

Only a tiny group among them went a step further, embracing the lifestyle and symbols of jihadists abroad as the only answer to their perceived sense of injustice and insecurity, and even put them into practice in the Netherlands.⁷⁵ The members of the Hofstad Group legitimized their terrorist intentions with thoughts they took from notable Salafi-jihadi clerics such as Abu Hamza al-Masri or Abu Muhammad al-Maqdisi.

This still does not solidify a causal relationship. Salafist mosques did indeed function as an ideological hotbed for potential radicals. The al-Fourqaan mosque in Eindhoven was identified as a playground for jihadist recruiters. The members of the Hofstad Group, however, were not passive victims of Salafist “hatemongers” from abroad. On the contrary, militant Muslims such as Samir Azzouz, Jason Walters or Mohammed Bouyeri were actively seeking jihadist guidance once they had embarked on their course of radicalization. At some point, they even stopped visiting their Salafist mosques because it did not offer them instructions to wage jihad in the Netherlands. They therefore constructed their own brand of *umma*-oriented jihadism through texts and principles they found on the internet.

Indeed, the AIVD defined Salafism as “anti-integrative, anti-democratic and isolationist” in 2007 and again in 2009.⁷⁶ This definition, however, cannot be equated with terrorism. Salafism is not a sliding scale from passive orthodoxy into violent orthopraxy. On the contrary, from 2005 onward, Salafist imams, including Fawaz Jneid, have tried to put a brake on overly enthusiastic jihadist emotions among Muslim youth by steering them into more apolitical and especially non-violent action modes and sometimes even reported them to the police.⁷⁷

75 Kees van den Bos, Annermarie Loseman and Bertjan Doosje, *Waarom jongeren radicaliseren en sympathie krijgen voor terrorisme: Onrechtvaardigheid, onzekerheid en bedreigde groepen* (The Hague: WODC, 2009).

76 “De radicale da’wa: De opkomst van het neo-radicalisme in Nederland”; “Weerstand en tegenkracht: Actuele trends en ontwikkelingen van het salafisme in Nederland.” Also see Hans Moors and Menno Jacobs, *Aan de hand van de imam. Integratie en participatie van orthodoxe moslims in Tilburg-Noord* (Tilburg: IVA beleidsonderzoek en advies, 2009).

77 Buijs et al.; Alberts et al.

In sum, the Salafist movement in the Netherlands is still controversial. The strand of political Salafism remains responsible for anti-Western, isolationist and radical opinions; however, as stated by De Koning, political Salafists and apolitical Selefies hold a different view on violence and attitudes toward “infidels” compared to the jihadists. Salafist criticism of the war in Afghanistan or the exploitation of women in Western media and society should not be equated to terrorism, but could be viewed as the voice of a group of highly critical and religious citizens that are searching for a self-conscious position within Dutch society.⁷⁸ Moreover, both the NCTb and the AIVD signal a trend of adaptation and moderation (inspired by external pressure from Dutch security services and local authorities as well as from the Saudi regime) of Salafist excesses and a growing resilience and resistance against the seeds of violent jihadism.⁷⁹

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78 De Koning, *Zoeken naar een ‘zuivere’ islam*, p. 378.

79 NCTb, “Salafisme in Nederland”; “Weerstand en tegenkracht: Actuele trends en ontwikkelingen van het salafisme in Nederland.”

Pakistan’s Anti-Terrorism Courts

By Huma Yusuf

IN THE WAKE of the November 2008 terrorist attacks in Mumbai, Pakistani President Asif Ali Zardari stated, “Pakistan is committed to the pursuit, arrest, trial and punishment of anyone involved in these heinous attacks.”¹ Zardari’s emphasis on prosecuting accused terrorists in legal courts renewed interest in Pakistan’s anti-terrorism court (ATC) infrastructure, a parallel legal system established in 1997 under the Anti-Terrorism Act to dispense quick justice for those charged with terrorist activities. Almost a year later, an ATC in Rawalpindi indicted seven men for providing weapons and training to the Mumbai terrorists.² The trial is still in process, and in January 2010 an ATC judge in Rawalpindi rejected petitions seeking the acquittal of six of the seven who stand accused.³

