

# **Entrenching Impunity, Denying Redress:** The Commission of Inquiry on Enforced Disappearances in Pakistan

A Briefing Paper

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® Entrenching Impunity, Denying Redress: the Commission of Inquiry on Enforced Disappearances in Pakistan  
- A Briefing Paper

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## Introduction

In March 2011, Pakistan's Federal Government constituted a Commission of Inquiry on Enforced Disappearances (COIED).<sup>1</sup> 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 2017. Its extended mandate is set to expire on 14 September 2020.<sup>2</sup>

This briefing paper provides an assessment of the performance of the COIED since its formation, in particular how successful the Commission has been in holding accountable perpetrators of enforced disappearances as redress to victims. It also evaluates the laws and rules under which the Commission operates in light of international law and standards.

The analysis shows glaring flaws in the legal and normative framework establishing the Commission, which have profound implications on its impartiality, competence and overall effectiveness. The paper concludes that in its current form, the COIED has enabled and entrenched impunity for enforced disappearances instead of providing redress to victims.

<sup>1</sup> The COIED was preceded by a three-member judicial commission on enforced disappearances, which was constituted in April 2010 and submitted its final report to the Government in January 2011. The report was not made public.

<sup>2</sup> "Term of body probing 'enforced disappearances' extended", Dawn News, 8 September 2017, accessed at: <https://www.dawn.com/news/1356287>

## Background

While there are reports that the practice of enforced disappearance has existed in Pakistan since at least the 1970s, such cases have been recorded in significant numbers in the early 2000s, beginning with Pakistan's involvement in the US-led "war on terror" in late 2001. Since then, hundreds of people accused of terrorism-related offences have reportedly been "disappeared" after being abducted by security agencies and detained in secret facilities, particularly in Khyber Pakhtunkhwa, the North-Western region of Pakistan. Cases of enforced disappearances are also reported in large numbers in Balochistan, where the practice is used against political activists and people who are considered sympathetic to separatist or nationalist movements in the province, as well as Sindh, where political activists have largely been targeted.<sup>3</sup>

In recent years, there have also been a number of "short-term enforced disappearances", where the victims include bloggers, activists and others who are seen to be critical of the state. After apparently being interrogated in secret detention for weeks or months and reportedly being subjected to torture and other forms of ill treatment, they are released without being charged with any offence.<sup>4</sup>

The UN Working Group on Enforced and Involuntary Disappearances (WGEID), established by the UN Human Rights Council, undertook a country visit to Pakistan in 2012 and issued a report in 2013. The report expressed concern at the continuing practice of enforced disappearances in Pakistan and made a series of recommendations to the Government.<sup>5</sup> In its follow up in 2016, the WGEID regretted that "most of the recommendations contained in its country visit report have not been implemented" and that the Working Group is still "gravely concerned about the reported widespread practice of enforced disappearances in Pakistan".

The WGEID has received 1144 cases of allegations of enforced disappearances from Pakistan between 1980 and 2019, with a particularly large number in 2015-16, of which some 731 remained unclarified as of the end of 2019.<sup>6</sup>

<sup>3</sup> International Commission of Jurists, "No More Missing Persons: The criminalization of enforced disappearances in South Asia", August 2017, accessed at : <https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-Disappearance-Publications-Reports-Thematic-Reports-2017-ENG.pdf>

<sup>4</sup> See, for example, Reema Omer, "Short-term disappearances", Dawn News, 18 December 2017, available at: <https://www.dawn.com/news/1377235>

<sup>5</sup> Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2.

<sup>6</sup> Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc A/HRC/42/40, 30 July 2019.

In its most recent report to the UN Human Rights Council, the WGEID regretted that “it continues to receive a very high number of allegations both under the urgent action and the standard procedures in relation to cases of enforced disappearances” from Pakistan and that it was also “very concerned at the information received in relation to cases of reprisals against relatives and civil society actors working on their behalf.”<sup>7</sup>

<sup>7</sup> Ibid.

