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UNVEILING SHADOWS: *JUS COGENS* IMPERATIVE TO CRIMINALIZE ENFORCED DISAPPEARANCES IN PAKISTAN

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Abstract

The United Nations, aiming to eradicate enforced disappearance, introduced the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAPED), mandating signatory States to take preventive actions. Enforced disappearance is also deemed a crime against humanity under other international treaties. However, Pakistan has not ratified the ICPAPED, and its national laws lack specific provisions criminalizing enforced disappearance. Additionally, Pakistan is involved in various international treaties that uphold jus cogens, a fundamental principle of international law considered non-derogable. Given this context, the article highlights the misalignment of Pakistan's national laws with the principles of jus cogens and underscores the urgent need for Pakistan to enact specific legislation that criminalizes enforced disappearances in line with international standards.

Keywords: *international law, jus cogens, convention, enforced disappearance, criminalize, legislation, statute, Pakistan*

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The principle of *jus cogens* is a cornerstone of international law. These are the rules and regulations that have gained universal acceptability and hence cannot be changed via treaty or tradition.[1] Human rights, the prohibition of genocide, slavery, and torture, and other norms have all been codified as jus cogens by the international community.[2] *Jus cogens* is a foundational principle of international law that promotes justice, peace, and respect for human dignity. The *jus cogens* concept provides crucial safeguards against abuses of international law and injustice.

Coercion-based violations of human rights are fading away in certain parts of the globe, but they persist in others. When the government or other powerful forces kidnap or abduct people, they frequently keep the public in the dark about their whereabouts and circumstances. The crime has not only affected the victims and their families, but it also serves as a warning to the public about the government's actions and fosters an environment where wrongdoing often goes unpunished. Understanding the intricacy and implications of enforced disappearance is essential in the quest for justice and human rights for all

1 Erjona R. (2016), 'Binding International Norms, Jus Cogens', *European Journal of Sustainable Development*, Vol. 5, No. 3, p. 318.

2 Maruf B. (2021), 'Prosecuting Crimes against Humanity and Genocide at the International Crimes Tribunal Bangladesh: An Approach to International Criminal Law Standards', *Laws,* Vol. 10, No. 4, p. 82.

individuals. The practice of enforced disappearance is linked to *jus cogens* since it violates fundamental human rights.[3] A person's right to life is violated by enforced disappearance, as are their rights to liberty, security, and recognition as a person before the law, which are all guaranteed by numerous international conventions. Furthermore, torture, extrajudicial murders, and the denial of fundamental procedural rights are often the result of enforced disappearances, all of which are forbidden under *jus cogens* principles.[4] The international community has acknowledged the gravity of enforced disappearance and its incompatibility with *jus cogens* rules via a variety of legal tools and methods.[5]

The preamble to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAPED) acknowledges the duties stemming from the concept of *jus cogens*, and the text itself establishes that enforced disappearance constitutes a separate crime under international law.[6] Beyond just condemning enforced disappearance, *jus cogens* obligates nations to take active measures to avoid and investigate instances of it. *Jus cogens* requires that all necessary steps to stop enforced disappearances be taken, that those responsible should be brought to justice, and that compensation should be given to the victims and their families.[7] Failure to do so threatens the legitimacy of international law and fosters a culture of impunity that leads to subsequent violations of human rights.

For decades, enforced disappearances in Pakistan have thrown a shadow on the country's human rights record. Individuals are frequently being abducted and detained without legal proceedings or disclosure of their whereabouts by state security forces or their representatives. People from all walks of life, including political activists, journalists, members of religious and ethnic minorities, and even innocent bystanders caught in the crossfire of anti-terror operations, have fallen victim to enforced disappearances.[8] In addition to being a travesty of justice

3 Nikolas K. (2012), 'The International Convention for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, With Specific Reference to Extraordinary Rendition', *Melbourne Journal of International Law* , Vol. 13, No. 1, p. 1.

4 Danushka S. M. (2017), 'The Vanishing Act: Punishing and Deterring Perpetrators Through the Concurrent Application of Diverse Legal Regimes to Enforced Disappearances', *Florida Journal of International Law,* Vol. 29, No. 2. Retrieved from: https://scholarship.law.ufl.edu/fjil/vol29/iss2/3 [accessed 03 October 2023].

5 Pérez-León-Acevedo J. P. (2017), 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses', *Anuario Mexicano de Derecho Internacional,* Vol. 17, p. 145.

6 Jeremy S. (2012), 'Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law', *Nordic Journal of International Law,* Vol. 81, No. 4, p. 537.

7 Jeremy S. & Elisenda CM. (2022), 'The Global Practice of Systematic Enforced Disappearances of Children in International Law: Strategies for Preventing Future Occurrences and Solving Past Cases', *Catholic University Law Review,* Vol. 71, No. 1, p. 33.

8 The International Commission of Jurists (2017), 'No More "Missing Persons": The Criminalization of Enforced Disappearance in South Asia'. Retrieved from: https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-DisappearancePublications-Reports-Thematic-Reports-2017-ENG.pdf [accessed 04 October 2023].

and due process, this practice inflicts untold agony on families who are kept in the dark regarding the whereabouts of their loved ones.

Pakistan, as a party to many human rights conventions and treaties, has a responsibility to address the issue of enforced disappearances. The preservation of people's rights to life, liberty, and security are among these duties, which are spelled out in many UN conventions and treaties to which Pakistan is a party, but Pakistan has not yet signed or ratified the ICPAPED.

Although Pakistan is one of the few countries where the crime of enforced disappearance has not yet been codified at the national level, the country insists that its laws offer adequate protection against several other transgressions that are either directly or indirectly related to the phenomenon. Specific legal requirements are needed to address the unique nature of enforced disappearances, which may be both systematic and State sanctioned. The possibility of insufficient investigation, prosecution, and punishment for those engaged in enforced disappearances, thereby depriving victims and their families of access to justice, rises in the absence of a defined legal framework. The term "enforced disappearance" refers to the practice of taking someone against their will and then keeping quiet about what happened to them or where they are. Incomplete justice and difficulties in holding offenders responsible might result if this nuance of criminality is not defined and recognized within legal systems.

This issue of human rights infringement is addressed under Articles 4, 9, 10, 10 A, and 25 of the Constitution.[9] Although these fundamental safeguards establish the groundwork for protecting people from enforced disappearance, they are inadequate due to the lack of a specialized legal structure intended to handle this grave issue. There is an urgent need for comprehensive legislation in Pakistan that defines enforced disappearances, sets clear accountability mechanisms, and describes the legal rights of victims and their families, since these cases continue to be a major human rights concern in the country.

The widespread problem of enforced disappearances in Pakistan calls for a thorough investigation of systematic abuses. The textual discussion of the concept of *jus cogens* refers to immutable and generally accepted principles of international law. This article raises the issue at the international level, with the help of *jus cogens* legal theory, according to which prevention of enforced disappearances is not only in the interest of individual States but also a global duty. This article underscores the non-negotiable character of the principles it defends, which transcend political borders and reinforce the universality of fundamental human rights by emphasizing their position as *jus cogens*.

The research is based on doctrinal analyses including an examination of primary and secondary sources, as well as relevant laws and supplementary

9 The 1973 Constitution of the Islamic Republic of Pakistan.

materials. References to primary sources include, but are not limited to United Nations conventions, various international treaties and accords, relevant laws, the Constitution of Pakistan, and judgments of superior courts. Supplementing the primary materials, the study additionally makes use of journal articles as well as other online sources pertinent to the debate.