Although the involvement of Pakistani militants in the Mumbai attacks placed the spotlight on ATCs, the government’s decision to conduct military operations against Pakistani Taliban fighters in Swat in May 2009 and in South Waziristan Agency in October 2009 forced the government to revisit the ATC infrastructure.⁴ As hundreds of militants either surrendered or were arrested during the operations, questions have risen about how they should be dealt with according to the law.

This article will explain why the ATCs have become especially relevant due to Pakistan’s recent military operations in its northwest, provide the history of the country’s anti-terrorism legal policies and finally express significant concerns about the ATCs and the country’s overall anti-terrorism judicial infrastructure.

1 Asif Ali Zardari, “The Terrorists Want to Destroy Pakistan, Too,” *New York Times*, December 8, 2008.

2 “Seven Indicted for Planning, Aiding Mumbai Attack,” *Dawn*, November 25, 2009.

3 “Pakistan Court Refuses to Acquit Mumbai Suspects,” *Agence France-Presse*, January 6, 2010.

4 “Pakistan: The Swat Offensive Update,” *Stratfor*, May 22, 2009; Rahimullah Yusufzai, “Assessing the Progress of Pakistan’s South Waziristan Offensive,” *CTC Sentinel* 2:12 (2009).

ATC's Re-Enter the Spotlight

At the start of Pakistan's recent military operations in the northwest, it was unclear under what law suspected militants should be prosecuted. The government had not clarified whether military operations against militants were constitutionally categorized as law enforcement actions or operations "in aid of civil power" under Article 245 of the constitution.⁵ In the latter case, the detainees' fundamental rights would be suspended for the duration of the operation. Moreover, their trials would be conducted under the Action in Aid of Civil Power Ordinance (1998) that authorizes the establishment of mobile military courts. The Supreme Court, however, had previously ruled that military courts should be replaced with regular session courts.⁶ For that reason, in October 2009 the Interior Ministry clarified that all militants taken into custody during military operations and security sweeps in Swat, South Waziristan, and in other tribal agencies such as Bajaur and Khyber would be tried under the amended Anti-Terrorism Act in ATCs.⁷

To underscore that terrorists and Pakistani Taliban supporters would be answerable to the law, ATCs declared known militants as "proclaimed offenders"—fugitives from the law—as soon as local courts resumed functioning in the wake of the military operation in Swat. In August 2009, a Swat-based ATC identified the area's Taliban chief Maulana Fazlullah and six of his aides as proclaimed offenders and ordered that they appear in court within a week or face judgment in absentia.⁸ Similarly, in January 2010 Taliban spokesman Muslim Khan and 23 other militants who the government had in detention

were declared proclaimed offenders by an ATC and currently face charges of murder, attempted murder, kidnapping, attacking government installations, treason, and terrorism.⁹

As the number of suspects in custody—especially at the three interrogation centers in Fizat, Khwazakhela and Malakand in the Swat Valley—soared, human rights groups began to question the transparency of interrogation and detention procedures and the credibility of due process for arrested militants. Reports that more than 250 bodies had been dumped on the streets of Swat also raised concerns about extrajudicial killings of terrorism suspects by the military.¹⁰

To ensure that terrorism suspects were dealt with justly and expediently, the Supreme Court in August 2009 announced the formation of special committees to monitor the ATCs and ensure the quick disposal of anti-terrorism cases.¹¹ Moreover, in November the government issued the Anti-Terrorism Amendment Ordinance (2009), which included new clauses to facilitate the framing of charges against hundreds of alleged militants. As per the latest amendment, "extrajudicial confessions" recorded by security personnel are admissible as evidence in ATCs, the remand period is extended from 30 to 90 days, and the burden of proof has shifted to the accused.¹²

