives on a variety of issues have long been passed in the form of presidential ordinances every year, under this and previous governments. They have concluded that it appears arbitrary to challenge the JJSO on this ground while ignoring other laws and legal amendments made by ordinance. At the same time, the Lahore High Court is undoubtedly right in asserting that public debate and parliamentary discussion may have ensured the identification and early removal of some of the ambiguities in the JJSO which have hampered its implementation.

Amnesty International does not take any position on how legislation is passed but only looks at it in the light of international human rights standards and treaties. The promulgation of the JJSO, after a delay of 10 years, brought into domestic law the international commitments made by Pakistan in 1990 when it ratified the CRC. In fact the JJSO only reflects those of the provisions of the CRC which relate to the criminal justice system; many other provisions of the CRC have not yet been reflected in domestic law. Extensive lobbying for the adoption of domestic laws to protect children caught up in the criminal justice process was undertaken by Pakistani human rights groups and specifically child rights groups.

#### g. Argument that the JJSO encourages corruption

The judgment argues that the JJSO “is encouraging and promoting corruption in the society at a scale which is not only large but is also extremely alarming”. Relatives of criminal suspects allegedly pay bribes to obtain fake birth certificates or other documentation to establish that the suspects were children at the time of the alleged offence so the death penalty cannot be imposed. The court also argued that people are tempted to use children to carry out capital crimes in the knowledge that they would be given a lesser punishment. The judgment also points to the large number of pending trials in which the defence is seeking to establish that alleged offenders were below 18 years of age at the time of the offence. These trials, the High Court alleges, consume much of the courts’ time and “more often than not” are “undertaken with intentions and purposes which are other than bona fide”.

The judgment concludes that the JJSO has “created nothing but havoc in our criminal justice system in particular and society in general”. Child protection, it alleges, has come at a price which is too high for society: *“The Ordinance is promoting falsehood, lies, forgeries and corruption in society at a large scale and a law which corrupts the society at large in the name of protection for children is not worth retaining on the statute book. Destruction of the moral fibre of the society as a whole is once again too big a price to be paid for the protection of children. ... A law which contains the incentive for and has tendencies to corrupt the*

*society in such a manner is counterproductive, paradoxical and at odds with the 'protection of law' contemplated by the provisions of Articles 4 and 25 of the Constitution".<sup>29</sup>*

It is the function of the criminal justice system to investigate, prosecute and punish forgeries of certificates and perjuries. Strict enforcement of relevant laws would be the appropriate response to attempts to pass off adults as juveniles but such attempted abuse of the protection afforded by the JJSO can never serve as the basis for striking down a law which (partially) incorporates provisions of a treaty which Pakistan has taken upon itself to apply and which protects the rights of children against abuse, including by corrupt adults.

That courts are burdened with cases seeking to establish that criminal suspects were juveniles at the time of the alleged offences, as the Lahore High Court argues, is the result of an inadequate registration practice, not a failing of the JJSO itself. According to the annual report of the non-governmental Human Rights commission of Pakistan for 2003, in July of that year, over 300 cases were pending in Punjab province alone in which the ages of persons sentenced to death were contested, some of whom had exhausted all venues of appeal. Given that well over four million cases are pending in courts in Pakistan,<sup>30</sup> such a number cannot be described as "creating havoc" in the criminal justice system. By claiming that most of such pending cases are *male fide*, the Lahore High Court also appears to pre-judge such cases in an inappropriate manner.

Amnesty International believes that the Lahore High Court here places an undue responsibility for corruption on children. Corruption and abuse of law are reported to occur in many sectors of the economy and society in Pakistan. Corruption did not originate with the JJSO and many laws are similarly abused without the judiciary arguing for their abolition.

The fact that people may have recourse to fake documentation of age points to the state failure to implement the relevant law which requires prompt and accurate registration of births, and to provide adequate and correct documentation including school leaving certificates and marriage certificates of parents, which courts would accept and rely on.<sup>31</sup> The CRC in Article 7 lays down: "1. *The child shall be registered immediately after birth and shall have the rights from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.* 2. *State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*" In her address to the General Assembly at the UN Special Session on Children on 10 May 2002, the then Minister for Women Development, Social Welfare and Special Education said: "Pakistan has succeeded in bringing in a system of electronic registration of births and special cards are being provided to ensure that the right to an identity for every child, conferred by Article 7 of the CRC is realized. This system is to cover the existing population as well as the newborns." To Amnesty International's knowledge such a system is not in force yet.

Amnesty International calls on the Government of Pakistan to take all possible measures to ensure that every child is registered promptly after birth to avoid juvenile suspects struggling to prove their age in order to be treated in accordance with laws appropriate for their age.

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<sup>29</sup> Para 17.

<sup>30</sup> The governmental Law and Justice Commission in its report for 2003, released in October 2004 stated that on 1 January 2003 some 27,000 cases were pending in the Supreme Court and over four million cases in courts subordinate to it.

