

PRESIDENT MUSHARRAF

20 December 2013

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Steven Kay QC



President Musharraf Treason Trial: Legal Team Call for UN Review

Steven Kay QC and Toby Cadman of 9 Bedford Row International are today releasing a report submitted to the UN Office of the High Commissioner for Human Rights detailing the serious irregularities of this "incredible, unsound vendetta" against former President Musharraf.

The lawyers are calling for a full UN review by the UN High Commissioner and UN Special Rapporteurs to engage with the Government of Pakistan and reconsider their current actions against the former President.

Currently the treason trial is scheduled to begin on 24th December 2013. At the same time Kay QC and Cadman are calling on the international community, in particular the British, US and Saudi Arabian Governments to intervene to support Musharraf who has provided

immense assistance to the West in its "war on terror" during his time in office.

The Pakistan Prime Minister Nawaz Sharif has brought treason charges against Pervez Musharraf who removed him from office in 1999. Now premier again, Nawaz Sharif and his Government have, since Musharraf's return to Pakistan in March 2013 to re-enter public life, used the courts to bring a barrage of unsubstantiated charges against him, from false accusations surrounding the death of former PM Benazir Bhutto, to questioning his operations against Islamic fundamentalists in the global war on terror.

As each of these other charges have been dropped or bail granted the Government has used its powers to bring a final and politically motivated

treason charge. Nawaz Sharif has now set up a special court and handpicked three judges to try former President Musharraf.

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9 Bedford Row | Gray's Inn | London | WC1R 4AZ

Tel: +44 20 7489 2727

Fax: + 44 20 7489 2828

E-mail: clerks@9bedfordrow.co.uk

Web: <http://www.9bri.com>

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- PRESS RELEASE -

International press conference on former President Musharraf of Pakistan's treason trial

Speakers: Steven Kay QC and Toby Cadman, barrister-at-law

Venue: One Great George Street, Westminster

Time: 11:30 – 14:00

Date: Friday, 20th December

PERVEZ MUSHARRAF Treason Trial: “incredible, unsound vendetta” say international legal experts in call for UN review

- Treason trial against President Musharraf in breach of universally recognised principles of international law
- Actions of Prime Minister Nawaz Sharif “vendetta against his political opponent”
- One of judges directly involved in the treason trial previously removed from office during Musharraf's Presidency on grounds of misconduct
- The Special Court formed by Prime Minister Nawaz Sharif to hear treason trial consists of hand picked judges believed to demonstrate clear bias
- Urgent appeal submitted to the UN Office of the High Commissioner for Human Rights, UN Special Rapporteurs and other relevant international bodies to urgently intervene and ensure that the former President is not subjected to politically motivated charges
- Britain, US, Saudi Arabia called to assist their friend during “war on terror”

LONDON 20th December 2013 -- Pakistan Prime Minister Nawaz Sharif's attempts to bring former President Musharraf to trial on treason charges is a clear abuse of his office, complies with “no known legal norms” and shows total disregard of all forms of justice, leading international human rights lawyers will say today.

Steven Kay QC and Toby Cadman of 9 Bedford Row International are today submitting a report to the UN Office of the High Commissioner for Human Rights detailing the serious irregularities of this “incredible, unsound vendetta” against former President Musharraf. The lawyers are calling for a full UN review by the UN High Commissioner and UN Special Rapporteurs to engage with the Government of Pakistan and reconsider their current actions against the former President. Currently the treason trial is scheduled to begin on 24th December 2013.

At the same time Kay QC and Cadman are calling on the international community, in particular the British, US and Saudi Governments to intervene to support Musharraf who has provided immense assistance to the West in its “war on terror” during his time in office.

Pakistan Prime Minister Nawaz Sharif has brought treason charges against Pervez Musharraf who removed him from office in 1999. Now premier again, Nawaz Sharif and his Government have, since Musharraf's return to Pakistan in March 2013 to re-enter public life, used the courts to bring a barrage of unsubstantiated charges against him, from false accusations surrounding the death of former PM Benazir Bhutto, to questioning his operations against Islamic fundamentalists in the global war on terror.

As each of these other charges have been dropped or bail granted the Government has used its powers to bring a final and politically motivated treason charge directly associated with the events that removed Nawaz Sharif from office. Nawaz Sharif has now set up a special court and hand-picked three judges to try former President Musharraf.

Commenting on the action, Steven Kay QC, a member of President Musharraf's legal team, said:

"The British and US Governments owe former President Musharraf a great debt for his support in the war against Islamic terrorism and the ongoing military actions in Afghanistan. In his time of need, it is crucial the British and American authorities act to support Musharraf, and support the rule of law in Pakistan by bringing all pressure to bear on the Government to end this show trial".