## International legal framework

Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) defines 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.”<sup>8</sup>

The ICPPED is the leading global instrument setting out international standards on enforced disappearance. It was adopted by consensus at the UN General Assembly in 2006, and now has 63 States Parties with a further 35 States having signed but not yet ratified. The ICPPED builds on and establishes particular treaty obligations building on the UN Declaration on the Protection of all Persons from Enforced Disappearance, which had been adopted with the agreement of all States at the UN General Assembly in 1992.<sup>9</sup>

Pakistan has not yet signed or become a party to the ICPPED. However, the Supreme Court of Pakistan has held the principles of the Convention were applicable in Pakistan as the Convention was inextricably linked with the right to life, guaranteed by Pakistan’s Constitution.<sup>10</sup>

In addition, Pakistan is a party to other treaties that establish binding obligations protecting against enforced disappearance. These include the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Although enforced disappearance is not expressly mentioned in either treaty, any perpetration of an enforced disappearance inherently involves one or more acts that are prohibited by these treaties. The international bodies mandated to supervise State compliance with these treaties (i.e. the Human Rights Committee and the Committee against Torture) have consequently developed extensive jurisprudence and guidance on the application of the more general treaty provisions to acts of enforced disappearance, including with regards to the right to life, the right to be free from torture and other cruel, inhuman or

<sup>8</sup> Article 2, UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006.

<sup>9</sup> UN Commission on Human Rights, *Declaration on the Protection of All Persons from Enforced Disappearance*, 28 February 1992, E/CN.4/RES/1992/29.

<sup>10</sup> HRC No.29388-K/13, 10 December 2013.



degrading treatment, the right to liberty and security, and recognition as a person before the law.<sup>11</sup>

### **The duty to guarantee human rights**

Under international human rights law, States must respect, protect and fulfil human rights. Together, these form the duty to guarantee the enjoyment of human rights. This means that States must not only refrain from infringing upon human rights, but must take affirmative steps to protect their enjoyment against impairment by other actors and to ensure the necessary conditions for their full realization. To give effect to these obligations, States must take measures to prevent violations, to investigate them when they occur, to hold criminally responsible perpetrators in cases where violations amount to crimes, and to provide reparation for damage caused.<sup>12</sup>

### **The duty to investigate**

Effective, prompt, thorough and impartial investigations are a crucial first step towards gathering the facts of a violation. These then provide the basis for determining, where required, accountability of suspected perpetrators of crime, for providing proper and adequate reparation to victims, and for preventing recurrence in the future.

Typically, investigation of crimes, prosecution of the accused, punishment of the guilty, and provision of effective remedy and reparation to victims of violations are assured through the criminal justice system involving the police, prosecutors, courts and other executive bodies. However, “where the system in place is unable to function effectively and extraordinary measures are needed in order to bring justice,”<sup>13</sup> or where it might be inappropriate for it to carry out investigative procedure due to perceived or actual bias and lack of impartiality, COIs can play an important role towards a State’s fulfilment of its obligation to investigate human rights violations.<sup>14</sup>

<sup>11</sup> For a detailed discussion, see International Commission of Jurists, “No More Missing Persons: the criminalization of enforced disappearances in South Asia”, August 2017, available at: <https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-Disappearance-Publications-Reports-Thematic-Reports-2017-ENG.pdf>

<sup>12</sup> See for instance, Human Rights Committee, General Comment no 31 on “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” UN Doc CCPR/C/21/Rev.1/Add. 13 (2004)

<sup>13</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Report to the General Assembly*, UN Doc. A/HRC/8/3 (2 May 2008), para 5.

<sup>14</sup> The paragraphs below are largely reproduced from the following report by the International Commission of Jurists: “Commissions of inquiry in Nepal: Denying remedies, entrenching impunity”, June 2012, available at: <https://www.icj.org/wp-content/uploads/2012/06/Nepal-Commissions-of-Inquiry-thematic-report-2012.pdf>.

## General principles applicable to COIs

The standards that govern the conduct of any investigation within the regular criminal justice system also generally guide the functioning of COIs. The Updated Set of principles for the protection and promotion of human rights through action to combat impunity (UN Impunity Principles);<sup>15</sup> the Principles on the Effective Investigation and Documentation of Torture,<sup>16</sup> supplemented by the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol);<sup>17</sup> and the Principles on the Effective Prevention and Investigation of EJEs,<sup>18</sup> supplemented by the Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol)<sup>19</sup> all make special provision for the establishment of COIs where existing inquiry procedures are unable and/or unwilling to carry out an effective investigation.

From these standards, general principles that govern how a COI should function can be deduced. They include:

### Scope of the inquiry

The COI's terms of reference should: be neutrally framed so that they do not suggest a predetermined outcome; state precisely which events and issues are to be investigated and addressed in the commission's final report; provide sufficient flexibility in the scope of inquiry to ensure that investigation by the commission is not hampered by overly restrictive or overly broad terms of reference.