1. *Jus cogens* imperative in international law

Jus cogens must be formed and acknowledged in contemporary international law for the international legal system to have a set of foundations that includes rules and norms. To include not just the law of treaties and the law of nations but also the foundation of international law, the concept of *jus cogens* has evolved through time.[10] Article 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT) codified jus cogens as an absolute principle of international law. Article 53 of the VCLT defines jus cogens rules as those that must be followed even if they contradict other standards. A norm of general international law is a rule of law between States that is acknowledged universally and can only be superseded by another standard of the same kind.[11] It is for this reason that *jus cogens* is considered a bedrock principle of international law. A standard must contain the required substance and be ratified by enough States in order to be declared *jus cogens*, notwithstanding the fact that *jus cogens* takes priority over other principles of international law.[12] The term "*jus cogens*" is not defined precisely in international law. However, *just cogens* is a unique standard. *Jus cogens* norms are determined after extensive research and analysis. Whether or not a standard is acknowledged and recognized in international law is one of the primary prerequisites for defining a norm as a *jus cogens* norm.[13]

Human rights treaties are interpreted and applied in a manner consistent with international *jus cogens* norms, which are designed to protect and uphold human rights. Human rights do not fall under *jus dispositivum* and are not negotiable since they are a part of the international legal system.[14] Governments have the purpose of applying, observing, and recognizing the *jus cogens* norm as a legal duty since the standard is one of the traditional rights. When States adopt a standard, that standard might be considered a higher standard and should be applied in such a case.[15] Maintaining public order and the rule of

10 Ulf L. (2020), 'The Legal Consequences of Jus Cogens and the Individuation of Norms', *Leiden Journal of International Law*, Vol. 33, No. 4, p. 893.

11 Article 53 of the Vienna Convention on the Law of Treaties.

12 Thomas K. (2017), 'Jus Cogens Re-examined: Value Formalism in International Law', *European Journal of International Law,* Vol. 28, No. 1, p. 295.

13 Sean D. M. (2020), 'Peremptory Norms of General International Law (Jus Cogens) and Other Topics: The Seventy-First Session of the International Law Commission', *American Journal of International Law,* Vol. 114, No. 1, p. 68.

14 Sufyan D. (2016), 'Transnational Corporations and International Human Rights Law', *Notre Dame Journal of International & Comparative Law*, Vol. 6, No. 1, p. 119.

15 Thomas K., *supra* note 14, p. 305.

law, protecting the population from external attacks, protecting the welfare and safety of citizens, and protecting citizens who are abroad are all moral responsibilities of the State.[16]

An important pillar of the international law, *jus cogens* gives the international legal system its character of necessity and resistance. The importance of *jus cogens* lies in the fact that it provides broad protection against atrocities such as genocide and torture. Because of its non-contractual nature, *jus cogens* law forms a framework that guides the actions of governments, thereby creating specific principles rather than competing legal requirements. Governments are effectively prevented by the inevitability of the consequences of violating these binding principles, which encourages collective action and the highest moral standards. By looking at *jus cogens*, which provides a coherent and international framework that goes beyond borders, the implementation of international law is given greater credibility. This approach not only improves the clarity of law and policy, but also limits the sovereignty of the State when shared values are violated. Thus, *jus cogens* serves as a precedent for State action, strengthening the international legal system against the threat of a changing global environment. *Jus cogens* helps to grow and consolidate international law by ensuring that some basic concepts remain indisputable. For justice and human dignity to remain the pillars of global governance, *jus cogens* must reflect and preserve the collective conscience of international community.

2. Enforced disappearance under international law

When the State or agents acting on its behalf arrest, detain, or abduct an individual and subsequently deny the detention or hide the person's location, leaving them without any legal protection, that individual's human rights are infringed upon. Very often, those who have vanished are never seen again, and their relatives have no idea what happened to them. Abduction takes the victim outside the realm of legal protection, depriving them of all rights and placing them entirely at the discretion of the abductors. The victim may then be subjected to torture and live in constant fear for their life. This kind of fracture typically recurs years after it has been treated.

The international community is committed to addressing the issue of enforced disappearances through the 1992 Declaration on the Protection of all Persons from Enforced Disappearance (the 1992 Declaration),[17] the 1994 Inter-American Convention on Forced Disappearance of Persons (the 1994 Inter-American Convention),[18] the 1998 Rome Statute of the International Criminal

16 Steven JH. (1991), 'The First Duty of Government: Protection, Liberty and the Fourteenth Amendment', *Duke Law Journal,* Vol. 41, p. 507.

17 UN General Assembly Resolution 47/133 (1992), *Inter-American Convention on Forced Disappearance of Persons*. Retrieved from: http://www.cidh.oas.org/Basicos/English/Basic11.Disappearance.htm [accessed 03 October 2023].

18 *Ibid*.

Court (the 1998 Rome Statute),[19] and the ICPAPED.[20]

International law aims to address the enforced disappearances caused by these instruments, which all play an important role in promoting accountability and deterrence. The 1992 Declaration refers to the rejection of these practices and the State's responsibility to prevent and punish enforced disappearances. Although the announcement is not binding, it is based on morals and ethics. The 1998 Rome Statute created the legal framework for ending enforced disappearances. It allows the International Criminal Court (ICC) to prosecute missing persons for crimes against humanity. In addtition to these international legal instruments, the ICPAPED offers a detailed framework to address the limitations of current instruments. It outlines the rights of victims and their families, and the obligations of states to prevent, investigate, and punish enforced disappearances. Furthermore, ICPAPED establishes the Committee on Enforced Disappearances (CED), a body of independent experts tasked with monitoring the implementation of the convention. Participating countries seek to adopt laws and other measures to ensure that enforced disappearances are a criminal offense, as evidence of their agreement to end serious human rights violations.

2.1. Enforced disappearance under the 1998 Rome Statute

Officially established in 2002, the 1998 Rome Statute defines enforced disappearance as a crime in its Article 7(i).[21] The 1998 Rome Statute defines "enforced disappearance" as a person who has the knowledge, consent, or authorization of a State or political organization to arrest, detain, or remove a person and who subsequently refuses to tolerate the loss of one's freedom and to know the fate of this person.[22]

A single case of enforced disappearance can be deemed a crime against humanity if it is part of a wider, systematic assault on people. However, disappearances need not be widespread or systematic to be considered enforced.[23] The 1998 Rome Statute's Article 7 establishes the crime of enforced disappearance as a serious international offense.[24] The phrase has been referred to as everything from the "eternal crime" to the "octopus's crime." Multiple

19 Rome Statute of the International Criminal Court 2010. Retrieved from: http://untreaty.un.org/cod/icc/statute/romefra.htm [accessed 04 October 2023].

20 International Convention for the Protection of All Persons from Enforced Disappearance 2010. Retrieved from: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced [accessed 04 October 2023].

21 *Supra* note 19.

22 *Ibid*.

23 Kirsten A. (2006), 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?', *Melbourne Journal of International Law* 7 (2). Retrieved from: https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1681213/Anderson.pdf [accessed 04 October 2023].

24 Dalia VM., Justinas Ž, (2010), 'The Concept of Enforced Disappearances in International Law', *Jurisprudence,* Vol. 120, No. (2), p. 197.

people may face charges at various times during the disappearance, regardless of whether they knew or were aware of one another's involvement.

Freedom consciousness and information withholding are the two fundamental components of the crime. The person who does the act of freedom need not be the one to keep the context of the act secret, and *vice versa*. There might have been more than one person responsible for the crime. The law makes it illegal to conceal the fact that one has arrested, detained, or abducted another person, or to conceal information regarding the fate or whereabouts of an individual or individuals. The offender must have been aware that his actions were part of a larger, more organized campaign to harm innocent people. The 1998 Rome Statute's version of the offense adds certain novel element clarifying that it is the responsibility of the state or political groups to implement a policy of enforced disappearance.[25]

Meanwhile, neither the 1992 Declaration nor the 1994 Inter-American Agreement include any reference to political organizations as sources of authorization or support for such an act. Article 3 of ICPAPED stipulates that a member State is responsible for investigating disappearances committed without official engagement, while the most current draft of this Convention only refers to direct or indirect State involvement.[26] This is why it is crucial to explore the rationale behind the 1998 Rome Statute's provisions and the proper interpretation of the term "political organization" in this context.

