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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS IN
ADVANCE OF THE EXAMINATION OF THE SECOND REPORT OF PAKISTAN
UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

Submitted in September 2024

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ICJ's submission to the UN Human Rights Committee in advance of the Human Rights Committee's examination of Pakistan's second periodic report

INTRODUCTION

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the UN Human Rights Committee's ("the Committee") examination of Pakistan's second periodic report on the implementation of the International Covenant on Civil and Political Rights ("the Covenant").
2. In this submission, the ICJ draws the Committee's attention to the following issues:
 - The compliance of Pakistan's military justice system with the State's obligations under Articles 6, 9 and 14 of the Covenant (Section A. below);
 - The continuing practice of enforced disappearances and, in this context, the ongoing impunity of law enforcement and security agencies and the ineffective Commission of Inquiry on Enforced Disappearances (Section B. below); and
 - The violations and abuses of rights under the Covenant of people marginalized because of their sexual orientation, gender identity, gender expression, and sex characteristics (Section C. below).

A. THE TRIAL OF CIVILIANS IN MILITARY COURTS (Articles 6, 9 and 14 of the ICCPR)

Overview

3. The Pakistan Army Act, 1952, makes the provision for trial by court martial. The Pakistan Army Act is primarily applicable to military officers and those who are in active service of the army. However, Section 2 of Pakistan Army Act allows trials of civilians before military courts when they are accused of: 1) "Seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government"; or 2) committing an offence under the Official Secrets Act, 1923 (OSA), in relation to, among other things, the military of Pakistan. Section 59(4) of Army Act¹ provides for the trial of such civilians under the PAA by military courts.

4. The OSA relates to offences such as spying, taking photographs of certain notified "prohibited" places, "harboring spies", and attempting or abetting such offences. It carries harsh penalties - including the possibility of the death penalty - for some crimes such as certain kinds of "wrongful communication of information"² and espionage.³

5. The jurisdiction of military courts to try civilians accused of certain offences provided under the Pakistan Army Act is distinct from the temporary expanded jurisdiction of military courts to try civilians accused of terrorism-related offences for four years between January 2015 and March 2019 and is not longer in effect. This expanded

¹ "Notwithstanding anything contained in this Act or in any other law for the time being in force, a person who becomes subject to this Act by reason of his being accused of an offence mentioned in clause (d) of sub-section (1) of Section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly."

² Section 5(3)(a), Official Secrets Act, 1923.

³ Section 3(3), Official Secrets Act, 1923.

jurisdiction was enabled through the 21st and 23rd constitutional amendments and amendments to the PAA, which lapsed in March 2019.⁴

Trials of civilians by military courts

6. A number of civilians have been tried and convicted by military courts in recent years.⁵ Notably, Idrees Khattak – a prominent human rights defender - was forcibly disappeared in November 2019. His whereabouts remained unknown until June 2020, when military authorities informed the Commission of Inquiry on Enforced Disappearances that he was being tried by a military court under the PAA and OSA. In January 2021, the Peshawar High Court dismissed a petition challenging the military court’s jurisdiction and allowed the military trial to continue.⁶ On 2 December 2021, it was reported in the media Idrees Khattak had been convicted and sentenced to 14 years’ imprisonment under the PAA and OSA for offences related to spying. The military court’s judgment against him has not been made public.⁷

7. In May 2023, Pakistani military and government authorities announced their decision to hold trials of civilians allegedly involved in violence and arson⁸ on 9 and 10 May 2023 in military courts, including under the OSA and PAA. To justify their decision, they cited the nature of offences, which included alleged attacks on military installations and military personnel, as well as lack of trust in the civilian justice system to hold perpetrators to account.

8. In May and June 2023, administrative judges of anti-terrorism courts handed over the custody of 102 civilians to military authorities on the request of commanding officers of the military for their trial by military courts.⁹ According to material reviewed by the ICJ, in a number of cases, the military’s request to hand over custody of civilians accused was based on an initial investigation that found that *prima facie* they were involved in various offences under the OSA, including section 3 (spying), section 7 (interfering with officers of the Police or members of the armed forces of Pakistan), and section 9 (attempting to commit or abetting offences under the Act). In August 2023, the Lahore High Court was informed that another civilian was handed over to the military authorities by the police on the request of a commanding officer of the military for trial by a military court under the PAA and OSA in relation to the violence on 9 and 10 May 2023.¹⁰

9. A number of people, including a former Chief Justice of Pakistan, petitioned the Supreme Court (SC), challenging the trial of those accused for violence on 9 and 10 May in military courts.¹¹ Some of the petitioners also requested the SC to declare the trial of civilians before military courts inconsistent with the Pakistani Constitution, the principle of the independence of the judiciary, and the right to a fair trial.

10. On 23 October 2023, the Supreme Court delivered a landmark ruling. A five-member bench of the Court held provisions of the Army Act, 1952, which brought

⁴ <https://www.icj.org/pakistan-as-military-courts-lapse-government-must-prioritize-reform-of-the-criminal-justice-system/>

⁵ The exact number is not known.

⁶ <https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/W.P.No.4271-P2020-Muhammad-IdreesKhattak-VS-Govt.-of-Pakistan,-through-Secretary,-Ministry-of-Defence-&-others- Dismissed .pdf>

⁷ <https://www.icj.org/idrees-khattaks-conviction-by-a-military-court-is-a-gross-miscarriage-of-justice/>

⁸ <https://www.dawn.com/news/1752003>

⁹ <https://www.dawn.com/news/1761297>

¹⁰ <https://www.dawn.com/news/1770793>

¹¹ Constitution Petition Nos.24, 25, 26, 27 & 28 and 30 of 2023.

civilians under its ambit and provided for their trial by courts martial, were ultra vires the Constitution and of no legal effect. In addition, the SC held instead of military courts, ordinary criminal courts of competent jurisdiction must conduct trials of those accused of committing crimes on 9 and 10 May 2023.¹²

11. The Government appealed the decision of the Supreme Court through an intra-court appeal to a larger bench of the Supreme Court. On 13 December 2023, a six-member bench of the Supreme Court heard the Government's appeal. The Court held that "since the appellants have raised various questions of law which require consideration," the operation of the judgment is suspended subject to the condition that no final judgment shall be passed against the 103 accused persons by the military courts.¹³

12. The Supreme Court bench hearing the appeal has since then been reconstituted a number of times. The Supreme Court has passed orders on miscellaneous applications regarding the legality of the Government's engagement of private counsel in this case, as well as whether bar association could be impleaded as respondents, but the case has not been heard on merits. The last hearing was on 11 July 2024, when the proceedings were adjourned indefinitely. As on 16 September 2024, the case has not been re-listed for hearing.

Applicable international standards

13. Under international law and standards, the jurisdiction of military tribunals should be restricted solely to specifically military offences committed by military personnel. Courts martial should not, in general, be used to try civilians, or to try people charged with offences disclosing evidence of gross human rights violations.