### Guarantees of independence

The COI should be structurally and hierarchically independent of the authorities against which the complaint is brought. Irremovability of commissioners should be ensured, except on grounds of incapacity or behaviour rendering them unfit to discharge their duties, and pursuant to procedures ensuring fair, impartial and independent determinations. Commission members should also enjoy whatever privileges and immunities necessary for their protection, including in

<sup>15</sup> Independent Expert to update the Set of principles to combat impunity, Diane Orentlicher, *Report to the Commission on Human Rights*, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), principles 6-13.

<sup>16</sup> Principle 5.

<sup>17</sup> Office of the United Nations High Commissioner for Human Rights, Geneva, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. HR/P/PT/8/Rev.1 (2004), paras. 107-119.

<sup>18</sup> Principle 11.

<sup>19</sup> The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2016).

the period following their mandate, especially in respect of any defamation proceedings or other civil or criminal action brought on the basis of facts and/or opinions contained in the COI's report.

### **Membership selection and criteria**

Commissioners should be selected based for their recognized impartiality (the individual should have a reputation for fairness, and not have preconceived ideas or prejudice about the incident); competence (the individual should have expertise in law, medicine, forensic science, or any other relevant specialized field, and must be capable of evaluating and weighing the evidence and be able to exercise sound judgment); and independence (the individual should not be closely associated with parties potentially implicated in the violation, or too intimately connected with victims' groups, which may affect the COI's credibility). There should also be reasonable gender balance, as well as representation from groups whose members have been especially vulnerable to human rights violations.

### **Powers and resources of the commission**

The commission should be empowered with the authority to: compel testimony under legal sanction; order the production of documents; conduct on-site visits; prevent the burial or disposal of bodies until adequate post-mortem examinations have been concluded; receive evidence from abroad; and issue a public report. The COI should also be provided with sufficient and transparent funding to facilitate its independence and adequate material and human resources to help ensure its competence and credibility.

### **Notice of inquiry**

There should be wide and public notice of the appointment of a COI and the subject of its inquiry. The notice should include an invitation to submit relevant information and written statements to the commission and instructions to persons willing to testify.

### **Commission proceedings**

Following from general principles of criminal procedure, hearings by the COI should be conducted in public, unless in-camera proceedings are necessary to protect the safety of a witness.

### **Victim and witness protection**

Effective measures must be taken to ensure that complainants, witnesses and their families are protected from violence, threats of violence or any other form of intimidation or harassment.

## **Publicizing of commission's report**

The COI's final report should be made public in full within a reasonable period and disseminated as widely as possible, except where for security reasons, relevant portions of the inquiry are to be kept confidential. Following publicizing of the report, the government should undertake to furnish a public reply and/or indicate the actions it will take in response to the findings and recommendations of the COI.

## **National legal framework**

The Commission of Inquiry on Enforced Disappearances was initially constituted under the Commissions of Inquiry Act, 1956. In 2017, the Commission of Inquiry Act, 1956, was substituted with the Commissions of Inquiry Act, 2017. At present, the COIED derives its mandate from the 2017 Act.

Other relevant instruments to assess the legal framework governing the COIED include the Statutory Notification appointing the Commission and setting its Terms of Reference (TORs), and the Regulations adopted by the Commission regarding its procedure for registration, inquiry, hearing and investigation of complaints.

### **Commissions of Inquiry Act, 2017**

The Commission of Inquiry Act empowers the Government of Pakistan to appoint commissions for the “purpose of making an inquiry into any definite matter of public importance.” It defines public importance to include “a matter of general interest or direct or vital concern to the public.” Some of the salient provisions of the Act are:

#### **Time period**

Section 3(5) of the Act provides that the Federal Government shall specify the time period within which such inquiry shall be concluded and further provides “that the Federal Government may, on the request of the Chairman of the Commission, for reasons to be recorded, extend the time so specified.”

#### **Appointment of commissioners**

The 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 criteria on the basis of which appointments to the commissions shall be made.

#### **Immunity**

Section 17 of the law provides: “No suit or other legal proceedings shall lie against the Federal Government, the Commission or any member thereof, or any person acting under the direction either of the Federal Government or of the Commission in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder or in respect of

the publication, by or under the authority of the Federal Government, or the Commission, of any report, paper or proceedings.”