The 1998 Rome Statute requires that public officials take a proactive role and demonstrate a genuine sense of responsibility by informing and engaging with those impacted by these incidents, thereby fostering a culture of transparency and accountability. This two-pronged approach provides a comprehensive response to crime and promotes justice at the international and national levels. The principle of the Rome Statute protects the rights of victims. The law also requires States to cooperate in expediting the deportation of suspects and providing relevant information.

By working together, the international community can effectively investigate and prosecute violent crimes despite legal obstacles. The powers of the Rome Statute extend not only to State actors but also to private citizens, which encourages accountability even from those in positions of power. This provision helps deter criminal activity by sending a clear message that punishment will not be tolerated. In conclusion, the Rome Statute is a trailblazer in the fight against enforced disappearances, as it creates a comprehensive legal framework, prioritizes the rights of victims, and promotes international cooperation.

25 Jeremy Sarkin, *supra* note 6, p. 556.

26 Lene G. (2021), 'State Responsibility for a Failure to Prevent Violations of the Right to Life by Organized Criminal Groups: Disappearances in Mexico', *Human Rights Law Review,* Vol. 21, No. 2, p. 329.

2.2. International Convention for the Protection of all Persons from Enforced Disappearance

The ICPAPED provisions are primarily based on the United Nation's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and it is awaiting ratification by a necessary number of nations before entering into effect.[27] The positive duties of nations are emphasized throughout the drafted agreement. The Convention provides a more comprehensive definition of "victim" than the 1992 Declaration or regional agreements. Deprivation of liberty by agents of the state or by people or groups acting with the authority, support, or consent of the state is considered an enforced disappearance if the state refuses to acknowledge the deprivation of liberty or disclose the disappeared person's secret fate or whereabouts.[28] The term "victim" refers to someone who has been abducted as a direct consequence of an enforced disappearance, as defined by the ICPAPED. Victims may be either directly or indirectly affected by this definition. As a consequence, the term "victim" is used to describe not just those who have been abducted but also everyone who has been harmed as a direct result of an enforced absence.[29] The latter is especially crucial in circumstances of enforced disappearance, when the victim's relatives may be viewed (directly or indirectly) as victims of torture due to their lack of knowledge regarding the location of their relatives.[30] It is the first time a human rights convention has explicitly recognized a victim's right to be informed about the investigation's status, the missing person's fate, and the circumstances surrounding their disappearance.[31] The ICPAPED provides a definition of "victim" and a list of possible forms of redress. The right to compensation encompasses not only monetary losses but also non-monetary losses such as enhancements, rehabilitation, satisfaction (including the restoration of esteem and reputation), and a guarantee that the crime will not be repeated.[32]

The UN General Assembly Resolution No. A/RES/60/147 (the UN Resolution) acknowledged the necessity of effective redress. According to the UN resolution, all member States must investigate the matter and bring

27 Enforced Disappearances (2010), *Fact Sheet no. 6/ Rev.3*. Retrieved from: http://www2.ohchr.org/english/issues/disappear/index.htm [accessed 05 October 2023].

28 Kirsten A. (2006), *supra* note 28.

29 Mercedes SP. et al. (2021), 'The Search Process: Integrating the Investigation and Identification of Missing and Unidentified Persons', *Forensic Science International: Synergy* 3, (2021). Retrieved from: https://www.sciencedirect.com/science/article/pii/S2589871X21000243 [accessed 05 October 2023].

30 Ariel ED. (2019), 'The Latin-American Flavor of Enforced Disappearances', *Chicago Journal of International Law,* Vol. 19, No. 2, p. 423.

31 Marloes van N. (2021), 'A Critical Reflection on the Right to the Truth about Gross Human Rights Violations', *Human Rights Law Review*, Vol. 21, No, 4, p. 874.

32 UN General Assembly Resolution No. A/RES/60/147 (2005). Retrieved from: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation [accessed 06 October 2023].

criminal charges against the perpetrators if they find enough evidence. And the responsibility to punish the culprit, work together, and assist the international legal agencies responsible for investigating and prosecuting such crimes if they are proven guilty. Member States are expected to work together for the sake of international justice by making it easier for offenders to be extradited to other member's States or to appropriate international courts. Helping and safeguarding victims and witnesses is a requirement of international law and human rights norms, for example in relation to the prohibition of torture.[33]

A Committee on Enforced Disappearances (CED) is set up under the ICAPED to monitor its implementation. The CED may review reports, requests, and notifications from the government. The ICAPED also includes Article 30 which allows the CED to communicate requests for urgent actions and temporary measures to the member States, in addition to the mandatory application process of Article 29 and the optional procedures for individual and interstate appeals, in accordance with Articles 31 and 32. In the event that the CED receives a request to look for a missing person, it may ask the relevant State party to report back within a certain period of time with details on the whereabouts of the missing person. Anyone with a valid interest may make such a request, including the abducted person's family, legal guardian, or agent. A request may be granted only if it satisfies the requirements set below. The same criteria for the inadmissibility of individual applications apply, i.e., the application is not manifestly groundless; it does not constitute an abuse of the right to make such requests; the competent authorities of the relevant signatory state have been informed, if applicable; it does not violate the terms of this Agreement; and the same case is not pending in another international investigation.[34]

It is generally agreed that enforced disappearance is a gross abuse of human rights. Several international human rights organizations, as well as the 1998 Rome Statute and other regional human rights agreements, endorse against enforced disappearance. There is consensus regarding the nature, the risk, and the need to address it and support victims, but there is some disagreement over how to define enforced disappearance. Countries interested in committing to the ICPAPED may find this Convention provides a comprehensive, global definition of "enforced disappearance", expanding the scope and understanding of this human rights issue. Thus, the ICPAPED establishes a system of monitoring and reporting on human rights breaches and directs the provision of adequate remedies for victims of such violations.[35] For victims of human rights breaches,

33 *Ibid*, para 4 and 5.

34 Carlos S. (2021), 'Forced Disappearances and the Inequalities of a Global Crime', *Alternatives* Vol. 46, No. 1, p. 17.

35 Carlos M. et al. (2022), 'Forced Disappearances and Missing People in Colombia, South America', *Forensic Science International: Reports,* No. 6. Retrieved from: https://www.sciencedirect.com/science/article/pii/S2665910722000330 [accessed 06 October 2023].

this significant UN document will aid in the creation of applicable law and the establishment of alternative complaint systems.

Overall, the ICPAPED stands as a beacon of justice, accountability, and the safeguarding of individuals from abuses of power. It represents a significant commitment to upholding human rights and preventing violations in the form of enforced disappearances. The Convention supports the universal obligation to protect human dignity and the rights of all people by establishing clear guidelines and criteria. Furthermore, the Convention distinguishes between the victim's right to truth, justice, and compensation. The CED is another body that monitors incidents and ensures that everyone complies with the law. The increase in signatories to the Convention reflects international recognition of the importance of enforced disappearances and the role the Convention plays in this fight. ICPAPED's work is critical to building a global, just, and compassionate community for accountability, justice, and protection against the victimization of vulnerable people.