Toby Cadman, representing President Musharraf commented:

"It is clear the current Government is abusing the powers of the premiership to bring charges against former President Musharraf for purely political reasons and out of vindictiveness over events of the past. This does not bode well for the stability of Pakistan under his premiership, at a time when the international community needs the rule of law and multi-party democracy to re-establish itself in the face of the threat from Islamic militancy".

Commenting specifically on the impending trial, Cadman added:

"Called by a dismissed Prime Minister and former Chief Justice, and to be presided over by three hand-picked judges whose impartiality is now in question, nowhere in the world would such a court or charges be considered fair or just. The international community, led by the United Nations, needs to intervene before this case begins a dangerous precedent by making political show trials acceptable in Pakistan, and sets the country on a path that decimates the rule of law".

--ENDS--



OHCHR-UNOG

1211 Geneva 10

Switzerland

Re: Communication to the United Nations High Commissioner, the Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, regarding the impending trial of the former President of the Islamic Republic of Pakistan, Mr. Pervez Musharraf, for high treason under article 6 of the Constitution

Date: 20 December 2013

I. Executive summary

1. A Special Court, formed by the Pakistan government has initiated legal proceedings against former President Pervez Musharraf for high treason and has summoned him to appear before it on 24 December 2013. He stands accused of high treason by way of declaring a state of emergency in 2007 and suspending the constitution. The then Pakistani government argued that a State of Emergency was necessary to curb a rise in extremism in Pakistan.

2. It is the role and duty of the High Commissioner and the Special Rapporteurs to ensure that all member states of the International Covenant on Civil and Political Rights ('ICCPR' or 'Covenant') uphold the fundamental rights enshrined in the Covenant, most importantly the right to a fair trial pursuant to article 14 ICCPR.

3. This communication outlines the grave concerns regarding the sanctity of Mr. Musharraf's right to a fair and impartial tribunal, and to a trial free of political machination. This communication does not purport to discuss the nature of the allegations but rather focuses solely on the rights of the accused.

II. Former President Pervez Musharraf

4. Mr. Musharraf came to power in 1999 after ousting Prime Minister Nawaz Sharif in a bloodless coup. The following year, the Supreme Court validated his take over.¹ He led Pakistan for nine years until 2008. Five years after leaving the country, he returned in March 2013 to run in the general election however he was arrested and barred from contesting in the general election.

5. Following the election on 11 May 2013, a coalition between Mr. Sharif's PML-N party and independent candidates was formed and, eight days later, Mr. Sharif was declared Pakistan's 18th Prime Minister. This is his third term as Prime Minister.

6. Mr. Musharraf already faces several other charges over the following:

- a. An army operation in 2007 to remove Islamic militants from the Red Mosque in Islamabad, an incident which left more than 100 dead, including a cleric, and several SSG Army Commandoes belonging to the Pakistani Army which helped spark Islamist unrest.
- b. The assassination of former Prime Minister Benazir Bhutto and Baloch rebel tribal leader Nawab Akbar Bugti (he is charged with murder); and
- c. Over his attempts to fire the senior judiciary five years ago.²

7. It is however worth noting that many of the charges he faces have been either amended or withdrawn over the course of time leading to speculation in the media that the charges are unfounded and politically motivated.

8. It is also critical to highlight that the Pakistani government has only targeted Mr. Musharraf in his individual capacity with respect to the legal proceedings for high treason. The Pakistani government has not sought to bring charges against any other government officials, bureaucrats or members of the Pakistani military for the events of declaring a state of emergency in 2007. This is despite the fact that article 6 of the Constitution explicitly provides that "any person aiding or abetting or collaborating" in carrying out events constituting high treason are also guilty. The nature of the offence of high treason is such that it is a joint enterprise and that it cannot be effectively undertaken by a single individual as the government apparatus as a whole is

¹ <http://www.dawn.com/news/1056765/govt-to-try-musharraf-for-treason-says-nisar>

² <http://www.bbc.co.uk/news/world-asia-24977818>

involved in its planning, preparation, and implementation of a state of emergency. It can be argued that by singling out Mr Musharraf as the only accused in the high treason case is contrary to the spirit and legislative intent of article 6 of the Constitution. It also strongly re-affirms the notion that Mr Sharif is undertaking a politically motivated trial based upon personal revenge against a political opponent."

III. Case history

9. In April 2013, the Supreme Court of Pakistan constituted a three-member Bench composed of Mr Justice Jawwad S. Khawaja (presiding), Mr Justice Khilji Arif Hussain and Mr Justice Ejaz Afzal Khan, to hear on 22 April 2013 Civil Petition No. 2255/2010 and other connected Petitions seeking directions for initiating proceedings against Mr Musharraf under Article 6 of Constitution read with the High Treason (Punishment) Act, 1973, for having committed high treason.