14. Article 14 of the ICCPR provides "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This Committee has made clear that the right to a fair trial before an independent and impartial court under Article 14 applies to all tribunals, whether ordinary or specialized, civilian or military.¹⁴ The Committee has also stated that, "the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned."¹⁵ It has also repeatedly called on countries to prohibit trials of civilians before military courts.¹⁶

15. The *Draft Principles Governing the Administration of Justice Through Military Tribunals*,¹⁷ which were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006, affirm that the jurisdiction of military courts should be restricted to military personnel in relation to military offences. The principles also emphasize the right to a fair trial, including the right to appeal to civilian courts, and also that civilians accused of a criminal offence – whatever its nature – shall be tried by civilian courts.

¹²https://www.supremecourt.gov.pk/downloads_judgements/const.p. 24_2023_f.pdf

¹³ https://www.supremecourt.gov.pk/downloads_judgements/i.c.a. 5_2023.pdf

¹⁴ Human Rights Committee General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial," (General Comment 32) UN Doc. CCPR/C/GC/32, para. 22.

¹⁵ *Ibid.*

¹⁶ For example, Human Rights Committee, Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997) para 20; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) para. 14; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) para 12; Tajikistan, UN Doc. CCPR/CO/84/ TJK (2004) para. 18.

¹⁷ *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

16. Similarly, Principle 29 of the UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity states that: "The jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel."¹⁸ The UN Special Rapporteur on the Independence of the Judiciary has expressed a similar view.¹⁹

17. International standards require that military courts, where they are used, must, like other courts, be independent, impartial and competent, and must respect minimum guarantees of fairness, including those set out in Article 14 of the ICCPR.²⁰

18. The ICJ has long documented how Pakistani military courts are not independent and the proceedings before them fall far short of national and international fair trial standards.²¹ Military court judges are military officers who are a part of the executive branch of the State and do not enjoy independence from the military hierarchy. They are not required to have judicial or legal training, or even a law degree,²² and do not enjoy any security of tenure,²³ which are prerequisites of judicial competence and independence.²⁴

19. Pakistani military courts do not give detailed, reasoned judgments. A duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is an essential component of a fair trial. Even in cases in which the public may be excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except in the interest of juveniles, or proceedings concerning matrimonial disputes or the guardianship of children.²⁵

20. In May 2017, the UN Committee against Torture in its Concluding Observations on Pakistan's first periodic report expressed serious concern about the fact that Pakistan has authorized military courts to try civilians for terrorism-related offences in view of "the lack of independence of military court judges, which are within the military hierarchy, and practices of such courts including holding closed trials." The CAT Committee urged Pakistan to "end the resort to military courts for terrorism-related prosecutions, transfer criminal cases against civilians from military courts to civilian

¹⁸ *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

¹⁹ UN Doc. A/68/285, para 45-56, accessed at:

<https://documents.un.org/doc/undoc/gen/n13/421/29/pdf/n1342129.pdf>

²⁰ For more details on international standards on the trial of civilians before military courts, see *International Commission of Jurists*, "The trial of civilians by military courts", Section 5, accessed at: <http://www.icj.org/pakistan-military-justice-system-an-affront-to-human-rights-new-analysis-brief/>

²¹ For more information about the operation of military courts, see also Katharine Houreld, "Worries grow as new courts hand Pakistan army more power", *Reuters*, 25 March 2015, accessed at: <http://www.reuters.com/article/us-pakistan-military-courts-insight-idUSKBNOML2PD20150325>

²² See, for example, *UN Basic Principles on Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (UN Basic Principles on Independence of the Judiciary). Principle 10: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives."

²³ *Ibid.*, principle 12: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

²⁴ Section 133, Pakistan Army Act, 1952.

²⁵ Human Rights Committee General Comment 32, "Article 14: Right to Equality before courts and tribunals and to a fair trial," (General Comment 32) UN Doc. CCPR/C/GC/32, para. 22.

courts and provide the opportunity for appeal in civilian courts of cases involving civilians already adjudicated under military jurisdiction."²⁶

21. In July 2017, this Committee too recommended that Pakistan "review the legislation relating to the military courts with a view to abrogating their jurisdiction over civilians and their authority to impose the death penalty" and "reform military courts to bring their proceedings into full conformity with articles 14 and 15 of the Covenant in order to ensure a fair trial."²⁷

No right of appeal

22. The Pakistan Army Act bars civilian courts from exercising their appellate jurisdiction over decisions of courts martial.²⁸ Civilian courts in Pakistan have held they may use their extraordinary writ jurisdiction to hear cases related to military courts where "any action or order of any authority relating to the Armed Forces of Pakistan is...either *coram non judice*,²⁹ *mala fide*,³⁰ or without jurisdiction."³¹

23. It should be noted that under Pakistani law, the scope of judicial review is severely limited. Courts have also interpreted their review jurisdiction narrowly, and have held that "the High Court in its constitutional jurisdiction is not a Court of Appeal and hence is not empowered to analyze each and every piece of evidence in order to return a verdict"³² and that "controversial questions of facts...cannot be looked into in this limited extraordinary writ jurisdiction."³³

24. In the context of review petitions filed by family members of civilians convicted by military courts, the Supreme Court held that the circumstances in which people were arrested, even if they were forcibly disappeared and kept in secret detention for years, was not relevant to its review jurisdiction.³⁴ Similarly, the Peshawar High Court recently held "the mode, manner and the time of the confessions made by the accused, under the ordinary criminal jurisprudence would seriously diminish the evidentiary value" but in view of the limited scope available to the high courts, they could not interfere in the convictions handed down by military courts on this basis.³⁵

²⁶ *UN Committee against Torture*, "Concluding Observations on the initial report of Pakistan", May 2017, accessed at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PAK/INT_CAT_COC_PAK_27467_E.pdf, paras 12-13.

²⁷ *UN Human Rights Committee*, "Concluding observations on the initial report of Pakistan", July 2017, UN Doc. CCPR/C/PAK/CO/1.

²⁸ Section 133, Pakistan Army Act, 1952.

²⁹ If the case is referred to or decided by a court lacking the authority to hear and decide the case in question.

³⁰ If the decision is made in bad faith.

³¹ 2014 SCMR 1530: "When any action of the army authorities regarding a serving officer of the armed forces or any other person subject to the Pakistan army act, 1952, was established to be either *mala fide*, *quorum non judice* or without jurisdiction then the same could be assailed through a constitutional petition by the aggrieved person, and the bar of jurisdiction under Art.199(3) of the Constitution would have no applicability."

³² 2014 SCMR 849, Supreme Court, para 6.

³³ 2010 YLR 2895, Lahore High Court, para 14.

³⁴ Supreme Court of Pakistan, Civil petitions no. 842 of 2016 and others, June 2016, accessed at: http://www.supremecourt.gov.pk/web/user_files/File/C.P._842_2016.pdf.

³⁵ Peshawar High Court, Writ Petition No.1706-Pof 2016, May 2017, para 22.

25. According to international standards, where military tribunals exist, their authority should be limited to ruling in the first instance and recourse procedures, particularly appeals, should be brought before civilian courts.³⁶

Death Penalty (ICCPR, articles 6,7,and 14)

26. The ICJ considers the application of the death penalty to constitute an arbitrary denial of the right to life and a form of cruel, inhuman or degrading punishment and calls for all retentionist states to adhere to multiple UN General Assembly Resolutions, including resolution 77/222, and to declare and immediate moratorium on the death penalty with a view to abolition.