### **Final report**

The Act states that the final report or an interim report of the Commission shall be made public within thirty days of the submission of the report to the Federal Government. However, the Commission may, in “public interest”, recommend to the Federal Government that all or any part of the report may not be made public.

### **Powers of the commission**

The COI Act provides that commissions constituted under the Act shall have the powers of a civil court under the Code of Civil Procedure, 1908, including: “summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of any documents; receiving evidence on affidavits; issuing commissions for the examination of witnesses or documents; and requisitioning any public record or copy thereof from any court or office.”

In further provides that in case the specific nature of the inquiry so requires, the Federal Government may, by notification in the official Gazette, confer certain additional powers on the Commission.

### **Terms of reference of the commission**

Section 3(3) of the COI Act provides that the Commission shall conduct the inquiry and perform its functions in accordance with the Terms of Reference specified in the notification.

The Ministry of the Interior issued a notification constituting the Commission in March 2011. The Commission’s TORs defined in the notification include:

- Trace the whereabouts of allegedly enforced disappeared persons;
- Fix responsibility of individuals or institutions responsible;
- Register or direct the registration of First Information Reports (FIRs) against named individuals who in the view of the Commission were involved either directly or indirectly in the disappearance of an untraced person;
- Recommend Standard Operating Procedures (SOPs) to be adopted by law enforcement and intelligence agencies through which arrests/detentions of a suspected person could be recorded in one database; and

- Recommend SOPs to be adopted by all law enforcement and intelligence agencies through which the arrest/detention of a suspected person could be declared under the provisions of existing Acts/Rules.

The notification also provides that in addition to the powers defined under the COI Act, the Commission shall have the powers to order production of a person the Commission suspects is held in illegal detention of a law enforcement or intelligence agency.

### **Regulations of the commission**

Section 14 of the COI Act provides that the commissions constituted under the law shall have power to regulate their own procedure, including fixing the places and time of their sittings and deciding whether to sit in public or in private.

The Commission adopted Regulations setting out its procedures on 13 March 2011. These Regulations contain a number of provisions regarding the procedure to be followed by the Commission, including how to register of complaints; how to conduct inquiries; and how the Commission's hearings are to take place.

The Regulations provide for the following procedure for the Commission: Once a case is filed before the Commission or referred to it by the courts, human rights groups or the WGEID, the Commission shall call for a reply from the agency or person complained against. If considered necessary "in the interest of fair and expeditious disposal of the case", the Commission may fix a hearing for the complaint. In each case of a "missing person", a Joint Investigation Team (JIT) shall be constituted consisting of police officers and representatives of federal and provincial intelligence agencies - who will be in charge of investigating the matter. The team is required to report to the Commission on the results of the investigation. The Commission has the power to summon any alleged perpetrators, including State officials. If the Commission is of the view that law enforcement officials have been involved in a case of enforced disappearance, it may order the issuance of a summons to appear, as well as register a criminal case against all those involved.<sup>20</sup>

Notably, the Regulations also provide a definition of enforced disappearance, defining the crime 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."

<sup>20</sup> Chapters 3 and 4 of the Regulations.

## Progress reports of the commission

According to its monthly progress report from September 2020, the Commission received 23 new cases in August 2020, bringing the total number of cases received since March 2011 to 6752.

The largest number of cases received by the Commission are from Khyber Pakhtunkhwa (2862 – out of which 291 were reported from the former Federally Administered Tribal Areas), followed by Sindh (1618), Punjab (1406), Balochistan (509), Islamabad (291), Azad Jammu and Kashmir (57) and Gilgit Baltistan (nine).

Out of the 6752 cases received by the Commission, 4642 cases have been “disposed of” and 2110 cases are still pending. According to the Commission’s monthly reports, cases which the Commission categorizes as “disposed of” include those where people been “traced” (in jails, internment centres, 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 complaint, or in cases of “non-prosecution” by the complainants.<sup>21</sup>

The Commission’s monthly reports show that in 837 cases, “missing persons” were eventually found in internment centres or other detention facilities in the country. In a number of cases, the “missing persons” were traced in internment centres years after their families registered a complaint before the COIED. Mujahid Ali, for example, was reported as “missing” in January 2015. The Military Intelligence, however, only acknowledged that he was being detained in an internment centre in Lakki Marwat in July 2020, more than five years after he went “missing”.<sup>22</sup> 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 centres.

The Commission’s reports also indicate that in 213 cases, “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

<sup>21</sup> As provided in the COIED’s progress reports.