3. Application of *jus cogens* to human rights

Human rights legislation, which is more specific than broader international law, creates through international organizations a network of mutual obligations that may not always align with each country's individual interests.[36] For example, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) ensures the right to a fair trial for the accused, in alignment with international law, indicating that this principle is broadly supported within state institutions and reinforced by authoritative legal perspectives.[37] However, one may wonder whether this regulation has reached the level of *jus cogens* or the imperial standard. If a treaty clashes with an inflexible rule of general international law, the pact is null and void under the concept of j*us cogens*, as stated in Article 53 of VCIT. The question of what kind of rule should be considered *jus cogens* has long been contentious. Due to confusion about the stance on other subjects not stated in the article, the International Law Commission opted against providing examples of *jus cogens* standards in Article 53.[38] The rule of law, the administration of justice, effective governance, and principles of governance all contribute to what is often known as "access to justice". Justice is the first virtue of social institutions, as truth is a system of thought. The State is responsible for implementing measures

36 Bhupinder C. (2018), 'Customary International Law: A Third World Perspective', *American Journal of International Law,* Vol. 112, No. 1, doi:10.1017/ajil.2018.12.

37 Paul MT. (2020), 'Article 14: Fair Trial Rights. In A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights', in *The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge: Cambridge University Press. doi:10.1017/9781108689458.017.

38 Dordeska M. (2015), 'The Process of International Law-Making: The Relationship Between the International Court of Justice and the International Law Commission', *International and Comparative Law Review,* Vol. 15, No. 1, p. 7.

to minimize harassment of victims, protect them from threats, uphold their right to privacy, assist them in accessing justice, and provide all suitable remedies, thereby ensuring victims can effectively exercise their right to legal redress.[39]

The right to access the legal system is either explicitly stated or implicitly guaranteed in the constitutions of all countries with contemporary legal systems. It means nothing more than being legally able to show up to court. People have the right to (i) obtain assistance and advice regarding potential litigation; (ii) initiate proceedings; (iii) obtain full and proper treatment of their case; and (iv) cause the court to issue an effective legal order. Access to justice is defined as the ability to seek and obtain remedies through formal or informal legal institutions.[40]

The goal of protecting people's access to justice is to ensure that they may make their own decisions and pursue their own goals in life. These safeguards are essential to liberal democracies because they allow for the free expression of people. Individuals should have access to the administrative and judicial institutions created by the State for this purpose, since the right of access to the courts permits them to resort to an unbiased third party for conflict settlement. Rights are just laws and concepts on paper if these institutions are inefficient in their design, methods, and outcomes. Therefore, in a liberal society, the availability of justice affects not just the public sphere but also individuals' daily lives. All people should be guaranteed the freedom to form and express their unique identities.[41] A person's or group's right to file a lawsuit in a court of law alleging a violation of their rights and to have that lawsuit heard by a judge who will make a decision based on the facts presented and in compliance with the law. This term is broader than the ideas of access, legal standing to suit, and financial resources to cover legal fees and counsel. As is the case in many nations, this demonstrates how private interests may be included in governmental or personal processes. Furthermore, the private sector's legal and economic resources are directly correlated with its capacity to successfully execute the norms of international law.[42]

It is very important that national jurisdiction include *jus cogens* to protect and promote human rights. When *jus cogens* is enshrined in national law, it serves as a deterrent to abuse, as citizens have the right to challenge government actions that contravene internationally accepted norms. It would also be possible for national courts to have jurisdiction over international crimes and criminal cases based on

39 John R. (1999), *A Theory of Justice*, Harvard University Press, p. 03.

40 Laurent P. (2022), 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', *Hague Journal on the Rule of Law,* Vol. 14, p. 107.

41 Colin C. & Daniel BM. (2020), 'Access to Justice: Theory and Practice from a Comparative Perspective', *Indiana Journal of Global Legal Studies*, Vol. 27, No. 1, p. 01.

42 Samuel PB. (2011), 'Does Access to Justice Improve Compliance with Human Rights Norms-An Empirical Study', *Cornell International Law Journal*, Vol. 44, No. 3. Retrieved from: https://scholarship.law.cornell.edu/cilj/vol44/iss3/1 [accessed 06 October 2023].

jus cogens, even if the crimes occurred outside national borders. National courts can invalidate laws that conflict with these non-negotiable principles through judicial review based on *jus cogens*. It is important for the defense of human rights to apply *jus cogens* in domestic courts. It creates legal frameworks to punish injustice and promote a global society of respect and rights.

4. Nexus between *jus cogens* and prohibition of enforced disappearances

The relationship between *jus cogens* and the prevention of enforced disappearance constitutes an important part of international law and includes the fundamental principles that bind the international community. *Jus cogens* establishes precedent that defines the severity and scope of certain laws. Enforced disappearances due to deprivation and serious human rights violations appear to contradict these principles. The rise of international law in recent years has made the States aware of the importance of eradicating this type of crime by creating policies that prohibit violence. Enforced disappearances, with their hidden agenda and denial of principles, go to the heart of these legal systems. States and international actors must, through *jus cogens*, recognize and combat the crime of enforced disappearance as an extrajudicial crime in the country. This requires the cooperation and opinion of the international community. Avoiding enforced disappearances by j*us cogens* reinforces the idea of a glimmer of hope for victims and their families because some actions can never be undertaken. The scope of this prohibition reinforces the fact that no state or group can claim immunity. Justice and accountability are non-negotiable, and the world is united in upholding the dignity of human rights. The link between *jus cogens* and the prohibition of enforced disappearance remains a cornerstone of the international justice order, reflecting a commitment to a future where impunity is not a refuge and where human rights are truly universal and indivisible.

5. Application of *jus cogens* in the national jurisdiction to combat enforced disappearances

In order to protect against serious violations of human rights and forced disappearances that threaten the foundations of a just and democratic people, it is essential to apply *jus cogens* to domestic legislation. A strong deterrent to such crimes, *jus cogens* enables nations to fulfill their duty to protect individuals and create a global system based on justice and respect for the dignity of individuals when incorporated into the country's national laws. Some international legal standards exceed the jurisdiction of states and are binding on all communities, regardless of jurisdiction. The international community sees the protection of human rights as important, and the ban on enforced disappearances reflects this. If these principles are established, victims will have a place to seek reparation, and abusers will bear responsibility. By recognizing *jus cogens* in national law,

many countries actively support the prevention and punishment of enforced disappearances, sending a clear statement that they do not condone atrocities. In other words, a State's commitment to justice and human rights is strengthened when *jus cogens* principles are codified in national laws. This allows countries to work together to fight human rights abuses around the world and reinforces the principles that underpin the rules-based international system. Victims of coercive crimes have significant means of seeking redress, combining *jus cogens* and constitutional rights.

The application of *jus cogens* to national laws is very important because it can be used as a tool for social healing and reconciliation. The emotional impact of enforced displacement extends beyond the victims themselves and the cities and countries where it occurs. There can be no post-conflict justice or reform without truth and accountability. Truth commissions, reparations programs, and other mechanisms haveeen established to address the legacy of enforced disappearances with the support of civil rights, including jus cogens. As a result, a culture of work, openness, and respect for human rights is promoted, which lays the foundations for long-term stability in society. States can demonstrate compliance with international obligations and provide a basis for justice, accountability, and human rights by enshrining these principles in domestic law.

6. Enforced disappearances of persons in Pakistan

Since the mid-1980's, enforced disappearances have been a major problem for the people of Pakistan.[43] Separating individuals from their loved ones and placing them beyond the protection of the law is a common consequence of official actions or those taken in their name. Authorities have either refused to confirm or denied that the individual is now in their custody. The optimism of the relatives of the missing is dwindling as they brace themselves for the worst. Many people have been stuck here for a long time.[44]

Pakistan, as a member of the international community, has certain international obligations, especially when it comes to addressing the problem of enforced disappearances within its borders. Enforced disappearance, involuntary abduction, or detention of individuals by State authorities or their agents is a serious violation of human rights and is subject to international scrutiny and condemnation.