27. Under international law, including under Article 6 of the Covenant, the death penalty can only be carried out pursuant to a final judgment of a competent court. The safeguards to be afforded throughout the legal proceedings to ensure a fair trial in cases in which the death penalty may be imposed should be at least equal to those contained in Article 14 of the Covenant. As this Committee has stressed in its General Comment 36, "As a rule, civilians must not be tried for capital crimes before military tribunals."³⁷ The Committee has also stated the term "the most serious crimes" must be read restrictively and appertain "only to crimes of extreme gravity involving intentional killing."³⁸

28. Instead, proceedings before Pakistani military courts fall far short of national and international standards requiring a fair trial before independent and impartial courts: Judges are part of the executive branch of the State and continue to be subjected to military command; the right to appeal to civilian courts is not available; the right to a public hearing is not guaranteed; a duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is denied; and the procedures of military courts, the selection of cases to be referred to them, the location and timing of trial, and details about the alleged offences are kept secret.³⁹

29. Also, the Pakistan Army Act, 1952, and the Official Secrets Act, 1923, allow for the death penalty for offences related to mutiny and insubordination, espionage, and wrongful communication of information, which do not meet the threshold of "the most serious crimes" as defined by the Committee.

B. THE PREVALENCE AND IMPUNITY FOR ENFORCED DISAPPEARANCES (Articles 2(3), 6,7,9 and 16 of the ICCPR)

Background

30. While there were cases of enforced disappearances in Pakistan since at least the 1970s, this crime became rampant in the early 2000s, after Pakistan became a key ally in the US-led "war on terror". Since then, hundreds of people, many of whom are

³⁶ Principle 17 of the draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

³⁷ UN Human Rights Committee, General comment No. 36, Article 6: right to life, UN Doc. CCPR/C/GC/36, September 2019, accessed at: <https://documents.un.org/doc/undoc/gen/g19/261/15/pdf/g1926115.pdf>, para 45.

³⁸ *Ibid*, para 35.

³⁹ For a detailed analysis of the incompatibility of military trials with international standards, see International Commission of Jurists, "Military Injustice in Pakistan", June 2016, accessed at: <https://www.icj.org/pakistan-military-justice-system-unjust-and-ineffective-new-icj-paper/>

said to be suspected in connection with terrorism-related offences, have reportedly been “disappeared” and have been detained in secret facilities. Cases of suspected enforced disappearance were also reported in large numbers in Balochistan, where the practice is used against political activists, students and journalists - particularly those who were perceived to be sympathetic to separatist movements in the province.⁴⁰ Cases of enforced disappearances were also reported in Sindh, where political activists have largely been targeted.⁴¹

31. In recent years, a number of suspected enforced disappearances — mostly, but not exclusively, “short-term disappearances” — have been credibly reported across the country, where the victims include bloggers, activists, poets, reporters, politicians and others who are seen to be critical of the military. After apparently being interrogated in secret detention for days or weeks and, in some instances, after reportedly being subjected to torture and other forms of ill treatment, they are released without being charged with any offence.

32. Pakistan has neither signed nor ratified the International Convention for the Protection of All Persons from Enforced Disappearance and “enforced disappearance” is still not recognized as a distinct crime in the country.

UN Working Group on Enforced and Involuntary Disappearances (WGEID)

33. In its 2024 report, the UN Working Group on Enforced and Involuntary Disappearances (WGEID) observed an increasing trend of cases of abduction of civilians, followed by their disappearance, being reported through its humanitarian procedure during the reporting period. The WGEID noted the “number of cases transmitted under the humanitarian procedure to the Government of Pakistan increased by 27 per cent over the preceding reporting period, and the number of urgent cases was the highest transmitted in the last five years” and that the “increased number of abductions of civilians by military and security officials, including paramilitary groups, police and intelligence services, was mostly reported in the Provinces of Balochistan, Sindh, Khyber Pakhtunkhwa and Punjab.”

34. As of May 2024, there were 934 outstanding cases before the WGEID out of a total of 1635 cases transmitted to the WGEID from 1980 to May 2024. The Government, in its reply to the List of Issues prepared by the UN Human Rights Committee claimed, “the alleged cases of missing persons are expeditiously and efficiently dealt by Commission of Inquiry on Enforced Disappearances. The overall decrease in number of alleged cases received from the UN Working Group on Enforced or Involuntary Disappearances support this positive trend.” Notably, the WGEID in its annual report expressed its concern about “the inaccurate information provided by the Government reporting a decrease in cases transmitted by the Working Group.”⁴²

⁴⁰ *International Commission of Jurists*, “Authority without Accountability: the search for justice in Pakistan”, December 2013, accessed at: <https://www.icj.org/wp-content/uploads/2013/12/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-PAKISTAN-FINAL-.pdf>, pp. 63-70.

⁴¹ See, for example, *Human Rights Commission of Pakistan*, “HRCP’s alarm at missing men in Sindh turning up dead”, 5 December 2014, accessed at: <http://hrcp-web.org/hrcpweb/hrcps-alarm-at-missing-men-in-sindh-turning-up-dead/>

⁴² Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/57/54, July 2024, accessed at: <https://documents.un.org/doc/undoc/gen/g24/122/18/pdf/g2412218.pdf>

The Commission of Inquiry on Enforced Disappearances

35. In March 2011, Pakistan's Federal Government constituted a Commission of Inquiry on Enforced Disappearances (COIED). The Commission's mandate was, among other things, to "trace the whereabouts of allegedly enforced disappeared persons" and "fix responsibility on individuals or organizations responsible." The COIED's mandate was extended multiple times, most recently in 2023.

36. The ICJ rates poorly the performance of the COIED since its formation, in particular it in holding accountable perpetrators of enforced disappearances and advancing justice to victims. The ICJ has found glaring flaws in the legal and normative framework establishing the Commission (see below), which have profound implications on its impartiality, competence and overall effectiveness. In its current form, the COIED has enabled and entrenched impunity for enforced disappearances instead of providing redress to victims, in line with its Pakistan's obligation under Article 2(3) of the ICCPR. The Islamabad High Court, too, has observed the COIED has become a liability and "has failed in its duty nor can it justify its existence in the circumstances."⁴³

37. As of 1 August 2024, 2,269 were pending before the COIED out of 10,285 cases instituted since March 2011. According to the Commission, the remaining 8077 cases have been "disposed of." Notably, according to the Commission's monthly reports, cases which the Commission categorizes as "disposed of" include those where people been "traced" (in jails, internment centers, or their homes); where they have been found dead; and where the commission "closed" the case after concluding that they were not cases of enforced disappearance, where the complainant provided an incomplete address, where the complainant withdrew the complainant, or in cases of "non-prosecution" by the complainants.⁴⁴

38. It should be recalled that irrespective of whether the fate or whereabouts is contemporaneously clarified, a period of unacknowledged detention remains an enforced disappearance, which is a crime under international law. The Commission, however, has not "fixed responsibility" on any person or organization, or directed the registration of FIRs against those responsible for concealing the whereabouts of the disappeared people who were eventually traced in detention centers. Instead, its reports state such cases are "closed" and "disposed of."