10. The constitution of a three-member Bench came after an application by Sardar Muhammad Siddique Khan, AOR for Mr Musharraf to the Chief Justice Iftikhar Muhammed Chaudry of Pakistan for the constitution of the Full Court / Larger Bench to hear and decide the aforementioned petitions. Having considered the application, the Chief Justice Iftikhar Muhammed Chaudry passed the following order:

'This application has been moved on behalf of Raja Muhammad Ibrahim Satti, learned counsel for respondent No.4 in Civil Petition No.2255 of 2010 arising out of a judgment dated 14.10.2010 passed by two learned Judges of High Court of Sindh, whereby petition under Article 199 of the Constitution filed by the petitioner has been dismissed.

Under Order XI of the Supreme Court Rules, 1980 petitions for leave to appeal ordinarily are to be heard and disposed of by a Bench of two Hon'ble Judges but the Chief Justice, in a fit case, can constitute a Bench consisting not less than three Judges.

There are also other petitions, filed under Article 184(3) of the Constitution, which shall also be heard and disposed of by a Bench consisting of not less than two Judges under Order XXV Rule 2 of the Supreme Court Rules.

On having taken into consideration discreetly the contents of the application and for the reason that two kinds of jurisdictions of this Court have been invoked, therefore, in the interest of justice, a 3-Member Bench comprising Hon'ble Mr. Justice Jawwad S. Khawaja, Mr. Justice Khilji Arif Hussain and Mr.

*Justice Ejaz Afzal Khan is constituted for disposal of the cases referred to hereinabove. Application is disposed of.*³

11. The caretaker government in charge at the time stated that it would not put the Mr. Musharraf on trial for high treason as such a move would exceed its mandate which was limited to organising elections and tackling the security threats in the run-up to the polls.

12. In June 2013, Mr. Sharif's government announced that it wanted Mr. Musharraf to be tried for treason, but a formal complaint was not submitted until November.

13. In November 2013, the Secretary Minister of Law, Justice and Human Rights, Islamabad wrote to the Registrar of the Supreme Court, stating that the Federal Government have decided to invoke the powers vested in it under Section 4 of the Criminal Law Amendment (Special Courts) Act, 1976 to establish a Special Court to try Mr. Musharraf under Section 2 of the High Treason (Punishment) Act, 1973. He also wrote that the Special Court had to be comprised of three serving judges of the High Court. There are five High Courts in Pakistan, therefore, the Supreme Court, in other words, Chief Justice Iftikhar Muhammed Chaudry of Pakistan, was invited to nominate any three judges of the High Courts to the Special Court. According to *Dawn News*,⁴ 'the names of the judges, along with their profiles, were sent to Law Secretary Barrister Zafarullah Khan by the SC registrar with a suggestion to select any three of them as members of the special court.' The Supreme Court 'sent the names of Justice Syeda Tahira Safdar of the Balochistan High Court, Justice Noorul Haq N. Qureshi of the Islamabad High Court, Justice Mohammad Yawar Ali of the Lahore High Court, Justice Yahya Afridi of the Peshawar High Court and Justice Faisal Arab of the Sindh High Court. Prime Minister Nawaz Sharif approved the names of Justice Faisal Arab (SHC), Justice Tahira Safdar (BHC) and Justice Yawar Ali (LHC).'

14. The Special Court will function at Islamabad. The Chief Justice of Pakistan, Iftikhar Muhammed Chaudry passed the following order:-

'Copy of the letter be circulated amongst the learned Chief Justices of all High Courts viz High Court of Balochistan, High Court of Sindh, Lahore High Court, Peshawar High Court and Islamabad High Court so that they may each nominate a judge of their respective Court, out of which three names shall be forwarded to the Government for the Special Court. The nomination may reach this Court on

³ <http://www.supremecourt.gov.pk/web/page.asp?id=1435>

⁴ <http://www.dawn.com/news/1057196/>

19.11.2013 positively.’⁵

15. It is understood that Mr. Musharraf will be formally charged on 24 December 2013.

IV. Nature of the charges

16. Mr. Musharraf is accused of high treason pursuant to Part I, article 6 of the Constitution, Section 2 of the High Treason (Punishment) Act, 1973, and Section 5 of the Criminal Law Amendment (Special Court Act) 1976.

17. Article 6 of the Constitution provides:

(1) Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.

(2) Any person aiding or abetting [or collaborating]⁶ the acts mentioned in clause (1) shall likewise be guilty of high treason.

[(2A) An act of high treason mentioned in clause (1) or clause (2) shall not be validated by any court including the Supreme Court and a High Court.]⁷

(3) [Majlis-e-Shoora (Parliament)]⁸ shall by law provide for the punishment of persons found guilty of high treason.⁹

18. Section 2 of the High Treason (Punishment) Act, 1973 provides:

(2) Punishment for high treason, etc.: A person who is found guilty -

(a) of having committed an act of abrogation or subversion of a constitution in force in

⁵ <http://www.supremecourt.gov.pk/web/page.asp?id=1691>

⁶ Inserted by Constitution (Eighteenth Amendment) Act, 2010, s. 4(ii) with effect from 19 April 2010.