By a special presidential order, the amended act was also extended to the Provincially Administered Tribal Areas (PATA), which include Malakand Division where Swat is located.¹³ The

authorities also established new ATCs in the region, bringing the total number of special courts in Peshawar and Malakand Division to 11.¹⁴

These measures acknowledged that the current ATC infrastructure, particularly in the North-West Frontier Province (NWFP), is ill-equipped to deal justly with the hundreds of suspected militants awaiting trial.¹⁵ Indeed, since their inception in 1997, ATCs have failed to fulfill their mandate, as described by then Prime Minister Nawaz Sharif, to "impart timely and inexpensive justice."¹⁶ Riddled with the same problems faced by the regular justice system—inadequate funding, understaffing, trial delays, and corruption—ATCs cannot be relied on to ensure that suspected terrorists are served justice.

The Anti-Terrorism Act in Context

One of the problems ATCs face in dispensing swift and credible justice is that they have always been perceived as discriminatory. The Anti-Terrorism Act (1997) is an extension of the Suppression of Terrorist Activities Act (1975), which was passed by Zulfikar Ali Bhutto's government to contend with opposition and nationalist movements in the NWFP and Baluchistan. Anti-terrorism mechanisms have thus been historically understood as means to suppress dissent.¹⁷

In 1997, Sharif's government promulgated the Anti-Terrorism Act after years of communal and sectarian violence contributed to political instability. The act established special courts and gave the police wide-ranging powers to arrest and detain suspects. The following year, in its judgment in the *Mebram Ali v. Pakistan* case, the Supreme Court declared 12 key sections

situated, with the approval of the President, so directs."

¹⁴ Personal interview, Colonel Waheed Hamid, Inter-Services Public Relations, Islamabad, Pakistan, February 2010.

¹⁵ Ibid. According to the Inter-Services Public Relations, the exact number of detainees awaiting trial has not been determined because suspected militants are constantly being transferred between ATCs, and from the settled areas of the North-West Frontier Province to the Federally Administered Tribal Areas.

¹⁶ "Anti-Terrorism Act Promulgated," *Dawn*, November 29, 1997.

¹⁷ Fayyaz.

⁵ Ahmer Soofi, "The Legal Challenge," *Dawn*, October 3, 2009.

⁶ See *Liaquat Hussain v. Federation of Pakistan*. In its 1999 judgment on the Liaquat Hussain case, the Supreme Court directed that civilians cannot be tried by military courts; that special courts cannot perform parallel functions to regular courts; and that the Action in Aid of Civil Power Ordinance (1998) does not extend to the creation of courts. For more information on this case, see Shabana Fayyaz, "Responding to Terrorism: Pakistan's Anti-Terrorism Laws," *Perspectives on Terrorism* 2:6 (2008).

⁷ "Militants to Get Fair Trial, Says Rehman Malik," *Dawn*, October 28, 2009.

⁸ "Anti-Terrorism Court Declares Fazlullah a Fugitive," *Indian Express*, August 19, 2009.

⁹ "Muslim Khan, 23 Others Declared POs," *Dawn*, January 31, 2010.

¹⁰ Jane Perlez and Pir Zubair Shah, "Pakistan Army Said to be Linked to Swat Killings," *New York Times*, September 14, 2009.

¹¹ "Special Committees to Monitor Anti-Terrorism Courts," *Daily Times*, August 4, 2009.

¹² Khalid Khesghi, "Anti-Terror Ordinance May Be Extended to Malakand," *The News International*, November 6, 2009.