<sup>22</sup> Progress report of the COIED, July 2020.



or other security forces had killed the “missing person” in an “encounter”.<sup>23</sup> 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.

<sup>23</sup> Progress report of the COIED, January 2020.

## **Compliance with international standards**

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 guarantee the human rights of victims of enforced disappearance.

The Commission, while possibly performing some function in clarifying the fate or whereabouts of some “disappeared” persons, has in nine 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.

### **Definition of enforced disappearance**

As discussed above, 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.”

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. 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.”

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. And it does not recognize that State authorities do not necessary have to carry out an arrest or abduction- it can be done by non-State actors, where they have the “authorization, support or acquiescence of the state.”

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.<sup>24</sup> 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.

### **Enforced disappearance and military courts**

Another example is the trial of civilians for terrorism-related offences by military courts. Pakistan empowered military courts to try civilians accused of certain terrorism-related offences in secret proceedings in 2015.<sup>25</sup> This expanded jurisdiction of military courts lapsed in March 2019.

A number of people convicted by military courts for terrorism-related offences were reportedly subjected to enforced disappearance by military authorities as far back as 2009, and kept in secret detention for many years before their military trials. The laws empowering military courts to try terrorism-related offences had retrospective effect, and all arrests or detentions made even before the Army Act was amended in 2015 (and subsequently in 2017) were deemed to have been made “legally” under the military’s new powers. The COIED’s narrow definition of enforced disappearance appears to exclude such people from being considered “disappeared”, and consequently, for perpetrators being prosecuted and victims being provided reparations.

In its monthly reports, the COIED too has “disposed of” cases as “traced” where authorities have informed the Commission that “missing persons” were in detention following their trials by military courts. Abdul Wadood Ahmed, for example, was reported as missing in August 2011. Representative of the Military Intelligence submitted a report before the COIED in May 2020 that he had been convicted by a military court and was presently in detention in Mardan.<sup>26</sup> In the nine years from the complaint to the Commission and the admission that Abdul Wadood Ahmed was in detention following a conviction by

<sup>24</sup> The current status of the Regulations is unclear after the merger of the former “Federally Administered Tribal Areas” with the province of Khyber Pakhtunkhwa in 2018.

<sup>25</sup> For a detailed analysis of the compatibility of military trials with human rights standards, see International Commission of Jurists, “Military Injustice in Pakistan”, January 2019, accessed at: <https://www.icj.org/wp-content/uploads/2019/01/Pakistan-military-courts-Advocacy-Analysis-brief-2018-ENG.pdf>

<sup>26</sup> Report of the COIED, May 2020.

a military court, his detention was not acknowledged and his whereabouts were not disclosed.

### **No separate offence of enforced disappearance**

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 it has the mandate to hold perpetrators of enforced disappearance responsible, Pakistan's criminal laws do not currently recognize enforced disappearance as a distinct crime.

This is why enforced disappearances are 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. 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.

### **Independence of the commission**

The UN Impunity Principles provide that commissions of inquiry "must be established through procedures that ensure their independence, impartiality and competence."

The COIED was established pursuant to a notification by the Ministry of the Interior. 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.<sup>27</sup>

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 the

<sup>27</sup> Correspondence with the ICJ, September 2017.

Commission is seen to have limited authority over law enforcement and security agencies and why its orders are not complied with, a concern the WGEID also raised in its country report.<sup>28</sup>

### **Criteria for appointment of commissioners**

The composition of a commission is particularly important, as the quality and competence of commissioners generally determine the effective functioning of the commission. The UN Impunity Principles provide that the criteria of selection of members of the commission must be based on proven expertise and experience in human rights and other relevant fields. The commissioners should be of high moral character, impartiality and integrity and demonstrated commitment to human rights. There should also be reasonable gender balance, as well as representation from groups whose members have been especially vulnerable to human rights violations.<sup>29</sup>

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.

### **Procedure for appointment of commissioners**

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.

<sup>28</sup> Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2.

<sup>29</sup> Principle 7. “Guarantees of Independence, Impartiality, and Competence”, UN Impunity Principles.

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.

These concerns have manifested in practice as well. The COIED has been heavily criticized for its lack of impartiality. Voice for Baloch Missing Persons (VBMP), an organization comprised of family members of “missing persons” from Balochistan, has criticized the Commission for protecting the security agencies allegedly responsible for carrying out the enforced disappearances and has refused to appear before the Commission.