On April 17th, 2008, Pakistan became a party to the ICCPR and ratified

43 Aqil S. (2016), 'The Military and Democracy', in *Pakistan at the Crossroads: Domestic Dynamics and External Pressures*, ed. Christophe Jaff Relot, *Columbia University Press*, USA, p. 28.

44 UN, Report of the Working Group on Enforced or Involuntary Disappearances on its Mission to Pakistan (2013). Retrieved from: https://www.ohchr.org/en/documents/country-reports/ahrc2245add2-report-working-group-enforced-or-involuntary-disappearances [accessed 06 October 2023].

this Convention on June 23th, 2010.[45] Therefore, Pakistan must adhere to the ICCPR, namely Articles 7, 9, and 17, which prohibits torture, guarantees the right to freedom and security, and protects individuals from arbitrary arrest and detention. In addition, on April 17th, 2008, Pakistan signed the CAT,[46] which was ratified on June 23rd, 2010. Therefore, Pakistan has an important responsibility to protect its citizens from torture and other ill-treatment. However, the ICPAPED has not yet been signed and ratified by Pakistan. Thus, the risks of torture and potential death loom for those who are missing.

6.1. Constitutional provisions addressing enforced disappearance of persons in Pakistan

The right to life and freedom is guaranteed under the Pakistan Constitution, but in situations of enforced disappearance, these rights are routinely disregarded owing to a lack of adequate enforcement and accountability institutions. Equal protection under the law is guaranteed by the Constitution, and it is illegal to take any action that might endanger the accused person's physical or mental health or freedom or damage their reputation or property without first obtaining a court order.[47] Article 4 of the Constitution ensures that no person shall be deprived of life, liberty, or property without due process of law. Access to a court and due procedure for establishing legal responsibility are ensured under Section 10A.[48] As a result, no one may be damaged in the areas of life, liberty, body, or reputation unless such injury is specifically authorized by law. Further, the Constitution of Pakistan prohibits any individual or government to violate anybody else's basic rights.[49] Article 9 of the Constitution guarantees the right to life and liberty. Freedom and protection against unlawful denial of rights are both spelled forth in Pakistan's founding document. No one may be harmed or deprived of their rights to life or liberty without due process of law, which it guarantees.[50] The definition of "life" also includes the right to clean air, a safe and secure country, equal treatment under the law, a good standard of living, and protection against a hostile government are all included in this guarantee. Privacy and access to the legal system are derivatives of the right to life.[51]

Article 10 of the Constitution of Pakistan prohibits police from arresting or detaining suspects without probable cause. Custody cannot be extended

45 UN Treaty Body Data Base, 'Ratification Status for Pakistan'. Retrieved from: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=en [accessed 06 October 2023].

46 *Ibid*.

47 Article 4 of the 1973 Constitution of Pakistan.

48 *Gull Akbar Khan vs. Pakistan Railways*, 2023, YLR 236.

49 *National Industrial Cooperative Credit Corp vs. Government of the Punjab*, 1992, PLD Lahore 462.

50 *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry vs. President of Pakistan*, 2010, PLD Supreme Court, para. 61.

51 *Federation of Pakistan vs. Ghulam Mustafa Khar,* 1989, PLD Supreme Court 26.

without the approval of the court. Due process must be implemented to define the rights and responsibilities of an individual in criminal cases. The High Court has jurisdiction to take decisions regarding arrested persons and determine their legality under Article 199 of the Constitution.[52] Similarly, those who have been arrested or imprisoned are afforded some protections under Section 491 of the Pakistan's Code of Criminal Procedure. The High Court has the authority to evaluate whether an officer's arrest was valid.[53] The Lahore High Court has already ruled that anyone detained must be brought before the local magistrate as soon as possible after being taken into custody. If this requirement is not satisfied, then his arrest is illegal.[54]

According to Article 10 (2) of the Constitution of Pakistan, preventive detention serves as a deterrent rather than traditional punishment, with three unique characteristics: arrest without incarceration, detention without charge or interrogation, and deterrence of retaliation as a desired outcome.[55] The Constitution guarantees the right to a fair trial in all legal proceedings, including investigations. Decisions on the rights of the parties must be in accordance with the principles of natural justice as mentioned in Article 10A. All laws affecting the rights of an individual must be interpreted to respect his right to a fair trial and to protect due process.[56] The right to a fast and fair trial became a constitutional guarantee once Article 10-A was added to the Constitution. If the suspect is found guilty, he will be punished, but if he is proved innocent, he will be freed.[57]

Equal access to the courts and fair administration of justice are fundamental rights of all citizens. There must be no arbitrary deprivation of the life, liberty, reputation, body, or property of any person, nor shall any act injurious thereto be done unless in compliance with the law.[58] Guaranteeing the fair and impartial administration of justice and access to justice was a basic tenet of the rule of law.[59] Even one who is accused of the worst possible crime deserves a fair trial in a court of law where they will have a real chance to explain and defend their actions to the court and prosecution.[60]

Article 10A's protections apply to everyone engaged in civil, criminal, and administrative processes in Pakistan, not only nationals. The right to due process is not limited to the outcome of a trial but rather pertains to all aspects of civil and criminal procedures, including access to the courts.[61] The access to

52 Article 199 of the 1973 Constitution of Pakistan.
53 Section 491 ò the Criminal Procedure Code (Act V of 1898).
54 *The State vs. Mohammad Yousuf*, 1965, PLD Lahore 324.
55 *Mr. Kubic Dariusz vs. Union of India and others*, 1990, AIR Supreme Court 605.
56 *Ehsan Ullah Chaudhary vs. The State*, 2023, PLD Lahore 233.
57 *Izhar Ullah vs. The State*, 2023, MLD 777.
58 *Dr. Nadeem Kiani vs. Federation of Pakistan*, 2021, CLD 33.
59 *Messrs Jet Green (pvt) Ltd vs. Federation of Pakistan*, 2021, PLD Lahore.
60 *Ali Raza alias Peter vs. The State*, 2019, SCMR 1982.
61 *Amar Jeet Singh vs. Sant Singh*, 2022, CLC 6.

justice doctrine's underlying mission has always been to preserve the unalienable constitutional rights of all people. All government employees were expected to follow the law to the letter, and the spirit and 10A of the Pakistan's Constitution provide all citizens with the right to a fair trial in which they may present their side of the story and get explanations of the law and the relevant facts.[62] Article 10A of the Pakistan's Constitution guarantees every person the right to a speedy and fair trial in any legal proceeding. These constitutional protections guarantee both the procedural safeguards that courts must uphold to protect individual rights and the wide range of libertarian interests that laws and regulations must not infringe upon. To determine whether such a right exists or has been denied, the Supreme Court must first examine and evaluate existing laws, rules, and regulations. The responsibility of the court is to ensure that everyone receives a fair trial, regardless of how stringent or rigid the granting of this right may be. Each issue must be addressed separately so that cases may be heard and decided fairly. [63]

6.2. Penal laws addressing enforced disappearances of persons in Pakistan

From a criminal justice perspective, addressing enforced disappearance in Pakistan involves addressing limitations and gaps in the current legal framework.