⁷ Inserted by Constitution (Eighteenth Amendment) Act, 2010, s. 4(iii) with effect from 19 April 2010.

⁸ Substituted by Revival of Constitution of 1973 Order, 1985 (President's Order No. 14 of 1985), Sch. item 1 (with effect from March 2, 1985) for 'Parliament'.

⁹ See also for information, Part II, Chapter 1: The President, particularly article 47, 'The removal or impeachment of President'.

Pakistan at any time since the twenty-third day of March, 1956; or

(b) of high treason as defined in Article 6 of the Constitution, shall be punishable with death or imprisonment for life.

19. In November 2007, Mr Musharraf issued a proclamation of emergency and a Provisional Constitutional Order, designed to forestall constitutional challenge to the legitimacy of his holding simultaneously the position of President and Chief of Army Staff. A new Oath of Office (Judges) Order made it mandatory for superior court judges to take fresh oaths under the new Provisional Constitutional Order so as to remain in office. Only five of the 17 Supreme Court judges took oath under the new Provisional Constitutional Order. On 23 November 2007, the newly constituted Supreme Court and its Chief Justice upheld the legality of the Provisional Constitutional Order, as well as presidential actions that stemmed from the declaration of emergency. The former Chief Justice was placed on house arrest.¹⁰

20. The particulars of the charges are:

- a. Mr Musharraf as Chief of the Army Staff issued a proclamation of emergency order on Nov 3, 2007, which unconstitutionally and unlawfully held the constitution in abeyance. Thus he subverted the constitution and committed the offence of high treason punishable under section 2 of the High Treason (Punishment) Act 1973, which is within the jurisdiction of the special court established under Section 4 of the Criminal Law Amendment (Special Courts) Act 1976.
- b. Mr Musharraf issued the Provisional Constitution Order No 1 of 2007, which unconstitutionally and unlawfully empowered the President to amend the constitution from time to time. He also suspended the fundamental rights enshrined in Articles 9, 10, 15, 16, 17, 19 and 25 of the Constitution,
- c. Mr Musharraf as president of the country issued the Oath of Office (Judges) Order 2007 whereby an oath was unconstitutionally and unlawfully introduced in the Schedule which required a judge to abide by the provisions of the proclamation of emergency to perform acts and functions in accordance thereof. The order resulted in removal of a number of judges of the superior courts, including then Chief Justice Iftikhar Muhammad Chaudhry.

¹⁰ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013, p. 5.

- d. Mr Musharraf issued the Constitution (Amendment) Order 2007 whereby Articles 175, 186-A, 198, 218, 270B and 270C were unconstitutionally and unlawfully amended and Article 270AAA was added to the constitution, which was later removed through the 18th Amendment.
- e. Mr Musharraf issued the Constitution (Second Amendment) Order 2007 whereby the constitution was unconstitutionally and unlawfully amended.

21. If convicted of treason, Mr Musharraf could face the death penalty or life in prison.

22. The former President firmly denies all the charges against him and states that all the cases against him are politically motivated.

V. Rights under Pakistani law

23. The Constitution of the Islamic Republic of Pakistan provides a number of procedural safeguards as follows:

i. Fair Trial Provisions

Article 4: Right of individuals to be dealt with in accordance with law, etc.¹¹

- (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for
- (2) In particular: -
 - a. no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
 - b. no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
 - c. no person shall be compelled to do that which the law does not require him to do.

¹¹ Constitution, Part I: Introductory, Article 4.

Article 10A: Right to fair trial¹²

‘For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.’

Article 12: Protection against retrospective punishment

- (1) No law shall authorize the punishment of a person:-
- a. for an act or omission that was not punishable by law at the time of the act or omission; or
 - b. for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.
- (2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence.

ii. Part VII The Judicature¹³

a. Composition¹⁴

The Supreme Court is the highest court and therefore the final arbiter of the law and the Constitution. Its decisions are binding on all other courts. The Supreme Court is currently composed of 17 justices who are nominated by the Judicial Commission. The nominations need to be confirmed by a Parliamentary Committee before the President of Pakistan finally appoints the justices. If necessary, the Chief Justice, in consultation with the Judicial Commission, may nominate ad hoc judges for a limited period of time.¹⁵

¹² Constitution, Part II, Chapter 1: Fundamental Rights and Principles of Policy, Article 10A.

¹³ Constitution, Part VII, The Judicature, Article 175 and 176 to 191.

¹⁴ The following analysis is the result of a recent study by Gabriela Knaul, the United Nations Special Rapporteur for the Independence of Judges and Lawyers (“SRIJ”): Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013.