Amina Janjua, Chairperson of Defence for Human Rights, has also repeatedly expressed concern that the Commission’s members are not sympathetic to the cause of families of the disappeared.<sup>30</sup>

Furthermore, the Chairperson of the Commission, Justice (r) Javed Iqbal, has made a number of public statements that call into question his impartiality and commitment to human rights. In his briefing the National Assembly Standing Committee on Human Rights in 2018, for example, he claimed the issue of enforced disappearance is exaggerated by NGOs who are “working for foreign elements and they get their funding from abroad.” He also said that if he had the authority, he would have “placed a ban on the organizations.”<sup>31</sup>

Justice Javed Iqbal has also been involved in a number of other controversies, particularly in his capacity as the Chairperson of the National Accountability Bureau (NAB).<sup>32</sup> In a recent judgment, the Supreme Court of Pakistan observed that as the Chairperson of NAB, Justice Iqbal had been using his powers of arrest in an arbitrary manner and in violation of the rights of accused persons, including their right to liberty and fair trial.<sup>33</sup> Certain human rights organizations have also expressed concern that the Government is using NAB to detain its critics.<sup>34</sup>

<sup>30</sup>Marvi Sirmed, “Human Rights defenders say that the Chair of Inquiry Commission on Enforced Disappearances should be replaced,” *Daily Times*, accessed at:

<https://dailytimes.com.pk/229486/human-rights-defenders-say-that-the-chair-of-inquiry-commission-on-enforced-disappearances-should-be-replaced/>

<sup>31</sup> “4,000 Pakistanis handed over to foreigners for dollars”, *The News*, 17 April 2018, accessed at: <https://www.thenews.com.pk/amp/305463-4-000-pakistanis-handed-over-to-foreigners-for-dollars>

<sup>32</sup> The National Accountability Bureau is a statutory anti-corruption body that was established by the National Accountability Ordinance, 1999.

<sup>33</sup> Supreme Court of Pakistan, Civil Petitions No.2243-L and 2986-L of 2019.

<sup>34</sup> See, for example, Human Rights Watch, “Pakistan: End Anti-Corruption Agency’s Abuses”, 6 August 2020, accessed at: <https://www.hrw.org/news/2020/08/06/pakistan-end-anti-corruption-agencys-abuses>

It is also not clear why Justice Javed Iqbal continues to head the COIED even after his appointment as the Chairperson of the National Accountability Bureau in October 2017, especially given concerns raised by the WGEID that the Commission was functioning with limited capacities in staffing.

### **Irremovability of commissioners**

As discussed above, international standards provide that for a commission to be independent, irremovability of commissioners should be ensured, except on grounds of incapacity or behaviour rendering them unfit to discharge their duties, and pursuant to procedures ensuring fair, impartial and independent determinations. The legal framework governing the COIED makes no such provision. The absence of any protections in respect of removability leaves members vulnerable to the risk of being removed for impermissible grounds or for no expressed grounds at all and at the whim of the executive.

### **Scope of inquiry**

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**

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.<sup>35</sup> In its country report, the WGEID recommended that, as a rule, relatives of

<sup>35</sup> Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2.

disappeared persons should be heard in confidential meetings before the Commission.

### **Resources for the commission**

The UN Impunity Principles provide that Commissions should have transparent funding to ensure that their independence is never in doubt as well as “sufficient material and human resources” to ensure their credibility is never in doubt.<sup>36</sup>

Section 13(2) of the COI Act states that the Federal Government “shall provide all necessary funds and facilities to enable the Commission to perform its functions under this Act.”

However, a number of reports relating to the Commission’s functioning have highlighted the lack of adequate resources.

In its report following a visit to Pakistan in 2012, the UN Working Group on Enforced or Involuntary Disappearances noted the “limits imposed on a two-member commission, notably with regard to the limited capacities in staffing”, and recommended: “The Commission of Inquiry should be strengthened. Its membership should be extended to allow parallel hearings. Its staff and resources should also be strengthened.”<sup>37</sup>

The UN Human Rights Committee made a similar recommendation in its 2017 Concluding Observations to its report on Pakistan’s compliance with its ICCPR obligations, and said Pakistan “should further strengthen the authority and the capacity (financial and personnel) of the Commission of Inquiry on Enforced Disappearances so that the latter can function effectively.”<sup>38</sup>

There has been no effort to act on the recommendations of either body.