¹³ "Anti Terrorism (Amendment) Ordinance 2009 Extended to PATA of NWFP," Associated Press of Pakistan, November 17, 2009. The order reads: "Under Article 247 of the Constitution, no Act of Parliament or Provincial Assembly shall apply to a Provincially Administered Tribal Area (PATA) or any part thereof unless the Governor of Province, in which the Tribal Area is

of the law unconstitutional and called for amendments.¹⁸

Since then, the Anti-Terrorism Act has been amended in 1998, three times in 1999, once in 2001, twice in 2002, and once in 2004, 2005, 2007, and 2009. These amendments were usually to increase the range of crimes covered by the act.¹⁹ In addition to terrorist activities, the act covers arms trafficking, kidnapping, hijacking, extortion, sectarian violence, targeted political killings, and until last year gang rape.²⁰

Significant Dockets and Security Concerns

The variety of cases covered by the Anti-Terrorism Act contributes to the current backlog in ATCs nationwide. For example, in the southern port city of Karachi, which has largely escaped the wave of terrorist attacks that plagued the northern and western parts of Pakistan in 2009, there are 35 suspected Pakistani Taliban militants awaiting trial in the ATCs.²¹ However, 56, 54, and 89 cases, respectively, are pending in ATC I, ATC II, and ATC III—the three special courts in the city—making it unlikely that the 35 suspected Pakistani Taliban militants will be tried this year.²²

In fact, ATCs nationwide have been facing significant dockets since 2001.²³ These are worsened by the fact that the courts are severely understaffed and lack basic resources. The post of the judge for Karachi's ATC II, for example, has been vacant for more than six months. For their part, state prosecutors

complain that they are working in the poorest conditions—they have no offices, stationery, legal resources such as an archive of judgments, or clerical staff.²⁴ Many of these problems stem from the fact that the government has not allotted enough funds for the ATC infrastructure, a problem that plagues the Pakistani legal system at large. Moreover, since they work for a parallel system, state prosecutors employed by ATCs cannot even utilize the scant resources available to the regular session courts. As a result, ATCs have failed to deliver on their primary mandate—quick justice.²⁵

ATC trials are also delayed due to security concerns. In cases where suspects are accused of heinous crimes, in-camera trials are conducted in jail. Arranging logistics for such hearings can lead to prolonged delays.²⁶ Additionally, complainants and witnesses often refuse to testify against the accused. Since extensive militant networks support most terrorism suspects, witnesses fear being targeted during ATC trials.²⁷

Separately, personal security concerns on the part of judges, state prosecutors, and defense counsels frequently lead to the postponement of hearings. In January 2010, for example, Khwaja Sultan—the defense counsel for Zakiur Rehman Lakhvi, who is accused of plotting the 2008 Mumbai attacks—petitioned the Rawalpindi ATC to transfer Lakhvi's case to an ATC in Lahore citing security concerns. In his petition, he claimed that he feared Indian intelligence officials would target him during his long commute to Adiala Jail, where Lakhvi is being tried.²⁸ The Lahore High Court refused to transfer Lakhvi's trial, but has asked

the government to ensure the counsel's security.²⁹

Judicial or Political Expediency?

Beyond the impact security concerns have on ATC verdicts, a long history of political victimization through anti-terrorism cases continues to undermine the credibility of convictions. According to Judge Syed Hasan Shah Bukhari of Karachi's ATC I, until a democratic government was elected in February 2008, most ATCs were issuing convictions on the authorities' instructions, rather than on the basis of transparent trials.³⁰

The fact that ATCs are vulnerable to political influence is exemplified by several famous cases. For example, in November 1999 a case was registered against the recently deposed Prime Minister Nawaz Sharif in the Karachi ATC, and he was eventually sentenced to life imprisonment for conspiracy to hijack a flight that was carrying General Pervez Musharraf from Sri Lanka to Pakistan.³¹ In December 1999, Musharraf introduced amendments to the Anti-Terrorism Act, extending offenses cognizable by the ATC and creating a new ATC in Karachi. The crimes that Sharif was accused of committing were not previously cognizable before ATCs, and without the amendments would have been filed in regular courts.³² By turning to the ATCs, Musharraf successfully sidelined his political rival.