¹⁵ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013, p. 7.

The Judicial Commission is composed of nine members: the Chief Justice; the four most senior justices of the Supreme Court; a former justice of the Supreme Court nominated by the Chief Justice in consultation with the other justices in the Commission; the Federal Minister of Law, Justice and Parliamentary Affairs; the Attorney General and a senior advocate of the Supreme Court, nominated by the Pakistan Bar Council.¹⁶

The nominations made by the Judicial Commission are then presented before a Parliamentary Committee, composed of four senators and four members of the National Assembly, equally divided between the Government and the opposition, which have the power to reject or confirm the nominations. If rejected, the Committee has to state the reasons for its decision to the Prime Minister. If confirmed, the nominations are presented to the President of the Republic for appointment. The authority of the Parliamentary Committee was reportedly reduced through a judgement of the Supreme Court.¹⁷ How such jurisprudence is being applied in practice, and to what extent, remains unclear.¹⁸

b. Jurisdiction

The Supreme Court exercises original and exclusive jurisdiction in inter-governmental disputes, whether between the Federal Government and a provincial government or among provincial governments. The Supreme Court also exercises original jurisdiction, *suo moto* or upon petition, for the enforcement of fundamental rights where a ‘question of public importance’ is involved.¹⁹ The Court has advisory jurisdiction in giving an opinion to the President on a question of law. Finally, the Supreme Court acts as an appellate court in a number of civil and criminal matters referred to it by the High Courts, as well as against judgments and decisions of Service Tribunals and some special courts, and the Federal Shariat Court (the latter are heard before the Shariat Appellate Bench of the Supreme Court).²⁰

¹⁶ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013, p. 10.

¹⁷ *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407).

¹⁸ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013, p. 10.

¹⁹ Constitution, Part VII, The Judiciary, Article 184 (3).

²⁰ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013, p. 7.

VI. Rights under international law

24. Pakistan signed and ratified the International Covenant of Civil and Political Rights ('ICCPR' or 'the Covenant') on 17 April 2008 and 23 June 2010, respectively. It has a duty to uphold the rights protected by the Covenant, namely:

Article 14 of the ICCPR

- (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
- (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any

- case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

VII. Higher Standard of Procedural Safeguards Required for Death Penalty Cases

25. The protection of the rights of an accused person is even more important and demands an even higher standard of procedural safeguards and guarantees in cases that potentially carry the death penalty. Professor Schabas has stated “*that procedural safeguards must be respected in all capital trials is without doubt a norm of customary international law.*”²¹ Its universal recognition is confirmed under international law, i.e. Article 3 common to the 1949 Geneva Conventions, which proscribes the carrying out of executions, “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.” The norms of common article 3 are recognised as expressing norms of customary international law²² and form the minimum standards to be applied. Schabas states that such minimum guarantees must *a fortiori* be regarded as also applying to conflicts as well as during peacetime.²³

26. Critically Article 6 of the ICCPR which enunciates the right to life is regarded as, “the supreme right from which no derogation is permitted even in public emergency which threatens the life of the nation.”²⁴ The Human Rights Committee held, “*it follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.*”²⁵

²¹ William Schabas, *The Abolition of the Death Penalty in International Law*, page 369.

²² *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Reports 14, paras 218, 255, 292(9).

²³ William Schabas, *The Abolition of the Death Penalty in International Law*, page 370.

²⁴ Human Rights Committee: General Comment No. 06: The Right to Life (Art 6) 04/30/1982

²⁵ *Ibid.* paragraph 7. The view was reiterated in the case of *Carlton Reid v. Jamaica, Communication No. 250/1987*, paragraph 11.6

27. The former United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Amos Wako, has reiterated this point, stating that trials held without fulfilling the guarantees of article 14 of the Covenant are to be considered “summary executions” and therefore a breach of Article 6, where a capital sentence is imposed.²⁶

28. Article 6 of the ICCPR in the light of the fundamental procedural guarantees:

“Article 6(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life

“Article 6(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”

VIII. Procedural flaws & failures

i. Right to fair trial: independent and impartial tribunal

29. Independence of the judiciary can be distinguished in two categories: a) impartiality in the trying of a case and b) independence from the executive.

a. Impartiality of the bench

30. Mr. Musharraf’s right to be tried by an impartial tribunal is clearly a matter of urgent concern. There is an obvious conflict of interest between the judiciary in charge of Mr Musharraf’s trial and the issue at stake. In 2007, Pakistan’s top judiciary, led by the chief Justice Iftikhar Mohammed Chaudhry, was affected by Mr Musharraf’s controversial imposition of emergency rule. Judges were kept under house arrest for about six months.