6.2.1. Pakistan Penal Code

The Pakistan Penal Code, which criminalizes acts such as kidnapping and illegal imprisonment, does not define or punish enforced disappearance. This lack of a specific legal provision dealing directly with enforced disappearance creates a significant gap in the prosecution of those responsible for such acts. The penal system also lacks specific mechanisms to deal with the complexities of administrative accountability, whereby superiors can be held accountable for the actions of subordinates involved in enforced disappearance. The Pakistan's Penal Code, as the country's main penal law, contains provisions that indirectly relate to enforced disappearances.[64] Police can register complaints of enforced disappearances under Section 346 of the Pakistan's Penal Code, which refers to wrongful confinement in secret and carries a two-year prison sentence.[65] The criminal offense of abduction is defined in Section 362 of the Pakistan's Penal Code and is defined as anyone who compels a person by force or by deceitful means to go from any place is said to abduct that person.[66] Section 364 of the Pakistan's Penal Code prescribes a ten-year imprisonment for abduction.[67] An essential piece of legislation, section 365 of the Pakistan's Penal Code[68] addresses the crime of kidnaping or kidnaping with the goal to surreptitiously and illegally

62 *Rana Ghafoor Ali vs. Province of Punjab*, 2022, CLD 962.
63 *Ms. Gulnar vs. Muhammad Yousaf Barakzai*, 2023, PLD Sindh 96.
64 Act XLV of 1860 of the Pakistan's Penal Code.
65 *Ibid,* Sec. 346.
66 *Ibid,* Sec. 362.
67 *Ibid,* Sec. 364.
68 *Ibid,* Sec. 365.

confine a person. Because it addresses offenses that may cause substantial damage to both people and society, this section is crucial to the country's overall security and stability. Anyone who kidnaps another person with the goal of holding him in captivity without his knowledge or consent is subject to prosecution under Section 365 of the Pakistan's Penal Code. The goal of this provision is to safeguard the fundamental human rights of all individuals by prohibiting their detention against their will.

Penalties under Section 365 of the Pakistan's Penal Code are harsh, including a fine and jail time of up to seven years. If the victim is a child or a woman, or if they were abducted for criminal purposes, the sentence may be increased to life in prison or death. The heavy penalties outlined in Section 365 of the Pakistan's Penal Code are meant to serve as a deterrent against the horrific crime of kidnapping and abduction.

6.2.2. The Criminal Laws (Amendment) Act

The Ministry of Human Rights proposed an amendment to the Pakistan's Penal Code by introducing the Criminal Law Amendment Act in 2021.[69] The enforced disappearance of a person without their consent is considered as a serious offense and this amendment to the Pakistan's Penal Code is meant to punish those responsible and deliver justice to the victim's families. The proposed amendment to the Pakistan's Penal Code would include Section 52B, which specifies that any illegal and unlawful arrest, imprisonment, abduction, or loss of liberty by an agent of the State or by a person or group of individuals constitutes an act. When a person's loss of liberty or the fate or whereabouts of a missing person is denied with the approval, assistance, or cooperation of the state, that individual is no longer protected by law. For an act to be classified as an enforced or involuntary disappearance, three important elements must be present. It includes the illegal violation of freedom, or the denial of freedom, by a member of the State or a people or group of people, with the help or support of theSstate.

A person who illegally and without lawful authority causes the enforced disappearance of another person from or within Pakistan will be punished with imprisonment for 10 years and with a fine, according to the proposed language of Section 513 of the Pakistan's Penal Code. Anyone who fraudulently establishes that he or any other person may be, or seeks to be, enforced, or enforced disappearance will be penalized. The Senate (the higher body of parliament) unfortunately rejects this Bill.

The protection of Pakistani people, the maintenance of law and order, and the prevention of abuse are all paramount concerns. The police often refuses

69 The Criminal Laws (Amendment) Act, (Bill) (2021), 'National Assembly'. Retrieved from: https://na.gov.pk/uploads/documents/1636462037_177.pdf [accessed 06 October 2023].

to identify members of the security or intelligence services as suspects when complaints of alleged enforced disappearances are lodged under these laws. Such complaints are often lodged against persons of mystery.

6.2.3. Commission of Inquiry on Enforced Disappearances (COIED)

The Ministry of the Interior (MoI) established the Commission of Inquiry into Enforced Disappearances (COIED) in 2011 in response to an order from the Supreme Court. The COIED job is to track down the 'lost' person, identify the responsible party (government, private party, or other organization), file a missing person's report, and provide the police and intelligence agencies with best practices and guidance. COIED has received 8,122 cases since it was established, with 2,274 still open as of the September 2021 monthly report.[70]

While the COIED was established with positive intentions, it has faced significant criticism for its inadequate efforts in addressing this pressing issue. COIED's inability to function independently was a major flaw. Concerns were expressed regarding the COIED's capacity to examine charges of enforced disappearances, many of which included State security services, in an unbiased and effective manner because of its position inside the Ministry of the Interior. The COIED's credibility was immediately damaged by this organizational flaw, which fueled concerns that it might be influenced or manipulated by more influential actors inside government. The COIED also had a difficult time obtaining evidence and witness testimony. Evidence and willing witnesses are typically hard to come by in cases of enforced disappearance because of the prevalence of covert detentions and arbitrary processes. Because of this, the COIED was often unable to make any headway or bring any culprits to justice. Another factor discouraging the family of the kidnapped from helping the committee is the fact that they were threatened and intimidated when they sought to seek justice. The lack of openness and speed with which investigations are going is also a major problem for the committee. Numerous relatives of the missing had to wait years for answers, inflicting untold suffering and anguish. There is more reason to suspect corruption or inefficiency inside the commission due to its opaque operations and lack of frequent reports.

Another major flaw was that the COIED did not have the power to enforce its recommendations. There was no follow-up in terms of bringing those responsible for enforced disappearances accountable, even when the COIED was able to identify them. The COIED mandate was undermined because of the failure to bring charges or secure convictions against those responsible for the atrocities.

70 COIED (2021), 'Monthly Progress on Cases of Alleged Enforced Disappearances'. Retrieved from: http://coioed.pk/ [accessed 06 October 2023].

Furthermore, the COIED's restricted jurisdiction constituted a significant restriction. The failure of COIED was largely due to a lack of political commitment to confront enforced disappearances. The government's unwillingness to work with such a formidable organization severely hampered the commission's ability to do its job. The COIED's suggestions were often disregarded. Lack of independence, restricted jurisdiction, delayed investigations, and the overall political environment in Pakistan all contribute to the fact that nothing has been accomplished yet in terms of resolving enforced disappearances.

6.3. Failure of the penal laws to address enforced disappearance

Despite widespread claims that the Pakistan's Penal Code outlaws enforced disappearances, this piece of law has not been used to address this critical human rights problem in Pakistan. Legal protection against enforced disappearances should, in principle, be available under Sections 346, 362, and 365 of the Pakistan's Penal Code, which address wrongful confinement, abduction, and kidnapping for the purpose of covertly and unlawfully restricting a person. However, there are several serious flaws that explain why it was not successful. To begin with, the wording and scope of these sections are unclear. These sections are meant to deal with private abduction or kidnapping, including ransom or personal grudges. The intricacies of coerced disappearances, which often include governmental actors, are not addressed. The resulting lack of tools in the legal system makes it difficult to solve these issues. In addition, the severity of enforced disappearance as a breach of human rights is not adequately reflected in the consequences stipulated in the Pakistan's Penal Code, making it ineffective as a deterrent against State actors. The absence of internal enforcement and accountability procedures also contributes to the failure of these penal provisions.

Not having safeguards in place to prevent arbitrary detention is another major problem with these penal provisions. It is notoriously difficult for loved ones or legal counsel to locate the location or condition of victims of enforced disappearances since they are typically held in technological isolation at secret detention facilities. Law enforcement agencies are not obligated to maintain detention records or provide prisoners with access to legal counsel or medical care. Because of this breakdown, enforced disappearances may go unchecked, undermining ideals of openness and accountability.