Similarly, former Baluchistan chief minister and President of the Baluchistan

18 For a detailed discussion of the evolution of anti-terrorism laws in Pakistan, see Charles Kennedy, "The Creation and Development of Pakistan's Anti-Terrorism Regime," in Satu Limaye et al. eds., *Religious Radicalism and Security in South Asia* (Honolulu: Asia-Pacific Center for Security Studies, 2004), pp. 387-412.

19 Ibid.

20 "Rangers in Karachi to Get More Powers," *Dawn*, January 5, 2010. Under the Anti-Terrorism Act, the Rangers, a paramilitary force, were authorized to detain anyone suspected of violent activities for 90 days without charges.

21 Personal interview, Irfan Bahadur, deputy superintendent, Special Investigation Unit, Karachi, Pakistan, February 24, 2010.

22 Personal interview, Muhammad Khan Buriro, special public prosecutor, Anti-Terrorism Court I, Karachi, Pakistan, February 2010.

23 Kennedy, p. 15.

24 Personal interview, Buriro.

25 Kennedy, p. 15. According to the amended Anti-Terrorism Act, cases should be investigated within seven days, and subsequently disposed within seven days. Moreover, ATCs should only be assigned one case to dispose of at a time.

26 Personal interview, Mobashir Ahmed Mirza, special public prosecutor, Anti-Terrorism Court III, Karachi, Pakistan, February 2010. Mirza describes, for example, how state prosecutors ask the court to arrange transport for them from their offices to the Karachi Central Jail. Days may pass before the car requisition is granted.

27 Personal interview, Buriro.

28 "Lakhvi's Counsel Fears Attempt on Life," *Dawn*, January 14, 2010.

29 "LHC Refuses to Transfer Lakhvi's Trial," *The Nation*, January 23, 2010.

30 Personal interview, Syed Hasan Shah Bukhari, judge, Anti-Terrorism Court I, Karachi, Pakistan, February 2010.

31 On November 10, 1999, Lieutenant-Colonel Atiq-uz-Zaman Kiyani submitted a written complaint to the SHO Airport Police Station, Karachi, alleging that Nawaz Sharif had conspired to hijack Flight PK-805, thereby eliminating then COAS Pervez Musharraf. Karachi's ATC I convicted Sharif of the charges of hijacking and terrorism under Section 402 PPC and Section 7(ii) of the Anti-Terrorism Act. He was sentenced to life imprisonment and fined Rs. 500,000. The Sindh High Court upheld the ATC's decision. While serving his sentence, Sharif entered into a deal with Musharraf and agreed to remain abroad for 10 years and desist from political activities.

32 Kennedy, pp. 398-401.

National Party Sardar Akhtar Mengal was declared a proclaimed offender for taking army personnel hostage by Karachi's ATC V in June 2006.³³ He was then arrested during a rally in November 2006, a day before General Musharraf was due to visit Baluchistan. According to Amnesty International and the Asian Human Rights Commission, Mengal, who is a champion of the Baluch nationalist movement, was illegally detained until his release in May 2008, when all charges against him were dropped by the provincial Sindh government.³⁴

Human Rights Violations

Mengal's case illustrates how trials in ATCs can lead to human rights violations. Indeed, as soon as the Anti-Terrorism Act was passed in 1997, human rights groups such as Amnesty International rejected the formation of special courts.³⁵

There continues to be concern that law enforcement personnel resort more frequently to torture and extrajudicial executions if given wide-ranging powers. In particular, by placing time limits on the investigation process, ATCs can make investigating officials prone to falsifying evidence and using coercive methods with suspects. A 2009 amendment to the Anti-Terrorism Act, which permits "extrajudicial confessions" to be used as evidence, has been seen in some quarters as an invitation for investigators to torture suspects.³⁶

The courts themselves are perceived as lacking independence, as judges are held accountable to the executive. Moreover, ATCs deny terrorism suspects the right to equality before the law, as procedures differ significantly from regular courts. Terrorism suspects are also denied

the right to be tried in a public place, with a full defense, as well as the right to be presumed innocent until proven otherwise.