31. It is noted that Justice Faisal Arab (presiding) was one of the members of the judiciary who objected to the former President’s Provisional Constitution Order (PCO) and refused to

²⁶ ‘Report- Summary or Arbitrary Executions’, UN Doc. E/CN.4/1983/16, page 15.

take the oath administered. He was suspended by the former President's government. Furthermore, Justice Yawar Ali is a nephew of former Supreme Court judge Justice Khalilur Rehman Ramday, the son of former Chief Justice of Pakistan Yaqoob Ali Khan, and also the brother-in-law of Justice (ret'd) Khalilur Rehman Ramday, who gave the judgment to restore Chief Justice Iftikhar Muhammad Chaudhry when he was suspended by the former President.

32. Since Mr Musharraf's return to Pakistan, members of the judiciary has been extremely vocal in the press regarding its opinion of Mr Musharraf's actions in 2007 and have called repeatedly for Mr Musharraf to be tried for his decision to suspend the Constitution.

33. On 4 December 2013, Islamabad High Court (IHC) dismissed a petition challenging the constitution of a special court the impending high treason trial. Mr Musharraf submitted that the judges appointed for treason trial of Musharraf had refused to take oath under the Provisional Constitutional Order (PCO). Justice Yawar Ali was the nephew of Justice (ret'd) Khalil-ur-Rehman Ramday who had been affected by the November 2007 emergency. Mr Musharraf called into question the impartiality of the existing judges of the special court and argued that the judges should have been appointed on the basis of merit. He also contended that Federal Investigation Agency (FIA) had also not investigated the matter in a proper manner.²⁷

34. The three judges appointed to try Mr Musharraf's case have such an obvious conflict of interest that it is reasonable to call them to withdraw.

Jurisprudence

35. The Human Rights Committee (hereinafter: the HRC) which is tasked with upholding the provisions of the ICCPR has held, 'The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of Article 14(1). 'Impartiality' of the court implies that judges must not recognise preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statute, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of Article 14'.²⁸

²⁷ <http://tribune.com.pk/story/641348/musharafs-treason-trial-ihc-dismisses-petition-challenging-special-court/>

²⁸ *Karttunen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992)

36. In *De Jorge Asensi v. Spain*²⁹ the HRC held ‘Although Article 14 does not explain what is meant by a “fair hearing” in a suit at law, the concept of a fair hearing in the context of article 14, paragraph 1, of the Covenant should be interpreted as requiring certain conditions, such as *equality of arms*³⁰ and absence of arbitrariness, manifest error or denial of justice.’³¹

37. Under international law, the procedure for determining impartiality is highly important. If an accused raises the issue during the proceedings it must be investigated unless it is “devoid of merit”. This requires the court to determine whether, apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect the position is very clear. If there are legitimate reasons to doubt the impartiality then that judge **must** withdraw from the case.

38. The European Court of Human Rights (‘ECtHR’) distinguishes³² between subjective impartiality – the existence of actual prejudice on the part of a judge or tribunal - and objective impartiality – whether or not a judge offers guarantees sufficient to exclude any legitimate doubt in this matter.³³ Personal impartiality is to be presumed until there is proof to the contrary.³⁴ In practice this is a very strong presumption. The Court has commented that the fact that a judge takes a strongly negative view of the applicant’s case or even of its character is not sufficient to disclose bias, and that unduly harsh or oppressive behaviour is not necessarily a reflection of personal prejudice.³⁵

39. In the context of objective impartiality, appearances are of importance having regard to the confidence which the courts must inspire in the public in a democratic society, and above all in criminal proceedings, in the accused. The latter aspect was later qualified with the Court noted that the standpoint of the accused was important but not decisive. What was determinant was whether the fear could be considered as objectively justified.³⁶ The Court also commented that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must

²⁹ *De Jorge Asensi v. Spain*, Communication No. 1413/2005.

³⁰ *Moraël v. France*, Communication No. 207/1986, para. 9.3.

³¹ See the Committee’s general comment No. 32, para. 26, (2007) on article 14 of the Covenant, “Right to equality before courts and tribunals and to a fair trial”.

³² Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 4th edition, Sweet & Maxwell, pp. 162-163.

³³ *Piersack v Belgium*, 1 October 1982, Series A, No. 53, 5 E.H.R.R. 169, para. 30.

³⁴ *Le Compte v Belgium*, 23 June 1981, Series A, No 43, 4 E.H.R.R. 1, para. 58.

³⁵ eg. *Ranson v UK*, (14180/03) (Dec) September 2, 2003.