39. Similarly, the Commission's reports also indicate that in 285 cases out of the 8077 cases disposed of, "dead bodies" of missing persons were found, and since the "missing people" were no longer alive, their cases stand "disposed of". In a number of such cases, the Commission has also stated that the police or other security forces had killed the "missing person" in an "encounter".⁴⁵ It should be recalled that the fact that a person subsequently turns up dead has no bearing on whether the crime of enforced disappearance has occurred, though in many cases it will also be indicia of other crimes, such as extrajudicial killing. Again, the Commission's reports are silent on why such an admission of "encounter" was made months or years after the registration of their cases as "missing persons", and what steps, if any, had been taken to fix responsibility on perpetrators.

⁴³ <https://www.dawn.com/news/1696397>

⁴⁴ Reports available with the ICJ.

⁴⁵ Progress report of the COIED, January 2020.

40. Yet, the existence of the Commission has been repeatedly used by the Pakistani Government to purport to be upholding notions of accountability and to demonstrate the political will to address the issue of enforced disappearance. For instance, in its response to the List of Issues prepared by this Committee for this review, Pakistan claimed: "The alleged cases of missing persons are expeditiously and efficiently dealt by Commission of Inquiry on Enforced Disappearances. The overall decrease in number of alleged cases received from the UN Working Group on Enforced or Involuntary Disappearances support this positive trend...The Commission of Inquiry on Enforced Disappearances (CoIoED) is headed by a retired Senior Judge of the Supreme Court of Pakistan. The Commission scrutinizes cases of allegations of enforced disappearances and Pakistan submits its replies to UN Working Group on Enforced Disappearances regularly."⁴⁶ In its National Report for Pakistan's 4th Universal Periodic Review (UPR) submitted in 2022, Pakistan also made similar claims and stated: "The alleged cases of missing persons are being expeditiously and efficiently dealt by Commission of Inquiry on Enforced Disappearances."⁴⁷

41. However, to the ICJ's knowledge not a single perpetrator has been brought to justice in a case involving and alleged enforced disappearance, and Pakistan has certainly not publicized any information to the contrary. The Government's systematic failure to bring to account perpetrators of enforced disappearances has led the UN Working Group on Enforced and Involuntary Disappearances to conclude that, "there is a climate of impunity in Pakistan with regard to enforced disappearances, and the authorities are not sufficiently dedicated to investigate cases of enforced disappearance and hold the perpetrators accountable".⁴⁸

42. As this Committee has recognized, the obligation to respect and ensure the prohibition against enforced disappearance is engaged under ICCPR Article 6, 7, 9, and 16. ICCPR Article 2(3) obliges Pakistan to promptly, thoroughly, impartially and effectively investigate allegations of enforced disappearance and to bring perpetrators to justice through fair trials.⁴⁹ Pakistan has comprehensively failed to discharge any of these obligations.

43. The legal framework setting out the appointment and functioning of the COIED do not meet international standards for an effective investigation, and thus do not satisfy the duty incumbent on Pakistan to respect and ensure these ICCPR protected rights to victims and survivors of enforced disappearance. The Commission, while possibly performing some function in clarifying the fate or whereabouts of some "disappeared" persons, has in 13 years done nothing to advance access to justice and remedy and reparation for the family of victims, or to hold accountable perpetrators of the crime of enforced disappearance.

44. The ICJ's detailed analysis of the Commission's Terms of Reference, its Regulations, and its functioning in light of international standards has revealed numerous deficiencies, which contribute to the Commission's failure in achieving its

⁴⁶ Replies of Pakistan to the list of issues in relation to its second periodic report, UN. Doc CCPR/C/PAK/RQ/2, para 79.

⁴⁷ National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21, UN Doc. A/HRC/WG.6/42/PAK/1, Nov 2022, accessed at: <https://documents.un.org/doc/undoc/gen/q22/581/81/pdf/q2258181.pdf>

⁴⁸ Report of the Working Group on Enforced or Involuntary Disappearances, Follow-up report to the recommendations made by the Working Group, Missions to Congo and Pakistan, 13 September 2016, UN Doc. A/HRC/33/51/Add.7, para 25, p. 35.

⁴⁹ General Comment No 31, UN Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004,

objectives. In the analysis below, parts of the analysis from ICJ's briefing paper on the COIED is directly excerpted:⁵⁰

Definition of enforced disappearance

45. The Commission's Regulations define enforced disappearance as: "Enforced Disappearance/ Missing Person means such person as has been picked up/taken into custody by one of the law enforcement/intelligence agencies, working under the civilian or military control, in a manner which is contrary to the provision of Law."

46. This definition does not comport with the definition of enforced disappearance under international law and misses critical elements, leaving a potentially large number of victims outside of its purview. This means that cases of enforced disappearance, as recognized by this Committee, are left out the Commission's purview. The International Convention for the Protection of All Persons from Enforced Disappearance defines an enforced disappearance as the "arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

47. The Commission's definition is problematic for a number of reasons. It does not recognize secret detention, or detention in which the whereabouts of the detainee is not disclosed, as instances of enforced disappearance. It does not recognize that if deprivation of liberty is not acknowledged or the whereabouts of the detainee are not disclosed, even if this is "legally" mandated under domestic law, it will still qualify as an enforced disappearance.

48. These omissions are particularly critical because multiple "legal" regimes in Pakistan have effectively legitimized enforced disappearances. These include the controversial Actions (in Aid of Civil Power) Regulations (AACPR), 2011, which gave the Government or "any person" authorized by it sweeping powers of indefinite detention without charge and judicial supervision. While this practice is inconsistent with international law, it seems unlikely that the Commission would consider such deprivation of liberty as constituting enforced disappearances — even where families are not informed about the whereabouts of their loved ones — when AACPR have the force of law.

No separate offence of enforced disappearance

49. Even if the COIED recommends registration of FIRs against alleged perpetrators, its Regulations are silent as to the specific offence for which they would be charged. Significantly, while the COIED has the mandate to hold perpetrators of enforced disappearance responsible, Pakistan's criminal laws do not currently recognize enforced disappearance as a distinct crime.

⁵⁰ For a detailed analysis of the COIED's procedures and performance, see *International Commission of Jurists*, "Entrenching Impunity, Denying Redress, the Commission of Inquiry on Enforced Disappearances in Pakistan," September 2020, accessed at: <https://www.icj.org/resource/pakistan-commission-of-inquiry-on-enforced-disappearances-has-failed-in-providing-justice-to-victims/>

50. This is why enforced disappearances are typically reported to the police as “missing persons” cases, or as those of abduction, kidnapping or wrongful confinement. These offences are inadequate classifications of enforced disappearance cases. Indeed, all enforced disappearances also entail one or more other serious human rights violations and crimes under international law, including torture or other cruel, inhuman, degrading treatment or punishment; summary, extrajudicial or arbitrary killing in violation of the right to life; and prolonged arbitrary detention, all violations of the ICCPR as noted above. The offences ascribed to “missing persons” do not recognize the gravity or range of legal consequences of the crime; do not provide for commensurate penalties; and do not address the need to remedy the harm to families of those disappeared who are not legally considered victims.