For these reasons, Peshawar High Court advocate Ghulam Nabi challenged the Anti-Terrorism (Amendment) Ordinance 2009 under Article 199 of the constitution in December 2009, declaring that it violated basic human rights.³⁷

Conclusion

Although the Anti-Terrorism Act is flawed, observers in Pakistan are currently concerned about shortcomings in the state's anti-terrorism mechanisms that allow known militants to go free without facing charges in ATCs. For example, the decision to pursue a case against a terrorism suspect is left to the discretion of the apprehending security officials. There is currently no system in place to determine on what basis some detainees are freed, while others are charged with terrorist activities.³⁸

Terrorism suspects who remain in detention are transferred into the care of joint investigation teams, comprising officials of the Inter-Services Intelligence (ISI), Federal Investigation Agency, Intelligence Bureau, and police. These teams then determine whether local police officials should frame charges against the suspect, who would then be tried in the nearest ATC. During this process, terrorism suspects are often transferred between locations and interrogation cells. Investigating intelligence officials and police personnel have to gather evidence without having access to the area in which the suspect was first arrested. As a result, the charges they frame are often based on eyewitness accounts of military personnel. For this reason, it is expected that most suspected militants who were apprehended in recent military operations and are due to face trial in ATCs will be acquitted or face mild sentences.³⁹

Moreover, the Anti-Terrorism Act does not technically apply to residents of the Federally Administered Tribal Areas,

from where most known militants hail. Even if militants who claim FATA residency are arrested in the settled parts of the NWFP, they cannot legally be tried by ATCs and instead have to be transported to their tribal agency to face justice under the Frontier Crimes Regulation.⁴⁰ Although the government wants to try all militants in the ATCs, in the few situations where charges have been framed against FATA-based terrorism suspects in ATCs, their defense counsel has succeeded in having the charges dropped on the basis that residents of the tribal belt are subject to judgment under the FCR.⁴¹

If, as President Zardari stated, the Pakistan government is truly committed to punishing militants, the authorities must assess the credibility and capabilities of the anti-terrorism infrastructure. Funneling hundreds of suspected militants through the parallel courts will require the drafting of clear detention and interrogation protocols, financial investment, inter-provincial coordination, and appropriate human resource allocation. In their current incarnations, ATCs—even if they deliver convictions—cannot offer legal recourse against militant activity in Pakistan.

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33 "ATC Declares Mengal Proclaimed Offender," *Dawn*, June 11, 2006. Mengal's private security guards detained two army personnel at his private home after they tried to tail Mengal as he dropped his children off at school.

34 Peter Tatchell, "Pakistan's Nelson Mandela," *Guardian*, March 28, 2008; Latif Baloch and Ishaq Tanoli, "Mengal Freed; Worried About Missing Workers," *Dawn*, May 9, 2008.

35 "Legalizing the Impermissible: The New Anti-Terrorism Law," Amnesty International, October 1, 1997.

36 Personal interview, Iqbal Haider, co-chairperson of the Pakistan Human Rights Commission, Karachi, Pakistan, February 2010.

37 "Anti-Terrorism Law Challenged in PHC," *Daily Times*, December 24, 2009.

38 Personal interview, Hamid.

39 Personal interview, Haider.

40 According to Article 247 of the constitution, no act of parliament applies to FATA. Instead, a unique set of laws drafted by the British in 1848 and known as the Frontier Crimes Regulations (FCR) are enforced. As per the FCR, the doctrine of collective responsibility, whereby an entire tribe is punished for crimes committed on its territory, applies. A federally appointed political agent is also empowered to arrest individuals without specifying charges; detain members of a suspect or absconder's tribe; or blockade the absconder's village. The FCR has been criticized for violating human rights, and in August 2009 the Pakistani government made some amendments to the regulations. For more information, see Syed Irfan Raza, "Amendments to Frontier Crime Regulation Approved," *Dawn*, August 13, 2009.

41 Personal interview, Hamid.