³⁶ *Piersack*, op. cit., para. 30; *Morel v France*, 6 June 2000, ECHR 2000-VI, para 44; *Nortier v Netherlands*, 24 August 1993, Series A, No 267, 17 E.H.R.R. 273, para. 33, objective test even where the applicant’s apprehensions may be understandable.

withdraw.³⁷ Judges are also expected to exercise a maximum discretion with regard to their cases in order to preserve their image as impartial judges, in particular refraining from using the press for comment even when provoked.³⁸ There is a strong presumption that professional judges by their training are not influenced by adverse media coverage or hostile public opinion against an accused.³⁹ They cannot, however, be presumed to be neutral as regards alleged contempts of court carried out in their presence when they combine roles of complainant, witness, prosecutor and judge.⁴⁰

40. In *Piersack v. Belgium*⁴¹ it was held that the trial judge's prior membership of the department who investigated the applicant and who had initiated the prosecution against him was a violation of his impartiality. The European Court of Human Rights held:

‘Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

...

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 (see paragraph 17 above), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.’⁴²

41. In *Regina v. Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte*

³⁷ *Hauschildt v Denmark*, 24 May 1989, Series A, No. 155, 12 E.H.R.R. 266, para. 48.

³⁸ See findings of lack of impartiality in *Buscemi v Italy*, 16 September 1999, ECHR 1999-VI, where a judge responded to the applicant's comments in the press in a manner implying that he already held an unfavourable view of the applicant's case; *Lavents v Latvia*, 28 November 2002, paras. 118-121, where a judge expressed views critical of the defence; *Olujic v Croatia*, 5 February 2009, paras 61-68, three members of the National Judicial Council made prejudicial and unfavourable statements about the applicant or agreed that they were disqualified (violation).

³⁹ *Craxi v Italy*, (34896/97) (Dec) 5 December 2002.

⁴⁰ *Kyprianou v Cyprus*, 15 December 2005, ECHR 2005-VIII, para. 127, where the judge felt personally insulted by the lawyer's comments.

⁴¹ *Piersack v. Belgium*, Application No. 8692/79, Judgment of 1 October 1982, paras. 30-32.

⁴² *Ibid.*

(No. 2)⁴³ held:

‘...the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge’s decision would lead to the promotion of a cause in which he was involved together with one of the parties...that in order to maintain the absolute impartiality of the judiciary there had to be a rule which automatically disqualified a judge who was involved...in promoting the same causes...as was a party to the suit.’

‘The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

‘...I am of the opinion that there could be cases where the interests of the judge in the subject matters of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.’

42. In *Prosecutor v. Anto Furundzija*, the ICTY Appeals Chamber held:

‘The fundamental right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial.’ [para. 177]

‘On this basis the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the statute:

- A. A Judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if: (i) a judge is a party to the case, or has a financial or propriety interest in the outcome of a case, or if the Judge’s decision will lead to the

⁴³ *Regina v. Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte* (No. 2) (House of Lords) 1 AC 119.

promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."⁴⁴

43. It is noted that independence must be institutional and functional and to determine whether the court or tribunal meets the requirements of independence, regard must be had to the manner of appointment of its members and their term in office, the existence of guarantees from external pressures and the question of whether the body has the appearance of independence. In assessing impartiality, it is important to consider:

- a. Whether the court is biased with regard to the decision it takes;
- b. Whether the court allowed itself to be influenced by popular feeling or by any outside pressure whatsoever; and
- c. Whether the court based its opinion on objective arguments on the ground of what had been put forward at trial

44. If there are legitimate reasons to doubt the impartiality then the judge must withdraw from the case.

b. Independence from the executive

45. The separation of powers is a fundamental tenet of contemporary democratic society and a safeguard ensuring the three main bodies, the executive, legislative and judiciary, can carry out their roles in the most fair and balanced way.

46. It is apparent that the Prime Minister Nawaz Sharif handpicked the names of Justice Faisal Arab (SHC), Justice Tahira Safdar (BHC) and Justice Yawar Ali (LHC) from the list provided by the Supreme Court. It is a matter of grave concern that the Prime Minister, a man ousted by the accused in the past, is in control of the judges in charge of the trial of his own political opponent.

⁴⁴ *Prosecutor v. Anto Furundzija*, ICTY Appeals Chamber: 21 July 2000: Case No. IT – 95 – 17/1, para. 189.

47. From 19 to 29 May 2012, at the invitation of the Government, the United Nations Special Rapporteur for the Independence of Judges and Lawyers ('SRIJ'), Gabriela Knaul, travelled to Pakistan. Her purpose was 'to understand how Pakistan endeavours to ensure the independence of the judiciary, magistrates, prosecutors and lawyers, as well as their protection, and to analyse the challenges and obstacles encountered which impede justice to be administered adequately and efficiently and actors of the judicial system to discharge their functions independently, impartially and effectively.'⁴⁵

48. In her report, Ms. Knaul wrote by way of introduction that 'Although the Constitution formally protects the independence of the judiciary, Pakistan's history has seen repeated assaults on the integrity of the courts and the legal profession. In turn, Pakistan's higher judiciary often compromised its independence and impartiality by validating military interventions and sanctioning constitutional amendments that fundamentally changed the legal and political system in the country.'⁴⁶

49. She specifically highlights and commends a 'fundamental and generally positive change in the process for appointing judges to the superior courts' which was introduced in 2010 by the 18th and 19th amendments to the Constitution. 'Before the amendments, the President of Pakistan appointed the justices of the Supreme Court after consultation with the Chief Justice. The amendments created a Judicial Commission to nominate judges of the Supreme Court, the High Courts and the Federal Shariat Court.'⁴⁷ Therefore, the very mechanism of appointment which Ms Knaul condemned in her report is the one used in the trial of Mr Musharraf.