Scope of inquiry

51. One of the biggest shortcomings in the COIED’s terms of reference is that they specify that it may direct the registration of FIRs only in the disappearance of an “untraced” person. This effectively means that once a person subjected to an enforced disappearance is found, the commission no longer has the competency to register FIRs against alleged perpetrators. It also ignores the fact that the crime of enforced disappearance does not depend on whether the disappearance is on-going or not: States have the obligation to hold perpetrators accountable and provide for effective remedy and reparation even after the disappeared person is traced or released. Indeed, where the fate or whereabouts of a person is known, it is generally more straightforward and typically easier in evidentiary terms to pursue accountability and access to justice for victims. To date, there has not appeared to be a single FIR registered as a consequence of the commission’s work.

Security of victims and witnesses

52. The Commission’s Regulations make no provision for the security and protection of victims and witnesses who appear before it. In general, the Commission hears families and witnesses in the presence of representatives of law enforcement and intelligence agencies, which reportedly makes them feel intimidated in some cases.

Other shortcomings in the commission

53. There also a number of other structural shortcomings in how the COIED was established and how it functions, which makes it ineffective in fulfilling duties pursuant to Article 2(3) of the ICCPR.

54. For example, the Ministry of the Interior established the COIED pursuant to a notification. In practical terms, this has meant that the Commission is both structurally and functionally subordinate to the Ministry. According to Commission’s secretary, this means that even a request for information to the Commission must be made through the Ministry of the Interior. This lack of structural independence is especially problematic in the case of the COIED as the Ministry of the Interior has oversight authority over law enforcement agencies, which are often involved in enforced disappearances. This structural subordination also explains in part why Commission is seen to have limited authority over law enforcement and security agencies and why its orders are not complied with.

55. The selection and appointment of commissioners does not take into account their demonstrated commitment to human rights. The COI Act provides that a Commission

“may consist of one or more members appointed by the Federal Government, and where the Commission consists of more than one member, one of them may be appointed as the President thereof.” There are no procedural criteria on how appointments to the commissions shall be made, and there are no explicit requirements that members of COIs be chosen for their independence, competence and/or impartiality, not to mention gender balance and elements such as regional or ethnic diversity. In September 2011, the Federal Government appointed Justice Javed Iqbal (a former judge of the Supreme Court) as the head of the COIED, a position he still holds. It is not clear on what basis he was selected for this position, and why he continues to head the Commission despite a recommendation by the Public Accounts Committee that he be removed based on allegations of misuse of power and harassment.⁵¹

56. For a commission to be considered a credible mechanism, its members should be selected by visible and transparent processes involving public consultation, or public nomination and scrutiny by selection panel and other interested parties. Civil society organizations, victims groups, human rights defenders, the National Commission for Human Rights and persons from marginalized and vulnerable groups should actively participate in the process of selection and appointment of the commissioners. Further, the selection panel for commissioners should include representatives from government, civil society organizations and victim groups. The COI Act, however, leaves the decision of appointment of commissioners solely to the Federal Government (i.e. the Federal Cabinet), and fails to provide a transparent and consultative appointment process. This impedes on an effective functioning of and public confidence in the independence and impartiality of the Commission.

The rights of LGBTQI people (Articles 2, 3, 6, 7, 9, 17 and 26)

Overview

57. Lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) people in Pakistan are highly vulnerable to human rights violations and abuses on the basis of their sexual orientation, gender identity and expression and sex characteristics (SOGIESC) by State and non-State actors, including the police and members of other law enforcement agencies, as well as gangs, community members, intimate partners, and their families.

58. Pakistan has failed to discharge its ICCPR obligations to ensure protection for LGBTQI persons from discrimination and ensure equality and equal protection of the law pursuant article 26, and in particular respect of Covenant rights, Article 2(1). Pakistan has also failed to effectively protect LGBTQI persons from unlawful killings, torture and ill-treatment and other Covenant violations and abuses, including particularly those perpetrated by private persons or actors. The ICJ recalls this Committee’s admonition that discharge of obligations under the Covenant requires States Parties to protect against acts committed by private parties that would impair the enjoyment of Covenant rights.⁵²

Violence against LGBTQI people (Articles 2(3) 6,7, 9)

⁵¹ <https://www.dawn.com/news/1698685>

⁵² General Comment No 31, UN Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 8.

59. According to data collected by the ICJ and its partner organizations,⁵³ at least 45 transgender people were murdered in Pakistan from August 2019 to March 2024 in the provinces of Punjab and Khyber Pakhtunkhwa alone. In such cases, there is a culture of impunity in the country, and perpetrators have not been brought to justice in the majority of these cases. A number of Transgender people were also subjected to rape and other sexual violence, sexual harassment, abduction, blackmail and other serious crimes.

60. In addition to unlawful killings, the ICJ and its partner organizations have documented a number of other human rights violations and abuses against LGBTQI people, including sexual harassment, intimate partner violence, threats/blackmail, hate speech, public shaming, assault, evictions from their homes and bullying. These violations and abuses are rarely reported to the authorities, as a large number of LGBTQI people believe that if they report these violations or abuse, their sexual orientation and gender identity will be used as a reason to blackmail, threaten, “out” them before their families and media, and further persecute them.

61. There are a number of reasons why perpetrators of crimes against transgender people, including murder and other violent offences, are rarely brought to justice. One reason is underreporting. Killings of transgender people in many instances are not even reported to the police. With respect to the human rights violations and abuses against transgender people documented by the ICJ and its partner organizations between August 2019 to May 2022, complaints were filed with the police or other relevant authorities in only 17 per cent of the cases. Another reason is the profoundly negative experience that transgender individuals have of the police as they are routinely threatened, blackmailed, or even abused by the police because of their status as LGBTQI persons. In most instances, members of the transgender community are thus deterred from pursuing cases. The police and law enforcement officials, more generally, end up being perceived as abusers of the transgender community, and not as authorities capable of providing justice or protection.

62. Another reason is that a large number of transgender people in Pakistan, particularly those who belong to the socio-historically constituted khawaja sira community,⁵⁴ live in poverty. Many are engaged in informal or criminalized activities, such as begging and sex work. As a result, they face a greater risk of blackmail, threats and coercion, which can escalate to assault and killing. These groups are also least likely to report cases of violence to the authorities due to fear of discrimination, increasing chances of persistent victimization.

63. Additionally, perpetrators are rarely brought to justice in cases involving the unlawful killing of transgender people because the families of victims and the members of the community are pressurized into “compromising”⁵⁵ with those responsible due to lack of resources, as well as harassment, threats, and the influence of the perpetrators. These “settlements” and “compromises” ultimately deny justice for the victims, embolden perpetrators, and do little to deter the perpetration of killings and other violent offences against transgender people.

⁵³ Data available with the ICJ.

⁵⁴ Khawaja siras are socially, politically and historically constituted community of gender diverse people. Nowadays, they are often referred to as transgender women.

⁵⁵ Pakistani law allows legal heirs of the victim in murder cases to “compromise” with the perpetrator upon the payment of compensation.

64. Finally, even when cases are pursued, the police either fail to register complaints or carry out prompt, thorough, competent and effective investigations that could eventually lead to the prosecution and conviction of the perpetrators. As a result, even in the few and far between cases that end up before courts, perpetrators are often exonerated due to technicalities, such as errors in framing of charges, procedural irregularities in the investigation, and because of an overall lax attitude by the prosecuting authorities.