### **Public report**

Apart from its monthly progress reports that give updates on the cases received and “disposed of” by the Commission, the Commission has not published any interim report in its nine years of operation. Given the repeated extensions of the Commission’s mandate, it seems uncertain when, if at all, the COIED’s findings and recommendations would be made public.

<sup>36</sup> Principle 11, UN Impunity Principles.

<sup>37</sup> Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2.

<sup>38</sup> *UN Human Rights Committee*, “Concluding observations on the initial report of Pakistan”, July 2017, UN Doc. CCPR/C/PAK/CO/1.



This is of even more concern as the judicial commission formed to investigate enforced disappearance before the COIED was established had prepared a report containing its findings and recommendations. The Commission had submitted the report to the Government in January 2011; however, that report was never made public.

### **Access to courts**

Families of “missing persons” often approach high courts by making habeas corpus petitions to ascertain the whereabouts of their loved ones. In a number of cases, however, courts have refused to hear their petitions and have directed them to lodge their complaints before the COIED instead. Given the concerns about the Commission’s lack of independence and impartiality, as well as other shortcomings in its legal and normative framework, this practice further impedes the access to justice and redress for victims.

It should be recalled that the Declaration on the Protection of all Persons from Enforced Disappearance provides that:

*Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.*<sup>39</sup>

### **Failure to ensure accountability**

In its follow up report to its mission to Pakistan, the UN Working Group on Enforced and Involuntary Disappearances (WGEID) found “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.”<sup>40</sup>

<sup>39</sup> Article 13(1), UN Commission on Human Rights, *Declaration on the Protection of All Persons from Enforced Disappearance*, 28 February 1992, E/CN.4/RES/1992/29.

<sup>40</sup> Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Follow-up report to the recommendations made by the Working Group, 13 September 2016, UN Doc. A/HRC/33/51/Add.7.

This also appears to be true for the COIED. While the Commission has made some progress in documenting cases of enforced disappearances and “trace the whereabouts” of a number of disappeared people, it has failed in holding perpetrators accountable.

The COIED’s monthly reports are silent on whether it has taken any steps to bring perpetrators of enforced disappearance to justice. The only indication that there had been some progress in this regard is a statement by the Chairperson of the Commission, Justice (r) Javed Iqbal, to the Senate Human Rights Committee, where he said “action had been taken against 153 army personnel” in relation to their role in enforced disappearances.<sup>41</sup>

However, there is no other public record of such “action”. In its 2019 report on the follow-up to the Human Rights Committee’s Concluding Observations, Pakistan also made no indication of any such steps, even though the Committee had recommended that Pakistan should ensure all perpetrators of enforced disappearances “are prosecuted and punished.”<sup>42</sup>

The Commission’s sole focus on “tracing” people who are “missing” is also visible in the case of Idrees Khattak, a human rights defender, was subject to enforced disappearance in November 2019. His whereabouts remained unknown for more than six months until June 2020, when it was submitted before the Commission that he was being tried under the Official Secrets Act (the Commission’s report does not specify the Government agency that acknowledged the detention). Even though Idrees Khattak’s whereabouts continue to remain unknown, the Commission considers his case “disposed of” and is yet to take action against perpetrators.

<sup>41</sup> “The Chairman Committee (Senator Mustafa Khokhar) inquired if any action had been initiated against those individuals who were thought to be involved in abducting people and depriving missing persons of their liberty. The Committee was apprised that action had been taken against 153 army personnel,” as reproduced in “Missing Persons and More Questions”, Farhatullah Babar, The Friday Times, accessed at: <https://www.thefridaytimes.com/missing-persons-and-more-questions/>

<sup>42</sup> UN Human Rights Committee, Concluding observations on the initial report of Pakistan, Addendum, Information received from follow-up to the concluding observations, UN Doc. CCPR/C/PAK/CO/1/Add.1, May 2019.

## Conclusion and recommendations

In his global assessment of commissions of inquiries, the former United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions (Special Rapporteur) found that “many commissions have achieved very little...and that many of them have in fact done little other than deflect criticism.”<sup>43</sup>

The Special Rapporteur concluded that the commission’s mandate, its membership, the process by which it was selected, its terms of appointment, the availability of effective witness-protection programmes and the provision of adequate staffing and funding should all be examined to ascertain whether a commission meets relevant international standards. He stressed that “experience demonstrates that the standards are more than just best practice guidelines: they are necessary preconditions for an investigation capable of addressing impunity. If they are not met in practice, a commission is highly unlikely to be effective.”