50. Furthermore, Ms Knaul emphasised that the recruitment, appointment and promotion of judges 'should not be subjected to the vested interests of political and other actors.'⁴⁸

ii. Safeguards protecting the rights of those facing the death penalty

51. The Economic and Social Council Resolution 1984/50 of 25 May 1984 (the Resolution) provides safeguards guaranteeing protection of the rights of those facing the death penalty, including the following provisions relevant to the present cases:

⁴⁵ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.2, 4 April 2013, p. 4, paras 1-2.

⁴⁶ *Ibid*, p. 7.

⁴⁷ *Ibid*, p. 10.

⁴⁸ *Ibid*, p. 10.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

IX. Remedies

52. It is the obligation first and foremost of any contracting state to the Covenant to secure the individual rights and freedoms of the person. Therefore, the countervailing requirement that an individual has the opportunity to obtain redress for violations must be available in the domestic system. An absence of any possibility to seek redress at national level will disclose a

violation.⁴⁹

X. Communication to the UN-OHCHR

53. The Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions is reminded that the former President, Mr. Musharraf, faces the death penalty. This case is time-sensitive and involves potential loss of life. Attorney General Munir A. Malik has been reported to have said that given the evidence available against former President Musharraf, a decision in the treason case against him may be reached very soon.⁵⁰

54. The present situation is critical. It is reasonable to argue that the former President's decision in 2007 to suspend a number of members of the judiciary means that there is an obvious conflict of interest and serious concerns over the impartiality of the judges. It is no secret that the judiciary has been very vocal in the press about the need to try the former President for his actions in 2007. There is exists a very real and legitimate risk that the Special Tribunal lacks any notion of independence and impartiality and the panel must be withdrawn, a new panel constituted and the process subject to a complete review of the Special Rapporteurs.

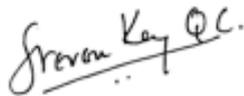
⁴⁹ See *e.g.* *Halford v UK*, 25 June 1997, RJD 1997-III, No. 39, 24 EHRR 523, where complaints under article 8 ECHR were admissible for claims of tapping of office and home phone, arguable claims under art. 13 arose in respect of the former alone.

⁵⁰ <http://www.dawn.com/news/1057395/musharraf-treason-case-ag-says-early-verdict-possible>

XI. Information regarding the source of the communication

Name: Steven Kay QC, Barrister-at-law
Toby M. Cadman, Barrister-at-law
Caroline Macpherson, Barrister-at-law
Address: 9 Bedford Row, London WC1R 4AZ, United Kingdom
Telephone: +44 20 7489 2727
Facsimile: +44 20 7489 2828
E-mail: toby.cadman@9bedfordrow.co.uk
caroline.macpherson@9bedfordrow.co.uk

Respectfully submitted,



Steven Kay QC, Barrister-at-law



Toby Cadman, Barrister-at-law



Caroline Macpherson, Barrister-at-law



Raza Anjum, Solicitor of the Senior Courts of England and Wales

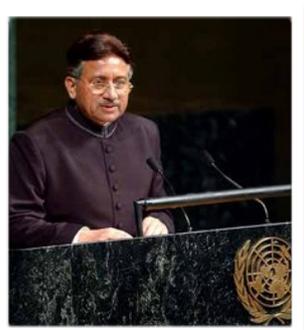
Political Manipulation:

Treason charges demonstrate clear abuse of office and breach of international standards

"It is clear the current Government is abusing the powers of the premiership to bring charges against former President Musharraf for purely political reasons and out of vindictiveness over events of the past. This does not bode well for the stability of Pakistan under his premiership, at a time when the international community needs the rule of law and multi-party democracy to re-establish itself in the face of the threat from Islamic militancy".

"Called by a dismissed Prime Minister and former Chief Justice, and to be presided over by three hand-picked judges whose impartiality is now in question, nowhere in the world would such a court or charges be considered fair or just. The international community, led by the United Nations, needs to intervene before this case begins a dangerous precedent by making political show trials acceptable in Pakistan, and sets the country on a path that decimates the rule of law".

Toby Cadman



The international community, led by the United Nations, needs to intervene before this case begins a dangerous precedent by making political show trials acceptable in Pakistan, and sets the country on a path that decimates the rule of law.

Toby Cadman