65. Data presented to the Khyber Pakhtukhwa assembly by the police regarding violence against transgender people in the province provides a snapshot into the impunity enjoyed by perpetrators. According to the data, 267 cases of violence against transgender people were reported from 2019-2023. In this period, only one conviction was reported.⁵⁶

Discrimination against LGBTQI people (Articles 2, 3, 17 and 26)

66. The Transgender Persons (Protection of Rights) Act, 2018, prohibits discrimination against transgender people. It states that “no person” shall discriminate against a transgender person with respect to a number of contexts, and lists, among others, educational facilities; employment; healthcare; access to goods and services; housing; and holding public office. However, the law does not provide any definition of what constitutes discrimination. Secondly, in chapter five of the Act titled “protection of the rights of transgender persons”, the obligation not to discriminate is repeated in relation to the right to hold public office; the right to access educational and healthcare facilities; the right to assembly; the right to access public places; and the right to hold property. The law also provides that the Government shall ensure that there is “no discrimination for any person on the basis of sex, gender identity or gender expression” in the guarantee of fundamental rights recognized by Pakistan’s Constitution.

67. The law however, does not provide any definition of what constitutes discrimination. It also provides no penalties, remedies or enforcement mechanisms in case of a violation of the anti-discrimination duty.

68. While the Pakistani Constitution guarantees the right to equal treatment of the law, the specific prohibition related to discrimination is limited to discrimination on the “basis of sex”.⁵⁷ Furthermore, there is no anti-discrimination legislation to protect people/groups who are at a heightened risk of human rights abuses as a result of discrimination on the grounds of their sexual orientation, gender expression, or gender identity, among other prohibited status grounds.⁵⁸

Criminalization of same-sex relations (Articles 9, 17 and 19)

69. Section 377 of the Pakistan Penal Code criminalizes voluntary “carnal intercourse against the order of nature”. Though there have been no convictions for consensual same-sex relations between adults, data collected by the ICJ and its partners shows this provision has been used as a tool to persecute people for their real or perceived

⁵⁶ Data available with the ICJ.

⁵⁷ Article 25, Constitution of Pakistan: “There shall be no discrimination on the basis of sex.”

⁵⁸ One of the few exceptions is the Sindh Empowerment of ‘Persons with Disabilities’ Act, 2018, which among other things, contains a provision related to non-discrimination.

sexual orientation and gender identity, including through the threat of prosecution, blackmail, extortion, and police abuse.

70. By allowing the criminalization of consensual same-sex conduct, section 377 has facilitated numerous human rights violations and abuses, including violations of the non-discrimination principle and of the rights to equality before the law and equal protection of the law, liberty and security of person, free expression, health, and privacy. Section 377 has also perpetuated homophobic and transphobic attitudes in Pakistan, leading to discrimination and violence against LGBTQI individuals. It has created an environment in which State authorities, including the police, not only fail to protect LGBTQI individuals, but perpetrate further human rights violations against them with impunity.

Federal Shariat Court judgment on the Transgender Persons (Protection of Rights) Act, 2018

71. On 19 May 2023, the Federal Shariat Court (FSC) gave its judgment on a number of petitions challenging the Transgender Persons (Protection of Rights) Act, 2018 (TG Act). The FSC declared sections 2(f), 3 and 7 of the TG Act - which relate to gender identity, the right to self-perceived gender identity and the right of inheritance for transgender people – against their interpretation of Islam.⁵⁹

72. Data collected by the ICJ and its partners shows that following the FSC's judgment, LGBTQI people experienced an increase in transphobia and homophobia, expressed in the form of hate speech, incitement to violence, religious denouncement, and discrimination, particularly not limited to social media.

73. A number of appellants and petitioners, including the Ministry of Law and Justice, challenged the judgment before the Shariat Appellate bench of the Supreme Court. Until the Shariat Appellate bench gives a ruling on the appeal, the operation of the judgment by the Federal Shariat Court is suspended. As of 16 September 2024, the Shariat Appellate bench of the Supreme Court had not listed the appeal for hearing.

Persecution and marginalization of transgender men

74. Transgender men are a generally less visible in the mainstream transgender rights movement in Pakistan and the specific human rights violations and abuses they experience are not adequately understood or highlighted. In particular, transgender men face legal persecution, including for "same sex marriage",⁶⁰ and are not represented in the Government's various schemes and programs for transgender people.

Discriminatory laws that criminalize life-sustaining activities in public spaces

75. As the ICJ has affirmed in its 8 March Principles, the use of the criminal law with a view preventing life-sustaining activities in public spaces carries profoundly adverse effects on the enjoyment of human rights, including those protected under the

⁵⁹ PLD 2023 FSC 301.

⁶⁰ See, for example, *Shumail Raj v. State* (W.P. 4144 of 2007).

Covenant. Pakistan's anti-vagrancy and anti-beggary laws are such laws that are not compliant with the ICCPR.⁶¹

Anti-beggary and "vagrancy" laws (Articles 2(3) and 26)

76. The Punjab Vagrancy Ordinance, 1958,⁶² defines a "vagrant"⁶³ as someone who "solicits or receives alms in a public place" or "allows himself to be used as an exhibit for the purpose of soliciting or receiving alms" and punishes the same "vagrants" upon conviction with a sentence of up to three years in prison. The Ordinance also criminalizes employing or causing "any person to solicit or receive alms" or using a person as "an exhibit for the purpose of soliciting or receiving alms", with a penalty of up to one year in prison.⁶⁴ Courts have upheld the Punjab Vagrancy Ordinance, reinforcing colonial stigmas of "pollution" and "nuisance" attached to collecting alms.⁶⁵

77. The Transgender Persons (Protection of Rights) Act,⁶⁶ passed in 2018, with the stated aim of protecting transgender people, also created a new criminal offence related to beggary. Section 17 of the Act states: "Whoever employs, compels or uses any transgender person for begging shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees or with both."

78. The provision's language appears to cast the net very wide: it is not restricted to "compelling" transgender people to beg, which would entail some kind of coercion, but also includes: "employs" or "uses", which may, therefore, also apply to voluntary and willful conduct on the part of transgender people.

79. Including begging by transgender people as a separate, distinct offence under the Transgender Persons (Protection of Rights) Act is at the very least questionable since, for many transgender people in Pakistan, begging remains one of their limited livelihood opportunities. In the past, laws related to beggary, including the Punjab Vagrancy Ordinance, have been significantly misused against the transgender community, with law enforcement agencies using them to harass, blackmail, imprison and sexually assault transgender people.⁶⁷ Furthermore, the police routinely interpret the vague penal clauses on "begging" and "vagrancy" to prohibit and penalize spiritual

⁶¹ International Commission of Jurists, *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, March 2023, accessed at: <https://www.icj.org/resource/icj-publishes-a-new-set-of-legal-principles-to-address-the-harmful-human-rights-impact-of-unjustified-criminalization-of-individuals-and-entire-communities/>

⁶² The Punjab Vagrancy Ordinance (1958), available at: [http://punjablaws.gov.pk/laws/94.html#:~:text=%E2%80%94\(1\)%20Any%20police%20officer,to%20confiscation%20under%20this%20Ordinance8](http://punjablaws.gov.pk/laws/94.html#:~:text=%E2%80%94(1)%20Any%20police%20officer,to%20confiscation%20under%20this%20Ordinance8)

⁶³ *Ibid.*, section 2(g).