These findings also hold true for the COIED. 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.

In its response to the List of Issues prepared by the UN Human Rights Committee in its review of Pakistan’s implementation of the ICCPR, for example, Pakistan claimed: “In order to take effective measures to deal with the issue of enforced disappearances...the Federal Government set up a Commission of Inquiry on Enforced Disappearances (COIED) under the Pakistan Commission of Inquiry Act 1956. COIED has actively investigated cases of enforced disappearances. As a result of this initiative, a number of cases have been disposed of.”<sup>44</sup> These assertions were repeated in Pakistan’s national report for its 2017 Universal Periodic Review process.<sup>45</sup>

<sup>43</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Report to the General Assembly*, UN Doc. A/HRC/8/3 (2 May 2008).

<sup>44</sup> UN Human Rights Committee, List of issues in relation to the initial report of Pakistan, Addendum, Replies of Pakistan to the list of issues, UN Doc. CCPR/C/PAK/Q/1/Add.1, 23 March 2017.

<sup>45</sup> UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Pakistan, UN Doc. A/HRC/WG.6/28/PAK/1, 4 September 2017.

In reality - as noted by the WGEID as well - there is a “climate of impunity” in Pakistan regarding enforced disappearances.<sup>46</sup>

Impunity means the impossibility of bringing violators of serious crimes and gross human rights violations to account, typically because there is an absence of a proper investigation that would lead to the arrest, prosecution and sentencing of those responsible. It results in concealing the truth; denying victims the right to effective remedy and reparation; and emboldening perpetrators of human rights violations. In Pakistan, impunity has also played a key role in the practice of enforced disappearances persisting, and also spreading — both in terms of geographical reach and also the categories of people being targeted.

In his report, the Special Rapporteur said that the “basic question that must guide an assessment of a commission is whether it can, in fact, address impunity.”<sup>47</sup> The Commission of Inquiry on Enforced Disappearances completely fails on that front. In its current form, the COIED has enabled impunity instead of providing redress to victims. The flaws in the legal and normative framework establishing the Commission identified in this paper have had profound implications on the impartiality, competence and overall effectiveness of the Commission, and have led to a compromised inquiry process where investigations do not lead to accountability, nor do they result in proper and adequate reparation for victims.

The failure of the COIED also demonstrates a larger problem: Though ostensibly formed to provide a measure of public accountability, more often than not, COIs have promoted impunity by diverting investigation of human rights violations and crime through the criminal justice process into a parallel ad hoc mechanism vulnerable to political interference and manipulation. Recent experiences in Pakistan, the South Asia region and around the world suggest that without substantial reform to existing law and practice, continued use of COIs will not succeed in providing effective remedies to victims of human rights violations.

<sup>46</sup> Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Follow-up report to the recommendations made by the Working Group, 13 September 2016, UN Doc. A/HRC/33/51/Add.7.

<sup>47</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Report to the General Assembly*, UN Doc. A/HRC/8/3 (2 May 2008).

**The ICJ, therefore, makes the following recommendations:**

*Regarding the Commission of Inquiry on Enforced Disappearances:*

- Do not extend the mandate of the Commission of Inquiry on Enforced Disappearances beyond 14 September 2020, when its current tenure expires;
- Make public the final report of the Commission; and
- Make public the report of the judicial commission that preceded the COIED.

*While the existing Commission in mandate, form and practical function is beyond reform, Parliament should take immediate steps toward the establishment of a new Commission on Enforced Disappearances, but only with a mandate and constitution that fully cures the deficiencies as outlined above of the existing COIED. 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:
  - a. 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;
  - b. 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;
  - c. 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;

- d. 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;
- e. Contain a clearly defined process and grounds for removal of the commissioners;
- f. Ensure the commission has sufficient material and human resources;
- g. Guarantee that the final report of the commission be published and made public without undue delay; and
- h. Establish a witness protection unit within the commission to oversee the protection of witnesses.

*Regarding impunity for enforced disappearance*

- 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;
- 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 have criminal responsibility 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;
- 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 centralised registers of all places of detention.

*Regarding reparations for victims*

- Set up a program of 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.

*General recommendations*

- Extend an invitation to the UN WGEID for a follow-up visit; and
- Ratify or accede to the International Convention for the Protection of All Persons from Enforced Disappearance.





## Commission Members

March 2020 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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