The efficacy of the Pakistan Penal Code is further diminished by the absence of a complete legal structure tailored to handle enforced disappearances. The Pakistan's Penal Code does not sufficiently address the crimes associated with enforced disappearances, which may include unlawful imprisonment, torture, and the denial of due process. All the way from the abduction until the victim's release or recovery, the Pakistan's Penal Code lacks a comprehensive answer to the problem of enforced disappearance. Without it, many elements of forced

disappearance remain unanswered, and justice is only achieved in part.

6.4. Need for criminalization of enforced disappearances in Pakistan

The provisions addressing enforced disappearance in the Pakistan 's Penal Code have prompted worries regarding respect for individual rights and the impartial application of justice in the country. There is no recourse for wrongful detention under Section 346 of the Pakistan's Penal Code, and disappearances are not addressed under Sections 362 and 365. It is difficult to criminalize enforced disappearance because of a lack of a comprehensive legal framework, and Section 365 of the Pakistan's Penal Code does not recognize enforced disappearance as a human rights violation.

After the National Assembly had approved it, the Senate rejected the 2021 Criminal Law Amendment Act, which offered a comprehensive framework for addressing enforced disappearances. This rejection could leave victims and their families feeling helpless and forsaken in their quest for justice, intensifying their sense of despair.

Adopting pertinent legislation can ensure both transparency and a legal framework, which are essential for addressing the issue of enforced disappearance. Disappearance is addressed in many sections of the Pakistan's Penal Code, although there is a lack of clarity and uniformity in the constitution on its application.

A specific statute would streamline the judicial system, outline the responsibilities of the appropriate authorities, and detail the protections afforded to victims and their loved ones. This will guarantee that instances of enforced disappearance are treated with the seriousness they deserve and help contribute to a more efficient and equitable justice system. Furthermore, a comprehensive statute might aid in establishing an unbiased and independent body to investigate cases of enforced disappearance. Conflicts of interest arise in investigating and punishing individuals accountable for these disappearances when governmental officials are involved. These matters may be investigated by a special commission or court without the involvement of regular government bodies if a specific statute allows for this. The investigation would gain more legitimacy, and the culprits would be more likely to face justice.

The issue of enforced disappearance in Pakistan needs a precise definition and strong legal sanctions. To establish legal clarity and make sure that all parties concerned, including law enforcement and the judicial system, understand the gravity of the crime of enforced disappearance, it is necessary to define it in law. To effectively address the pressing problem of enforced disappearances in Pakistan, it is crucial that an Independent Monitoring Mechanism (IOM) be set up under the planned future comprehensive separate legislation. The victims and families of enforced disappearances in Pakistan have endured unimaginable

anguish for decades. To properly tackle this pest, a robust and unbiased control strategy is required. The IOM would have a crucial role in the legal system, ensuring openness, responsibility, and objectivity in dealing with enforced disappearances.

Independent and prompt investigations are crucial for addressing enforced disappearance, a grave violation of human rights. To ensure the investigation's legitimacy and impartiality, the relevant authorities conducting it must be independent. This not only guarantees that the truth will be revealed but also strengthens faith in the state's dedication to delivering justice. In addition, the agreement should detail the roles and processes of the appropriate agencies and guarantee that they have the resources to conduct thorough investigations. Better training, financing, and monitoring systems may increase the reliability and efficacy of these probes.

The massive issue of enforced disappearances in Pakistan necessitates separate laws to ensure the safety of victims and their families. To begin, protections should be included in laws to guarantee the timely and secure release of victims while also holding offenders accountable. In addition to physical and emotional health care, victims and their families need legal representation. The victims of a disaster need access to funds to help them rebuild their lives. Strong protections should be included in legislation to protect the families of the missing from any potential threats or reprisals. Establishing witness protection programs is crucial to safeguard people who report missing persons. This all-encompassing plan seeks not only to bring about justice but also to restore victims' and families' trust in the judicial system and provide them some kind of closure. Therefore, Pakistan may make substantial progress in its quest to eliminate this flagrant human rights abuse and create a more equitable and caring society.

The total absence of immunity for criminals is a vital and critical issue in future legislation to criminalize enforced disappearances. This crucial clause is meant to make sure that no one, regardless of rank or allegiance, gets away with the crime of enforced disappearance. By adopting this measure, the government is making it quite clear that it intends to uphold the rule of law and that lawlessness will not be allowed. Furthermore, incorporating international human rights standards into the proposed future legislation aimed at tackling the critical issue of enforced disappearances in Pakistan is an essential and crucial element.

In addition, future legislation should prioritize the rigorous training of law enforcement and security forces. By prioritizing training, Pakistan can take a significant step towards eradicating enforced disappearances and fostering a society where the rule of law prevails, human rights are protected, and justice is accessible.

International collaboration will foster unity among States in solving global human rights concerns. By joining together with other nations, Pakistan may

show its support for human rights, solve a persistent issue, and create a better, more equitable future for its people.

Conclusion

In the pursuit of justice and the protection of human rights, recognition, and acceptance of the requirements of *jus cogens* are crucial to end enforced disappearances. The *jus cogens* status creates a sense of global presence and consistency in the fight against enforced disappearances. Since these restrictions are applied to all States, they create a system that cuts across cultural, political, and regional differences. This widespread situation encourages international cooperation to address the causes of enforced disappearances and prosecute the perpetrators of these crimes. By recognizing the right to *jus cogens*, governments are forced to cooperate in many areas, including sharing information, extraditing suspects, and providing legal assistance to prosecute perpetrators. The importance of *jus cogens* imperatives in eliminating enforced disappearances cannot be overstated. This policy creates definitive and non-negotiable conditions that transcend national borders so that the international community can unite in condemning and ending this heinous crime.

Pakistan's legal system requires urgent reform to align with jus cogens norms and recognize the absolute prohibition of enforced disappearances. Given the seriousness of the crime, there must be a resolute commitment to justice, accountability, and the protection of individuals from clandestine or arbitrary actions. The current legal system in Pakistan is examined considering *jus cogens* norms. The results highlight the shortcomings of the current legal system and its inability to keep up with international standards. There are several gaps in the legislation as it now stands in Pakistan; thus, substantial reforms are needed. Important aspects of the proposed reforms include a precise definition of enforced disappearance, guaranteeing responsibility via open investigations, and safeguarding victims' rights. The goal of the proposed reforms is to create a robust legal framework that expresses Pakistan's firm stance against enforced disappearance.

Enforced disappearances are a significant human rights problem in South Asia, including Pakistan, India, Sri Lanka, Nepal, and Bangladesh. Currently, in South Asian countries, enforced disappearance is not recognized as a distinct crime in their legal frameworks. Although not yet members of ICPAPED (except for Sri Lanka), all of the above South Asian states are parties to the ICCPR, and of them are members of the CAT. These legal instruments oblige States to take effective legislative, administrative, judicial, or other measures to prevent enforced disappearances and to ensure that perpetrators are held accountable and that victims receive effective legal remedies and reparations. To meet these obligations, it is necessary to criminalize enforced disappearance under domestic

law. While comprehensive legal and political reforms are necessary to end the region's entrenched impunity for enforced disappearances, an important first step would be to criminalize enforced disappearance. ●