⁶⁴ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>, p. 19.

⁶⁵ *Ibid.* p. 20.

⁶⁶ The Transgender Persons (Protection of Rights) Act (2018), available at: https://na.gov.pk/uploads/documents/1526547582_234.pdf

⁶⁷ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>, p. 19.

and celebratory rituals of the *khawaja sira*⁶⁸ community (for instance, at weddings and childbirth) that have crucial significance in the community's folk tradition.

80. Section 17 of the Transgender Persons (Protection of Rights) Act ultimately reinforces certain stereotypes against transgender people, which can be traced back to the British colonial period. The Criminal Tribes Act, enacted in 1871,⁶⁹ considered "begging" a nuisance to public order and designated it a criminal activity, taking away from *hijras*⁷⁰ one of the main sources of their traditional livelihood: the collection of alms at marriages, childbirth and other occasions.

81. The provision against begging in the Transgender Persons (Protection of Rights) Act not only reinforces the criminalization of beggary, but it could also be read to target the relationship between *guru*⁷¹ and *chaila*⁷², in which *gurus* train their *chailas* to collect alms. Such a provision also risks making the "structure of relatedness" and "kinship" of such communities vulnerable to the State's disciplinary and punitive measures, allowing the State to, effectively, "police" forms of kinship common in certain transgender communities.

82. Courts in Pakistan have failed to recognize the human rights concerns stemming from the criminalization of beggary and vagrancy. The Federal Shariat Court and the Lahore High Court have respectively declared the Punjab Vagrancy Ordinance of 1958 compatible with Islam and the Constitution of Pakistan.⁷³ Other courts have also reinforced the colonial stigmas of "pollution" and "nuisance" attached to collecting alms.⁷⁴

83. Unless criminal laws proscribing the above-mentioned conduct are directed at coercion or force or otherwise at the absence of consent, their mere existence – let alone their threatened or actual enforcement – violates human rights. The use of criminal law in these domains contributes to a broad range of human rights violations, especially of the rights to freedom from discrimination, equality before the law and equal protection of the law without discrimination.

Intersex people (Article 2(1), 6, 7, 26 and 27)

84. Since the Transgender Persons (Protection of Rights) Act includes intersex people in the definition of transgender, the rights and protections guaranteed by the law are also available to intersex people.

⁶⁸ Khawaja siras are socially, politically and historically constituted community of gender diverse people. Nowadays, they are often referred to as transgender women. But this classificatory category is unable to encapsulate the experience, complexity, diversity and historical position of khawaja siras.

⁶⁹ Criminal Tribes Act (1871), available at:

<https://ccnmtl.columbia.edu/projects/mmt/ambekar/web/readings/Simhadri.pdf>

⁷⁰ A term used to describe an identity category for people assigned male at birth whose gender identity and/or gender expression is female.

⁷¹ Roughly translated as "teacher" or "mentor".

⁷² Roughly translated as "disciple".

⁷³ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at:

[https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-](https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf)

[Analysis-brief-2020-ENG.pdf](https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf), p. 20. See also judgement PLD 1985 FSC 344 which is a Federal Shariat court judgment that upheld the Vagrancy Ordinance, including provisions related to begging; and the CLC 2002 LHC 139 which is a Lahore high court judgment that says the Vagrancy Ordinance is not against Islam or fundamental rights and it is not discriminatory. It refers to those who collect alms for a living as "parasites" and imposters.

⁷⁴ *Ibid.*

85. However, the Act leaves some of the most serious human rights violations and abuses faced by intersex people unaddressed. These include subjecting intersex children and adolescents to medically unnecessary hormonal treatment, surgical and other procedures for the purpose of trying to forcibly make their appearance conform to binary sex stereotypes and societal expectations about female and male bodies. These procedures, which are often irreversible, can cause permanent infertility, pain, loss of sexual sensation and lifelong mental suffering, including depression. This engages the Pakistan's obligations under Article 7 of the Covenant.

86. In Pakistan, intersex children and adolescents, who are born with atypical sex characteristics, are subjected to discrimination and medically unnecessary hormonal treatment, surgery and other procedures without their informed consent or that of their parents. Regularly performed without the full, free and informed consent of the person concerned - who is frequently too young to take part in the decision-making - these procedures violate their rights to mental and physical integrity and to be free from torture or other ill-treatment, among others.

87. There are no formal guidelines or protocols to regulate this practice in Pakistan. As a result, medical practitioners expose children to hormonal replacement regimens, psychotherapeutic interventions for "rehabilitation" and most seriously, unnecessary and coercive surgeries to modify genital features. Although there is not enough data to ascertain how widespread this practice is in Pakistan, the ICJ and its partners have identified at least one "foundation" where medical practitioners are offering free surgeries to "rehabilitate" intersex children since 2016.⁷⁵ In an interview with the ICJ, a representative from the clinic stated they perform surgeries on intersex infants from the age of six months.

88. In its advertising and media campaigns, the Birth Defects Foundation regularly features pictures and profiles of intersex infants and adolescents on whom genital modification surgeries have been performed. This not only violates the privacy of such children, in contravention of ICCPR Article 17, but also exposes them to possible lifelong suffering. The language used by the clinic is highly derogatory and pathologizing (e.g. "normal males and females", 'the rehabilitated females are married') and indicates the harmful practices adopted by the clinic in its "rehabilitation" practices. According to the website of this foundation, they have carried out surgeries on 274 intersex people.

89. The clinic also offers "treatment" for transgender people. It claims being transgender is a "psychological disorder" or "gender dysphasia" because of which "males like female appearance and females likes men-like appearance." Such patients are not intersex but are "normal persons with clear gender...but want to get appearance their opposite gender." The clinic offers to "treat" transgender people in six months to one year.

International standards on intersex surgeries

90. This Committee, in its Concluding Observation on Kenya in 2021, expressed concern about "cases of non-urgent, irreversible surgical procedures, infanticide and abandonment among intersex children" with respect to Articles arts. 2, 6, 7, 17 and 26 of the ICCPR, and recommended: "The State party should take appropriate steps

⁷⁵ <https://www.bdfpk.org/>

to...strengthen measures to end the performance of irreversible medical acts, especially surgical operations, on intersex children who are not yet capable of giving their full, free and informed consent, except in cases where such interventions are absolutely necessary for medical reasons. Access to effective remedies for victims of such interventions should also be ensured."⁷⁶

91. The UN Committee against Torture has also suggested early unnecessary and irreversible sex-determining surgeries would violate the CAT and expressed concern its long-term impact in several countries; and the UN Committee on the Rights of the Child has stated that such practices are discriminatory and constitute "harmful practices."⁷⁷

92. In April 2024, the United Nations Human Rights Council adopted its first ever resolution affirming the rights of intersex people. The resolution expressed grave concern "about the violence and harmful practices that persons with innate variations in sex characteristics, including children, face in all regions of the world, including medically unnecessary or deferrable interventions, which may be irreversible, with respect to sex characteristics, performed without the full, free and informed consent of the person, and in the case of children without complying with the provisions of the Convention on the Rights of the Child."⁷⁸

RECOMMENDATIONS

93. In light of the above concerns, the ICJ requests that the Committee consider making the following recommendations to Pakistan for implementation by the responsible Pakistani authorities:

Regarding the trial of civilians in military courts:

- Amend Pakistan Army Act, 1952, to ensure that military courts only have competency to try military personnel for exclusively military offences and in no manner have jurisdiction over civilians, including for terrorism or other security-related offences;
- Ensure procedures of military courts, in law and practice, meet all fair trial standards in accordance with Article 14 of the ICCPR; and
- Impose an immediate moratorium on the death penalty with the view of abolishing the death penalty in law and practice, and in any event removed the death penalty from the jurisdiction of the Army Act, 1952, and the Official Secrets Act, 1923.