<sup>31</sup> It is mandatory under the Births, Deaths and Marriages Registration Act, 1886 to register the birth of a child within a period of 15 days with the local Union Council; in practice this obligation is widely ignored, particularly in the rural and tribal areas. The Committee on the Right of the Child has expressed concern about the government's lack of efforts to promote timely registration of births.

The judgment also claims that juvenile crime has “significantly increased” after the introduction of the JJSO due to its concessionary treatment of children which, the High Court alleges, both encourages children to commit crimes and adults to persuade or force children to commit crimes on their behalf. Human rights lawyer Asma Jahangir has pointed out that the figures quoted in the judgment were taken from media reports and are not authenticated. She quoted Punjab Prison Department figures according to which in 2003, 596 juveniles were accused of murder in Punjab province, against 1,098 in 2002, indicating a distinct decline in juvenile crime.<sup>32</sup>

#### h. Argument that the death penalty is needed to deter crime

The judgment claims that doing away with the death penalty for juveniles removes an effective deterrent against juveniles committing capital offences as the “possibility of an equal or proportionate reprisal or punishment has always been accepted as the surest deterrence against aggression”. The Lahore High Court argues that the JJSO creates an incentive for juveniles to commit serious crimes “with an understanding and assurance that they will get away with lesser sentences [which] poses a grave threat and ... grim peril to the lives of citizens at large”. The Lahore High Court concludes that “the recent movement in some parts of the Western world in favour of abolishing the death penalty may just be a passing ... phase ... and we are not surprised that in many parts of the world the penalty of death is staging a comeback and is being reintroduced, not for the love of such a punishment but purely for its utility and efficacy as the most suitable deterrence.”<sup>33</sup>

The Lahore High Court’s assertion that the trend towards the abolition of the death penalty may be a passing phase, is not based on facts. The trend towards the abolition of the death penalty is persistent and clear. Currently 85 countries have abolished the death penalty for all crimes in law. Eleven countries have abolished the death penalty for all but exceptional crimes such as wartime crimes (hence abolitionist for ordinary crimes only) and 24 countries are abolitionist in practice. Seventy-six countries have retained the death penalty in law, but several of those countries are observing officially declared moratoria on executions and many others execute only infrequently. With regard to the death penalty for children there is virtual consensus that a child, a person below 18 years of age, cannot be sentenced to death. The USA, one of the last countries to retain the death penalty for juveniles abolished it on 1 March 2005 when the US Supreme Court found that the death penalty for juveniles was unconstitutional.<sup>34</sup> With this decision, there is now no country in the world that openly executes child offenders within its regular criminal justice system and claims for itself the right to do so under international law.

Scientific studies have consistently failed to find convincing evidence that the death penalty deters crime more effectively than other punishments. The most recent survey of research findings on the relation between the death penalty and homicide rates, conducted by the United Nations in 1988 and updated in 2002, concluded that “*it is not prudent to accept the*

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<sup>32</sup> Asma Jahangir, “Bang, bang, hang, hang”, *The News*, 7 January 2005.

<sup>33</sup> Para 22.

<sup>34</sup> In *Roper v. Simmons*, the Supreme Court found that executing child offenders violates the US Constitution, concluding that a national consensus against such executions had evolved since 1989 when it ruled that the execution of 16- and 17-year-old offenders was constitutional. The US Supreme Court found that the inherent differences between children and adults meant that child offenders “cannot with reliability be classified among the worst offenders” for which the USA supposedly reserves the death penalty. The Court had considered national and international trends, scientific evidence, and appeals from religious, human rights, legal and child advocacy organizations. See AI Index: AMR 51/047/2005

*hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and the application of the supposedly lesser punishment of life imprisonment.*"<sup>35</sup>

The judgment repeatedly asserts that the JJSO has created "havoc" in society because of the leniency shown to juveniles and argues for the retention of the death penalty as the most effective deterrence against serious crime. This argument ignores that under Pakistan law, murder, punishable with the death penalty, can be "compounded", i.e. the heir of the victim can forgive the perpetrator, accept compensation and thereby end criminal prosecution.<sup>36</sup> In other words, leniency to the extent of impunity for the offences of murder and manslaughter is already provided for in existing law. Clearly, in this context to argue for the retention of the death penalty on grounds of deterrence is misplaced.

## **5. Recommendation**

Amnesty International urges the Government of Pakistan to support unequivocally and forcefully the permanent 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. 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>35</sup> Roger Hood, *The death penalty: A world-wide perspective*, Oxford, Clarendon Press, third edition, 2002, p. 230.

<sup>36</sup> "Hanging a few children while those with muscle can get away by paying a few hundred bucks can hardly save an already decaying system." Asma Jahangir, "Bang, bang, hang, hang", *The News*, 7 January 2005.