References

Case law

[1] *Gull Akbar Khan vs. Pakistan Railways*, 2023, YLR 236

[2] *Izhar Ullah vs. The State*, 2023, MLD 777

[3] *Ms. Gulnar vs. Muhammad Yousaf Barakzai*, 2023, PLD Sindh 96

[4] *Ehsan Ullah Chaudhary vs. The State*, 2023, PLD Lahore 233

[5] *Amar Jeet Singh vs. Sant Singh*, 2022, CLC 6

[6] *Rana Ghafoor Ali vs. Province of Punjab*, 2022, CLD 962

[7] *Dr. Nadeem Kiani vs. Federation of Pakistan*, 2021, CLD 33

[8] *Messrs Jet Green (pvt) Ltd vs. Federation of Pakistan*, 2021, PLD Lahore

[9] A *Ali Raza alias Peter vs. The State*, 2019, SCMR 1982

[11] *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry vs. President of Pakistan*, 2010, PLD Supreme Court 61

[12] *National Industrial Cooperative Credit Corp vs. Government of the Punjab*, 1992, PLD Lahore 462

[13] *Mr. Kubic Dariusz vs. Union of India and others*, 1990, AIR Supreme Court 605

[14] *Federation of Pakistan vs. Ghulam Mustafa Khar,* 1989, PLD Supreme Court 26

[15] *The State vs. Mohammad Yousuf*, 1965, PLD Lahore 324

Books and articles

[16] Anthony JC. (2022), 'Procedural Jus Cogens', *Columbia Journal of Transnational Law,* Vol. 60, No. (2)

[17] Aqil S. (2016), 'The Military and Democracy', in *Pakistan at the Crossroads: Domestic Dynamics and External Pressures*, ed. Christophe Jaff Relot, *Columbia University Press*, USA

[18] Ariel ED. (2019), 'The Latin-American Flavor of Enforced Disappearances', *Chicago Journal of International Law,* Vol. 19, No. 2

[20] Bhupinder C. (2018), 'Customary International Law: A Third World Perspective', *American Journal of International Law,* Vol. 112, No. 1, doi:10.1017/ajil.2018.12

[21] Carlos M. et al. (2022), 'Forced Disappearances and Missing People in Colombia, South America', *Forensic Science International: Reports* 6. Retrieved from: https://www.sciencedirect.com/science/article/pii/S2665910722000330 [accessed 06 October 2023]

[22] Carlos S. (2021), 'Forced Disappearances and the Inequalities of a Global Crime', *Alternatives,* Vol. 46, No. 1

[24] COIED (2021), 'Monthly Progress on Cases of Alleged Enforced Disappearances'. Retrieved from: http://coioed.pk/ [accessed 06 October 2023]

[25] Colin C. & Daniel BM. (2020), 'Access to Justice: Theory and Practice from a Comparative Perspective', *Indiana Journal of Global Legal Studies,* Vol 27, No. 1

[26] Dalia VM., Justinas Ž, (2010), 'The Concept of Enforced Disappearances in International Law', *Jurisprudence*, Vol. 120, No. 2

[27] Danushka S. M. (2017), 'The Vanishing Act: Punishing and Deterring Perpetrators Through the Concurrent Application of Diverse Legal Regimes to Enforced Disappearances', *Florida Journal of International Law*, Vol. 29, No. 2. Retrieved from: https://scholarship.law.ufl.edu/fjil/vol29/iss2/3 [accessed 03 October 2023]

[28] Dordeska M. (2015), 'The Process of International Law-Making: The Relationship Between the International Court of Justice and the International Law Commission', *International and Comparative Law Review,* Vol. 15, No. 1

[29] Enforced Disappearances (2010), *Fact Sheet no. 6/ Rev.3*. Retrieved from: http://www2.ohchr.org/english/issues/disappear/index.htm [accessed 05 October 2023]

[30] Erica de Wet. (2004), 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law', *European Journal of International Law*, Vol. 15

[31] Erjona R. (2016), 'Binding International Norms, Jus Cogens', *European Journal of Sustainable Development*, Vol. 5, No. 3

[32] Jeremy S. & Elisenda CM. (2022), 'The Global Practice of Systematic Enforced Disappearances of Children in International Law: Strategies for Preventing Future Occurrences and Solving Past Cases', *Catholic University Law Review*, Vol. 71, No. 1

[33] Jeremy S. (2012), 'Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law', *Nordic Journal of International Law,* Vol 81, No. 4

[34] John R. (1999), *A Theory of Justice*, Harvard University Press

[35] Kirsten A. (2006), 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?', *Melbourne Journal of International Law*, Vol. 7, No. 2. Retrieved from: https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1681213/Anderson.pdf [accessed 04 October 2023]

[36] Laurent P. (2022), 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', *Hague Journal on the Rule of Law,* Vol. 14

[37] Lene G. (2021), 'State Responsibility for a Failure to Prevent Violations of the Right to Life by Organized Criminal Groups: Disappearances in Mexico', *Human Rights Law Review,* Vol. 21, No. 2

[38] Maruf B. (2021), 'Prosecuting Crimes against Humanity and Genocide at the International Crimes Tribunal Bangladesh: An Approach to International Criminal Law Standards', *Laws*, Vol. 10, No. 4

[39] Marloes van N. (2021), 'A Critical Reflection on the Right to the Truth about Gross Human Rights Violations', *Human Rights Law Review,* Vol. 21, No. 4

[40] Mercedes SP. et al. (2021), 'The Search Process: Integrating the Investigation and Identification of Missing and Unidentified Persons', *Forensic Science International: Synergy*, Vol. 3, (2021). Retrieved from: https://www.sciencedirect.com/science/article/pii/S2589871X21000243 [accessed 05 October 2023]

[41] Nikolas K. (2012), 'The International Convention for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, With Specific Reference to Extraordinary Rendition', *Melbourne Journal of*

International Law, Vol 13, No. 1

[42] Paul MT. (2020), 'Article 14: Fair Trial Rights. In A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights', in *The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge: Cambridge University Press. doi:10.1017/9781108689458.017

[43] Pérez-León-Acevedo J. P. (2017), 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses', *Anuario Mexicano de Derecho Internacional,* Vol. 17

[44] Samuel PB. (2011), 'Does Access to Justice Improve Compliance with Human Rights Norms-An Empirical Study', *Cornell International Law Journal* 44 (3). Retrieved from: https://scholarship.law.cornell.edu/cilj/vol44/iss3/1 [accessed 06 October 2023]

[45] Sean D. M. (2020), 'Peremptory Norms of General International Law (Jus Cogens) and Other Topics: The Seventy-First Session of the International Law Commission', *American Journal of International Law*, Vol. 114, No. 1

[46] Steven JH. (1991), 'The First Duty of Government: Protection, Liberty and the Fourteenth Amendment', *Duke Law Journal,* Vol. 41

[47] Sufyan D. (2016), 'Transnational Corporations and International Human Rights Law', *Notre Dame Journal of International & Comparative Law*, Vol. 6, No. 1

[48] The International Commission of Jurists (2017), 'No More "Missing Persons": The Criminalization of Enforced Disappearance in South Asia'. Retrieved from: https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-DisappearancePublications-Reports-Thematic-Reports-2017-ENG.pdf [accessed 04 October 2023]

[49] Thomas K. (2017), 'Jus Cogens Re-examined: Value Formalism in International Law', *European Journal of International Law*, Vol. 28, No. 1

[50] Ulf L. (2020), 'The Legal Consequences of Jus Cogens and the Individuation of Norms', *Leiden Journal of International Law*, Vol. 33, No. 4

[51] UN, Report of the Working Group on Enforced or Involuntary Disappearances on its Mission to Pakistan (2013). Retrieved from: https://www.ohchr.org/en/documents/country-reports/ahrc2245add2-report-working-group-enforced-or-involuntary-disappearances [accessed 06 October 2023]

[52] UN Treaty Body Data Base, 'Ratification Status for Pakistan'. Retrieved from: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=en [accessed 06 October 2023]

Author Contribution

The author solely contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

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