Regarding the Commission of Inquiry on Enforced Disappearances:

- The existing Commission in mandate, form and practical function is beyond reform and should be abolished. Parliament should consider the establishment of a new Commission of Inquiry on Enforced Disappearances, but only with a mandate and

⁷⁶ UN Human Rights Committee, Concluding Observations on Kenya, UN Doc. CCPR/C/KEN/CO/4, 2021.

⁷⁷ Sandberg, K. (2018). Intersex Children and the UN Convention on the Rights of the Child. In J. Scherpe, A. Dutta, & T. Helms (Eds.), *The Legal Status of Intersex Persons* (pp. 515-535). Intersentia. doi:10.1017/9781780687704.029

⁷⁸ Resolution adopted by the Human Rights Council on 4 April 2024 on Combating discrimination, violence and harmful practices against intersex persons, UN Doc. A/HRC/RES/55/14, 8 April 2024, accessed at: <https://documents.un.org/doc/undoc/gen/g24/060/57/pdf/g2406057.pdf>

constitution that fully cures the deficiencies as outlined above of the existing COIED.⁷⁹

Regarding impunity for enforced disappearance

- Parliament should establish enforced disappearances as a specific criminal offence in line with the internationally agreed definition set out in Articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearance and to conform with Covenant obligations;
- The sentence for enforced disappearance should be commensurate with the seriousness of the offence, in line with offences of similar gravity, such as homicide;
- To make it effective, ensure that national laws and policies provide for the duty to conduct prompt, thorough, impartial investigations into allegations of enforced disappearance with a view to criminal prosecution of those responsible;
- Ensure that subordinates who commit the offence of enforced disappearance cannot use the defense that they were obeying orders or instruction;
- Ensure that the crime of enforced disappearance is not subject to prescription or statutes of limitations, and recognize that the crime is continuous in nature and persists for as long as the fate and whereabouts of the “disappeared” person is unknown, placing the person outside the protection of the law;
- Ensure only competent civilian courts have jurisdiction over alleged enforced disappearances and military courts are barred from exercising jurisdiction over human rights violations allegedly perpetrated by the military; and
- • Ensure superiors may be held criminally liable for enforced disappearance where such persons knew or ought to have known that a subordinate was committing or about to commit the crime, but failed to take all necessary and reasonable measures to prevent the crime, or to submit the matter for investigation and prosecution.

Regarding prevention of enforced disappearances

- Formulate clear rules and dedicated institutions to ensure the oversight and accountability of law enforcement and intelligence agencies;

⁷⁹ Regarding the possibility of the establishment of such a new commission of inquiry, the Government must: Hold real and participative consultations with all relevant stakeholders, including victims’ groups and civil society organizations, on whether a new commission of inquiry on enforced disappearances is required; if a new commission is constituted, ensure it conforms with international standards governing investigations and conduct of COIs, in particular the UN Impunity Principles. Legal provisions establishing the commission should, at the minimum, provide a normative framework that conforms with international law and standards, including the definitions and other elements in the International Convention for the Protection of All Persons from Enforced Disappearance; Have a scope of inquiry aimed not only to determining the fate and whereabouts of the “missing”, but also at ensuring criminal accountability and effective remedy and reparation for victims; Set out in detail the eligibility criteria to ensure that the commissioners are selected on the basis of their competence in human rights and other relevant fields, proven independence and recognized impartiality; Ensure that the selection process of commissioners is based on a broad consultative process which includes members from difference stakeholder groups such as human rights organizations and victims’ groups; Contain a clearly defined process and grounds for removal of the commissioners; Ensure the commission has sufficient material and human resources; Guarantee that the final report of the commission be published and made public without undue delay; and Establish a witness protection unit within the commission to oversee the protection of witnesses.

- Give appropriate training to members of law enforcement and intelligence agencies in the field of human rights, with particular focus on enforced disappearances;
- Prohibit any form of incommunicado detention and any secret places of detention; and
- Establish an official and generally accessible, up-to-date register of all detainees and of centralized registers of all places of detention.

Regarding reparations for victims

- Set up a program to provide for effective remedy and reparations for all victims of enforced disappearances, including their family members and other persons directly affected by the enforced disappearance. The programme should include not only compensation, but also full rehabilitation, satisfaction, including restoration of dignity and reputation, and guarantees of non-repetition.

Regarding the rights of LGBTQI people

- Enact a comprehensive anti-discrimination law, following transparent, meaningful and broad-based nationwide consultations with all stakeholders, with the aim of providing equal protection of the law and prohibiting discrimination on protected grounds including sexual orientation, gender identity, gender expression and sex characteristics, in line with international law and standards;
- Ensure prompt, thorough, independent and impartial investigations and into all allegations of unlawful killings and other violent offences against LGBTQI persons, followed by prosecutions in fair trials;
- Conduct periodic sensitization of investigating officers, prosecutors and judiciary on SOGIESC and the specific needs and risks of human rights violations and abuse of persons marginalized on the basis of SOGIESC, including the impediments they face in accessing justice;
- Review Pakistan's legal framework to ensure that other laws, including provisions of the Pakistan Penal Code, do not violate or impair the Covenant rights of LGBTQI people. In particular, repeal section 377 of the PPC;
- Repeal vaguely worded criminal laws that invite discriminatory application or otherwise provide scope for arrests based on prejudice – including Section 17 of the Transgender Persons (Protection of Rights) Act, 2018, and the Punjab Vagrancy Ordinance, 1958 – or substantially revise them to ensure there is no scope for their abuse;
- Ensure that police officers refrain from detaining and harassing persons on the basis of their real or perceived sexual orientation or gender identity and that officers who abuse or harass LGBTQI persons are investigated and subject to disciplinary action or to prosecution, as is relevant;
- Ensure that police officers promptly register and investigate any complaint regarding violence or any other criminal act filed by an LGBTQI person and/or on their behalf, and initiate prosecutions where necessary in accordance with established rules of criminal law;
- Put in place standard operating procedures that ensure that police treat people of diverse sexual orientations and gender identities with the fullest respect for their dignity, privacy, and self-expression, including during arrest and detention; and
- Prohibit medically unnecessary hormonal treatment, surgical and other procedures, including “sex-assignment surgeries”, on intersex children and adolescents, unless and until they are performed with their full, free and informed consent.

